PART 17--SPECIAL CONTRACTING METHODS
SUBPART 17.72--ACQUISITION OF COMPONENT PARTS

17.7201 Privately Developed Items.

17.7201-1 **General.** It is Department of Defense policy to provide an
incentive to industry creativity by honoring the rights in data
resulting from private development and by limiting the demands for
such data to that which is essential for Government purposes.
It is important that the efforts directed toward permitting full and
open competition do not demand or use privately developed data in a
manner which is contrary to the policies and procedures established in
FAR Part 27. Accordingly, when the policy stated above produces
situations which require the contracting officer to decide whether to
procure data for future competitive acquisition, the provisions of
Part 27, as supplemented by this paragraph, shall govern.

17.7201-2 **Specific Acquisition Methods.**
    (a) When Defense requirements are for items which are available
from more than one source as a result of either licensing, competitive
copying, or independent development, the contracting officer shall
provide for full and open competition for such items.
    (b) When the Government desires to purchase privately developed
items but does not have necessary data with unlimited rights for use
in a specification for competitive acquisition, the contracting
officer shall use one of the following alternative procedures in order
of preference (see also 17.7203).
    (1) When items of identical design are not required, the
contracting officer shall provide for full and open competition using
performance or other similar specifications, including purchase
descriptions, which do not contain data pertaining to items,
components or processes, developed at private expense to which the
Government does not have unlimited rights. There are two methods of
competitive procurement which may provide items of the same or similar
design and suitable performance. One of these is purhcase by two-step
sealed bidding. The other is by the use of "brand name or equal"
purchase descriptions. To encourage participation by technically
oriented firms that are desirous of offering their privately developed
products in competition with similar articles, contracting activities
should consider incorporating a requirement in the IFB or RFP for a
bid sample to be used for evaluation purposes only (see
10.004(b)(3)(i)).
    (2) When items of design or composition similar or identical to
a privately developed item are required and other than full and open
competition is authorized under Part 6, procurement should be from the

DOD FAR SUPPLEMENT

2/7

firm which developed or designed the item or process or its licensees, provided productive capacity and quality are adequate and price is fair and reasonable.

(3) When additional sources are required for items of design or composition similar or identical to a privately developed item in order to meet total current or mobilization requirements, and the procedures in (1) above cannot practicably be used to create additional sources, the developer should be encouraged to license others to manufacture such items. Procuring activities should also consider the specific acquisition by the Government of the necessary rights in data. When complex technical equipment is involved and the establishment of satisfactory additional sources will require, in addition to data, technical assistance from the primary source, consideration should be given to the use of the leader company acquisition technique (see FAR Subpart 17.4).

(4) As a last alternative, a design specification may be developed by the Government through inspection and analysis of the product (i.e. reverse engineering) and used for competitive acquisition. Reverse engineering shall not be used unless significant cost savings can be reasonably demonstrated and the action is authorized by the Head of the Contracting Activity. In the case of the Air Force this authority may be delegated to the Commanders of the Air Force Systems Command Divisions and Centers and the Air Force Logistics Command Air Logistics Centers.

17.7201-3 Acquisition of Patented Items When Government is a Licensee. Award of a contract shall not be refused to a bidder/offeror merely because it is not the owner of or a licensee under any patent involved in the acquisition. If, at the time a solicitation is issued, the Government is obligated to pay royalties applicable to the proposed procurement because of a pre-existing license agreement between the Government and a patent owner, the solicitation shall so state and shall; (a) identify the patents and specify the royalty rate; and (b) advise that an amount equal to the royalty which the Government will be required to pay under the license agreement will be added as an evaluation factor to each bid/offer unless the bidder/offeror includes in the bid/offer a statement that the bidder/offeror is the owner of or a licensee under the patents.

17.7202 Component Breakout.

17.7202-1 Scope of Paragraph.
(a) This section sets forth guidance for making decisions on whether or not components should be acquired by the Government directly and furnished to an end item contractor as Government-furnished material, for incorporation in the end item. This

paragraph, however, does not pertain to all such decisions, but only to those which deal with whether components that have been included as contractor-furnished material in a previous procurement of the end item should be "broken out" from a forthcoming end item procurement for direct Government purchase. Thus, except as set forth in, this paragraph does not pertain to the initial Government-furnished equipment/contractor-furnished equipment decisions that must be made at the inception of a procurement program.

(b) Parts procured for replenishment are not covered by this paragraph, but are governed by and Supplement 6, Replenishment Parts Breakout Program.

(c) This paragraph applies to procurements of weapons systems or other items of major equipment involving components whose direct purchase by the Government may result in substantial net cost savings over the life of the procurement program. Accordingly, it will seldom be applicable to a procurement of such a system or item of less than $1,000,000. The term "component", as used in this paragraph, includes subsystems, assemblies, subassemblies, and other major elements of an end item, but does not include elements of relatively small annual purchase value.

17.7202-2 Policy. Whenever it is anticipated that the prime contract for a weapons system or other major end item will be awarded without adequate price competition, and the prime contractor is expected to acquire a component without such competition, it is Department of Defense policy to break out that component if:

(a) substantial net cost savings will probably be achieved; and

(b) such action will not jeopardize the quality, reliability, performance or timely delivery of the end item.

The desirability of breakout should also be considered (regardless of whether the prime contract or the component being purchased by the prime contractor is on the basis of price competition) whenever substantial net cost savings will result (1) from greater quantity purchases or (2) from such factors as improved logistics support through reduction in varieties of spare parts and economies in operations and training through standardization of design. Primary breakout consideration shall be given to those components of the end item representing the highest annual procurement costs and offering the largest potential net savings through breakout.

17.7202-3 Responsibility for Component Breakout Selection, Review and Decision. The program manager, project manager, project officer, program director, or other official responsible for the material program concerned, supported by a project team (to include the Small Business Specialist, cognizant engineering, production, logistics, maintenance and other appropriate personnel, and the contracting officer or his designee), shall be responsible for:

DOD FAR SUPPLEMENT

/

  (i) earmarking as susceptible to breakout those components potentially conforming to the criteria and policy set forth herein;

  (ii) conducting the breakout review and evaluation described in 17.7202-4;

  (iii) making the decision whether or not to break out the component; and

  (iv) preparing records explaining such decisions in compliance with 17.7202-5.

17.7202-4 Breakout Guidelines.

  (a) Each decision on whether or not to break out a component must embrace (1) assessment of the potential risks of degrading the end item through such contingencies as delayed delivery and reduced reliability of the component, (2) calculation of estimated net cost savings (i.e., estimated purchase savings less any offsetting costs), and (3) analysis of the technical, operational, logistic and administrative factors involved. As to each of these, the decision must be supported by adequate explanatory information, including an assessment by, and consultation with, the end item contractor when feasible.

  (b) In deciding whether a component should be broken out, the guidelines set forth below (in the form of questions) should be considered. Answers will rarely be "positively yes" or "positively no" but usually "probably yes" or "probably no", with the degree of probability governed by the facts of the particular case. The decisions will depend largely upon the degree and significance of the risks to quality performance, reliability and timely delivery of the end item which would be involved in breakout and upon the estimated overall cost savings. Where the risks, if any, are acceptable and breakout is expected to result in substantial overall cost savings, the component should be broken out. On the other hand, if such risks are unacceptable, the components should not be broken out.

  (1) Are the design of the component (and the design of the end item insofar as it will affect the component) sufficiently stable that further design or engineering effort by the end item contractor in respect to the component is unlikely to be required?

  (2) Is a suitable data package available with rights to use if for Government procurement? (Note that breakout may be warranted even though competitive procurement is not possible.)

  (3) Can any problems of quality control and reliability of the component be resolved without requiring effort by the end item contractor?

  (4) Is it anticipated that requirements for technical support (i.e., functions such as development of proposed detailed specifications; development of test requirements to prove design adequacy or compliance with design; monitoring tests to assure

compliance with established requirements; definition of quality assurance requirements for production of articles; and analysis and correction of service-revealed deficiencies) heretofore performed by the end item contractor will be negligible? If not, does the Government have the resources (manpower, technical competence, facilities, etc.) to provide such support, or can such support be obtained from the end item contractor (even though the component is broken out) or other source?

(5) Can breakout be accomplished without causing unacceptable difficulties in logistics support (e.g., by jeopardizing requisite standardization of components)?

(6) Can breakout be accomplished without causing over fragmentation of the end item that might materially impede administration, management, and performance of the end item contract (e.g, by unduly complicating production scheduling or identifying (and fixing responsibility for) end item failure that may be caused by a defective component)?

(7) Can breakout be accomplished without jeopardizing delivery requirements of the end item?

(8) If a decision is made to break out a component and to acquire it from a new source, can advance procurement funds be made available to provide that source any necessary additional lead time?

(9) Is there a source other than the present manufacturer capable of supplying the component?

(10) Has the component been (or is it known that it is going to be) purchased directly by the Government as a support item in the supply system or as GFE in other end items?

(11) Would the financial risks and other responsibilities being assumed by the prime contractor that will have to be assumed by the Government if the item is broken out be acceptable?

(12) Will breakout result in substantial net cost savings? Estimates of probable savings in cost, should be developed for each case on its own facts, with consideration given to any estimated offsetting costs such as increases in the cost of requirements determination and control, contracting, contract administration, data package purchase, material inspection, qualification or preproduction testing, ground support and test equipment, transportation, security, storage, distribution, and technical support.

(c) If application of the guidelines in (b) above reveals conditions currently unfavorable to breakout, the feasibility of eliminating such conditions should be considered. For example, where adequate technical support is not available from Government resources, or similar assistance must be obtained in order to successfully accomplish breakout, consideration should be given to the procurement of the necessary services, such as product assurance suitability services, from the end item contractor or other qualified source.

221

17.7202-5 Records and Review Procedure. The records of the purchasing activity shall contain documentation of:

(a) those components which have been reviewed and determined to have no potential for breakout;

(b) those components which have been reviewed and earmarked as being susceptible to breakout pursuant to 17.7202-3; and

(c) those components for which a decision to breakout has been made.

Documentation of these three categories, and for those components once earmarked but no longer considered susceptible to breakout, shall be signed by the cognizant project manager or other designated official and reflect the facts and conditions of the case, including any assessment by the contractor, and the basis for the decision. Components that have been earmarked for potential breakout shall be reviewed well in advance of each successive procurement, with a decision made as to whether the component will be broken out for the ensuing procurement. Such reviews, made preferably in the course of requirements determination, but in any event before procurement of the requirement is initiated, shall be repeated until a final decision on whether or not to breakout is reached, and shall be documented. When breakout is delayed or postponed, the documentation shall include a description of the actions required to accomplish breakout, identify the activities responsible for such actions, and indicate the fiscal year when breakout should be effected.

17.7203 Procurement of Parts.

(a) Any part, subassembly, or component (hereinafter called "part") for military equipment, to be used for replenishment of stock, repair, or replacement, must be procured so as to assure the requisite safe, dependable, and effective operation of the equipment. Where it is feasible to do so without impairing this assurance, parts should be procured on a competitive basis, as in the kind of cases described in (b) below. However, where this assurance can be had only if the parts are procured from the original manufacturer of the equipment or his supplier, the procurement should be restricted accordingly, as in the kind of cases described in (c) below. Centrally managed replenishment parts for military systems and equipment (except replenishment parts acquired under other specifically defined initial support programs or acquired through local purchase) are governed by Supplement 6, the Replenishment Parts Breakout Program.

(b) Parts that are fully identified and can be obtained from a number of known sources, and parts for which fully adequate manufacturing drawings and any other needed data are available with the right to use for procurement purposes (or can be made so available in keeping with the policies in FAR Part 27 are to be procured on a

competitive basis. In general, such parts are of a standard design configuration. They include individual items that are susceptible of separate acquisition, such as resistors, transformers, generators, spark plugs, electron tubes, or other parts having commercial equivalents.

(c) Parts not within the scope of (b) above generally should be procured (either directly or indirectly) only from sources that have satisfactorily manufactured or furnished such parts in the past, unless fully adequate data (including any necessary data developed at private expense), test results, and quality assurance procedures, are available with the right to use for procurement purposes (or can reasonably be made so available in keeping with the policies in FAR Part 27 to assure the requisite reliability and interchangeability of the parts, and acquisition on a competitive basis would be consistent with the assurance described in (a) above. In assessing this assurance, the nature and function of the equipment of which the part is needed should be considered. Parts qualifying under this criteria are normally sole source or source controlled parts (see MILSTD 100) which exclusively provide the performance, installation and interchangeability characteristics required for specific critical applications. To illustrate, acceptable tolerances for a commercial television part may be far less stringent than those for a comparable military radar part, permitting competitive contracting for the former but not for the latter. The exacting performance requirements of specially designed military equipment may demand that parts be closely controlled and have proven capabilities of precise integration with the system in which they operate, to a degree that precludes the use of even apparently identical parts from new sources, since the 'functioning of the whole may depend on latent characteristics of each part which are not definitely known.

(d) When an award is made to a source that has not previously produced the item, the cognizant Government inspection activity and the appropriate contract administration office should be notified by the contracting office that the contractor will be producing the item for the first time.

(e) Limitations on Price Increases.

(1) Except as provided in (2) below, the contracting officer shall not purchase or agree to a price for any centrally managed spare or replacement part, on a sole source basis, when the price of such part has increased by 25 percent or more at any time within the most recent 12-month period.

(2) The purchase of such part is permitted notwithstanding a price increase of 25 percent or more provided the contracting officer certifies in writing to the head of a contracting activity before the purchase is made that:

DOD FAR SUPPLEMENT

(i)   The contracting officer has evaluated the price of such part and concluded that the price increase is fair and reasonable, or
(ii)   The national security interests of the United States require that such part be purchased despite the price increase.
(3)   If necessary to implement this paragraph (e), contracting officers may require that vendors supply price and quantity data for any government orders issued within the most recent 12 months for the spare or replacement part as part of their response to a solicitation.
(4)   The fact that a particular price has not increased by 25 percent in no way relieves the contracting officer of the responsibility for obtaining a fair and reasonable price.

17.7204   Identification of Sources of Supply.

(a) 10 U.S.C. 2384(a) requires that, whenever practicable, each contract requiring the delivery of supplies shall require that the contractor identify:
(1) the actual manufacturer or producer of the item or of all sources of supply of the contractor for that item;
(2)   the national stock number of the item (if there is such a number), and the identification number of the actual manufacturer or producer of the item or of each source of supply of the contractor for the item; and
(3)   the source of any technical data delivered under the contract.
This enables contracting officers to obtain sufficient information to allow solicitation of all actual manufacturer(s) of end items, parts, subassemblies and/or components, thereby allowing for enhancing competition and avoiding payment where no significant value is added by dealers, distributors and manufacturers other than the actual manufacturer.
(b)   The contracting officer shall include the clauses at 52.217-7270 in all supply contracts except when:
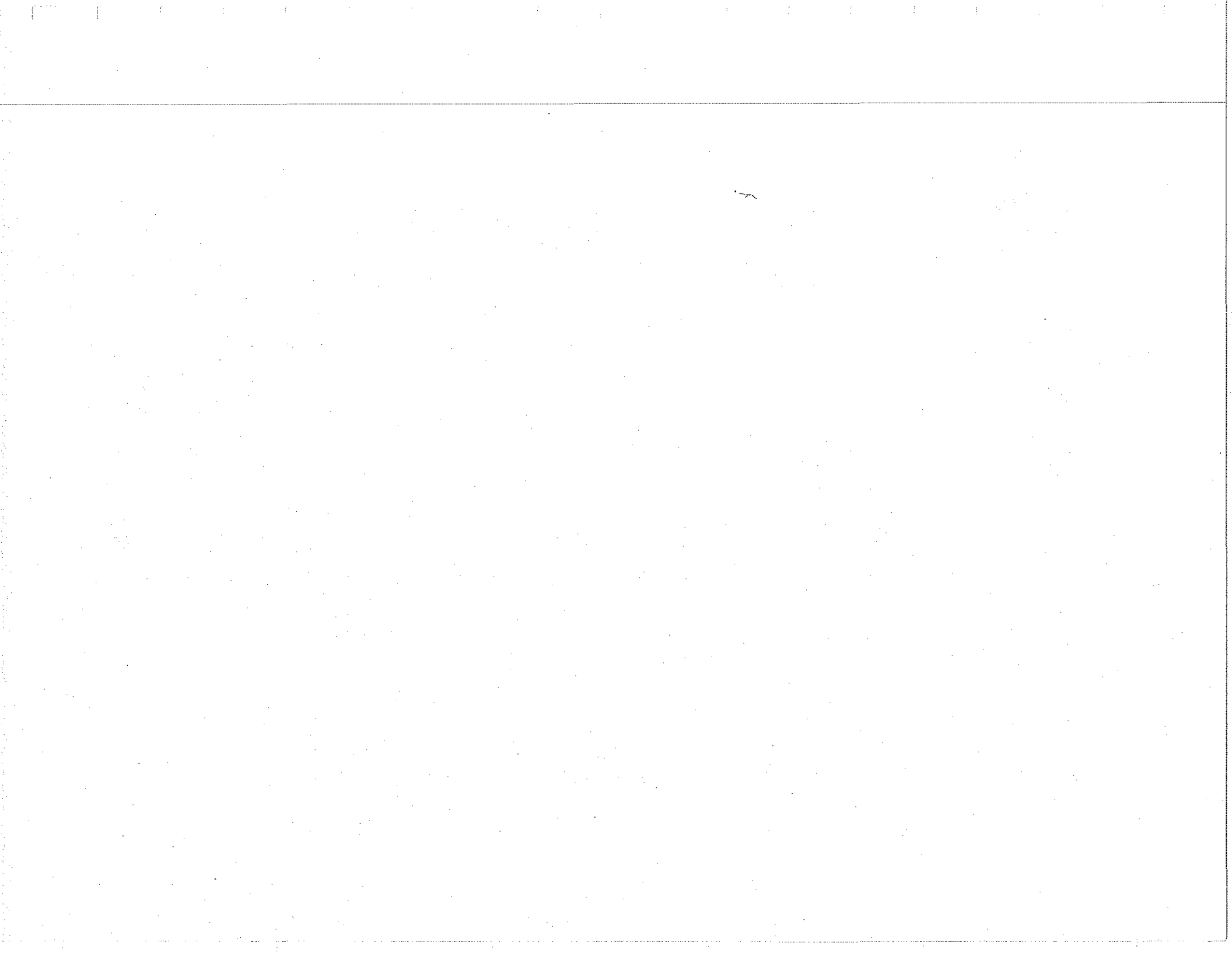(1)   The contracting officer already has the information required by this clause (for example, the information was obtained as part of the offer or under other acquisitions);
(2)   The contract is for subsistence, clothing or textiles, fuels, or supplies purchased and used outside the United States; or
(3)   The contracting officer determines that it would not be practicable to require the contractor to provide the information.
(c)   The contracting officer may include the clause at 52.217-7270 in service contracts requiring the delivery of supplies when appropriate.

DOD FAR SUPPLEMENT

224

REVISED AIR FORCE TECHNICAL DATA RIGHTS POLICY

Subject: AF acquisition circular (AFAC) 85-16, section A — AFFARS changes

1. This AFAC is issued pursuant to the authority of AFR 5-10. All material published in this AFAC is effective upon receipt. The item in this AFAC shall remain in effect until specifically cancelled or incorporated into a subsequent AFAC.

2. Item A1 — expiration of limited/restricted rights.

A. AF/RDC policy letter 84-12, rights in technical data and computer software, 5 May 84, is hereby superseded by establishing AFFARS section 27.490 and a clause at AFFARS 52.227-9000 (formerly subparagraph (B)(5) to DFARS 52.227-7013).

B. AFFARS part 27 is hereby established and the following section included:

"27.490 Expiration of limited/restricted rights.
27.490-1 policy.

(A) It is Air Force policy to use the competitive market and negotiation process to obtain rights in data to permit follow-on acquisition of items and modifications at fair and reasonable prices.

(B) Contractors retaining perpetually exclusive proprietary rights has been identified as being detrimental to achievement of fair and reasonable prices and a sound defense industrial base. The Secretary of Defense, on 20 August 1983, granted a deviation to DAR and tasked the departments to negotiate in new contracts firm dates after which the government would receive unrestricted use of data. The Secretary of the Air Force asked that the clause at 52.227-9000 be used to implement that direction. The purpose of this clause is to facilitate breakout and development of competitive sources for manufacture and modification of production items or any component, module, assembly or part thereof.

(C) Proper implementation of this policy requires contracting activities to focus their attention on data rights issues throughout all phases of an acquisition program. Air Force contracting activities shall —

(1) Develop business strategies that provide the government with maximum opportunity and least cost for breaking out and competitively acquiring the manufacture and modification of Air Force items, including components, modules, assemblies and parts thereof;

(2) Use predetermination of rights in technical data procedures to the maximum extent practicable (see DFARS 27.403-2(d)); and

(3) Challenge all questionable contractor proprietary claims in technical data and computer software.
27.490-2 Procedures.

(A) Contracting officers shall include the clause at 52.227-9000 in solicitations and contracts for programs anticipating the acquisition of supplies and equipment that will require significant numbers of spare parts or large expenditures of funds for spare parts. This threshold is defined as any program anticipating life cycle spare parts requirements of $500,000 or more. The clause shall not normally be included in solicitations and contracts for foreign military sales or prior to a program entering into full scale engineering development (FSED). The clause shall be included in solicitations and contracts for programs in FSED and production.

(B) The clause may be implemented as a separate contract line item.

(C) The clause shall be tailored as follows to match acquisition objectives and circumstances:

(1) Contracting officers may negotiate different time periods for different technical data and computer software.

(i) This period shall balance contractor economic interests in the data with the government's need for using competition to achieve reasonable sparts prices and an enhanced defense industrial base.

(ii) For most items, components, processes and computer software, this period should be less than five years. However, where the contractor can substantiate that certain technology requires a longer period of protection, a contracting officer may negotiate a period that shall not exceed seven years. In exceptional circumstances, HQ AFSC/PK, HQ AFLC/PM or, for other commands and agencies, HQ USAF/RDC may approve equitable periods that exceed seven years.

(2) Contracting officers may order data pertaining to item configurations that have been previously delivered as well as currently being produced.

(3) Contracting officers may not require an offeror, as a condition for obtaining a contract, to provide technical data pertaining to the design, development, and manufacture of existing commercial products or processes unless such data is necessary for the government to operate or maintain the product or use the process if obtained as an element of performance under a contract. However, contracting officers may negotiate to obtain this technical data and computer software with the right (e.g., unlimited, license) to use and disclose it at a specified point in time (see DFARS 27.403-2(f). Likewise, a contractor's willingness to provide such data and rights may be evaluated as part of a source selection.

(1) Existing commercial products and processes are items, components, processes and computer software that were developed at private expense and are sold, licensed or leased, or are intended for sale, license, or lease in substantial quantities to the general public based upon established catalog or market prices.

(11) Therefore, upon request by an offeror or contractor, contracting officers may exempt from this provision: (A) technical data pertaining to the design, development, manufacture or reproduction of existing commercial items, components, processes or computer software in which the government would otherwise obtain limited rights under DFARS 52.227-7013(B)(2), and (B) existing commercial computer software in which the government would otherwise obtain restricted rights under DFARS 52.227-7013(B)(3). This exemption shall be made in accordance with instructions at 27.490-2(c)(4).

(4) Contracting officers may exempt from this clause the technical data and computer software described at 27.490-2(c)(3) provided that —

(1) The offeror or contractor agrees to substantiate, upon government inquiry, that the subject items, compo-

nents, processes and computer software were developed at private expense, as defined by this subparagraph. "Developed" means brought to the point of practical application. To be considered developed, an item or component must have been constructed, a process practiced, and computer software used, and in each case must have been tested to the extent necessary to determine that it is capable of accomplishing the practical purpose for which it was developed. When an item, component, process or computer software does not meet these criteria, individual components thereof that do shall be considered to have been developed. "At private expense" means that completed development (100%) was accomplished without direct government payment, at a time when no government contract required performance of the development effort, and was not developed as a necessary part of performing a government contract;

(11) The offeror or contractor agrees to substantiate, upon government inquiry and consistent with FAR 15.804-3(c), that the subject items, components, processes and computer software are sold, licensed, or leased, or are intended for sale, license, or lease in substantial quantities to the general public based upon established catalog or market prices. Examples of evidence which an offeror or contractor may submit are marketing expenses, sales offers and sales records;

(III) The offeror or contractor agrees to: (a) notify the government when the subject items, components, processes and computer software no longer meet the test of FAR 15.804-3(C), are no longer intended for commercial sale, or in the event of a business failure on the part of the company supplying them and (b) upon government placement of an order within a specified time period after notification, provide the government with technical data and computer software, plus the rights given by this provision, to allow the government to competitively reprocure an equivalent replacement, as defined by this subparagraph. An "equivalent replacement" is one that assures that continued safe, dependable, and effective operation of its pertinent end item and does not require any modification of such end item in order to substitute this equivalent replacement; and

(IV) The exemption is only from 52.227-9000 and the government retains the rights in data and software specified in DFARS 52.227-7013 or, if applicable, any greater rights afforded by a negotiated agreement.

(5) Other modifications and waiver of 52.227-9000 may be approved by AFSC/CC, AFLC/CC and, for other commands and agencies, HQ USAF; provided steps have been taken to avoid contractor abuse of data rights and to eliminate excessive spare parts prices. Examples of such steps are requiring the contractor to provide multiple sourcing for components and parts, use of technical assistance or licensing agreements, use of breakout, and predetermination of proprietary rights."

ITEM A2. Expiration of limited/restricted rights clause. Add the following to AFFARS Part 52:

"52.227-9000 Expiration of Limited/Restricted Rights. As prescribed at 27.490-2, insert the following clause in solicitations and contracts.

Expiration of limited/restricted rights (APR 85)

Notwithstanding any other provision of this contract, it is the intent of both the government and contractor that   *   months after the first delivery of production items under this contract, the government shall have unlimited rights as defined in paragraph (A) of the rights in technical data and computer software clause included in this contract, in all technical data and computer software used by the contractor, including subcontractors and suppliers at any tier, in all phases of the development and manufacture of production items including, but not limited to, all components, modules, assemblies or parts thereof. For the purposes of this clause, the government shall have the right at any time during the performance of this contract or within three (3) years after either acceptance of all items (other than data or computer software) to be delivered under this contract or termination of this contract, to direct the contractor to deliver all technical data and computer software, in a format prescribed by the contracting officer, necessary to reprocure from another contractor(s) either an entire production item or any component, module, assembly or part thereof, in a configuration specified by the contracting officer. When the contracting officer directs delivery of technical data and computer software under this clause, to the extent not otherwise previously compensated for delivery of such data and software, the contractor shall be compensated for converting the technical data and computer software into the prescribed form, for reproduction and delivery.

---

* Contracting officers shall insert the number of months in accordance with 27.490-2(C)"

IN REPLY REFER TO
4200
0212C

27 SEP 1984

From: Chief of Naval Material

Subj: IMPLEMENTATION OF AN ADVANCE CHANGE TO THE NAVY
ACQUISITION REGULATION SUPPLEMENT (NARSUP)

Ref: (a) NAVMAT ltr 4200 0212C of 02 July 1984
       (b) NAVMAT ltr 0212C/PD of 07 May 1984

Encl: (1) Revised clause entitled "Acquisition of Unlimited
            Rights in Technical Data and Computer Software"

1. As I indicated in reference (a), I have taken a hard look
at the technical data clause implemented by reference (b).

2. Accordingly, enclosure (1) is provided for immediate
implementation. The Contracting Officer is authorized to
include this clause in design, development and initial
production contracts when the use of the clause is considered
to be cost effective and otherwise is in the best interests of
the Government. With the approval of the Chief of Contracting
Office, the Contracting Officer may extend the times for
submission of clear and convincing evidence and for price
proposals by up to 90 days. Any other variances from the
clause shall be considered a deviation requiring MAT 02
approval.

3. A determination by the Contracting Officer not to include
the clause shall be documented. The basis for such a
determination shall be fully addressed in any pre-negotiation
business clearance prepared for higher level approval.

4. Please be advised that enclosure (1) is an interim approach
pending incorporation in the DoD FAR Supplement.

J. S. SANCHE, JR.
Deputy Chief of Naval Material
(Contracts and Business Management)

Distribution:
COMNAVAIRSYSCOM (02)
COMNAVELEXSYSCOM (02)
COMNAVFACENGCOM (02)
COMNAVSEASYSCOM (02)
COMNAVSUPSYSCOM (02)
COADPSO
DIRSSPO (SPN)
DIRJCMPO (JCM-02)
CMC (LB)
CNR (600)
COMSC (M-10)
OGC

227

ACQUISITION OF UNLIMITED RIGHTS IN
TECHNICAL DATA AND COMPUTER SOFTWARE

(a) Pursuant to the provisions "Predetermination of Rights in Technical Data" and "Identification of Restricted Rights Computer Software" included in the solicitation preceding this contract, the Contractor has identified (listed) in Attachment 1:

(1) all technical data, including technical data obtained from subcontractors, that will be delivered with limited rights and computer software, including software obtained from subcontractors, that will be delivered with restricted rights in accordance with the terms of the "Rights in Technical Data and Computer Software" clause of this contract; and

(2) the not-to-exceed ceiling price for the Government to acquire unlimited rights in each item of such data and software.

This identification need not be made as to technical data which relates to standard commercial items which are manufactured by more than one source of supply or to computer software sold in substantial quantities to the general public. Such identification in Attachment 1 does not mean that the Government considers any such data or software to come within the definitions of limited rights technical data or restricted rights computer software.

(b) The Contractor agrees that, without the prior written consent of the Contracting Officer, it will not use in the design, development or production of or incorporate in any end item being designed, developed or produced under this contract, any item, component, or process developed at private expense or any computer software developed at private expense, if the technical data pertaining to such item, component or process, or the privately developed computer software, is required to be delivered under this contract, will be delivered with limited or restricted rights and is not listed in Attachment 1. Such consent and listing are not required with respect to standard commercial items which are manufactured by more than one source of supply or to computer software sold in substantial quantities to the general public.

(c) Any request for consent in paragraph (b) above shall include, as a minimum, alternatives to the use of such item, component, process or computer software, and a ceiling price offer to sell to the Government with unlimited rights the technical data pertaining to such item, component or process and the privately developed computer software. Upon the consent of the Contracting Officer, Attachment 1 will be amended to add each item for which consent is granted.

(d) The Contractor agrees that any technical data or computer software required to be delivered under this contract for the design, development or production of any end item being designed, developed or produced under this contract will be acquired by the Government with unlimited rights, unless such technical data or computer software has been listed in Attachment 1.

(e) The Contractor grants to the Government options to acquire each item of technical data listed in Attachment 1 subject to the "Rights in Technical Data Specific Acquisition" clause of this contract and each item of computer software listed in Attachment 1 with unlimited rights at a price not to exceed the ceiling price specified in Attachment 1 for each item. The Contracting Officer may, by giving written notice to the Contractor, exercise the options at any time, and from time to time, until final payment under this contract.

(f) (1) Within sixty (60) days after execution of this contract and after each amendment of Attachment 1, the Contractor agrees to provide for each item listed in Attachment 1 or added to Attachment 1 clear and convincing evidence that each item of technical data pertains to an item, component or process developed at private expense and that each item of computer software was developed at private expense; and

(2) within thirty (30) days after a written request by the Contracting Officer, the Contractor agrees to submit a firm fixed price proposal for each item listed in Attachment 1 and to enter into good faith negotiations to establish a fair and reasonable price for each item.

In the event of a failure to agree on a price for each item, the Contracting Officer may, with the approval of the Head of the Contracting Activity, determine a reasonable price, subject to an appeal by the Contractor in accordance with the "Disputes" clause of this contract.

(g) Upon exercise of any option under this clause, the Government may immediately cancel, ignore, obliterate, erase or otherwise remove any legend restricting the Government's rights to use, disseminate or disclose the items for which the option is exercised.

229

WHO SHOULD OWN

DATA RIGHTS:

GOVERNMENT OR INDUSTRY?

SEEKING A BALANCE

A REPORT PREPARED FOR

THE UNDER SECRETARY OF DEFENSE

RESEARCH AND ENGINEERING

OSD TECHNICAL DATA RIGHTS STUDY GROUP

JUNE 22, 1984

APPENDIX 2

MODEL DIRECT LICENSING CLAUSE

There is a wide divergence of opinion on the exact form that a direct licensing clause should take. The Study Group received extensive comments on the model clause contained in the draft version of this report. This attachment contains a model clause that recognizes industry concerns as balanced against those of Government commentators. The Study Group offers this clause as a baseline only. Specific clauses need to be developed and tailored to specific acquisitions. We do not believe that there can be a standard clause, but offer this as a model that could be incorporated in the DOD FAR SUP along with the other changes we have proposed.

52.227-70XX   AGREEMENT TO LICENSE AND ASSIST DESIGNATED PARTIES TO USE TECHNICAL DATA FOR SPARE PARTS MANUFACTURING.   As prescribed at 27.412(w), insert the following clause:

AGREEMENT TO LICENSE AND ASSIST DESIGNATED PARTIES TO USE TECHNICAL DATA FOR SPARE PARTS MANUFACTURING (_____ 1984)

(a)   The Government shall have the option right to direct the contractor to grant non-exclusive licenses and provide necessary technical assistance to other willing and qualified manufacturers for the purpose of establishing competing sources of supply for replenishment spare parts.

(b)   Exercise of this right will be by modification to this contract any time up to ____ years after the end of the period of performance.   The option right to direct license rights and technical assistance applies to:

(1)   Any limited rights technical data related to spare parts required in the performance of this contract, except that excluded in paragraph (c).   The not-to-exceed prices (flat fee and paid up royalty free license fee) and delivery times in the contract schedule apply.

(2)   Technical assistance necessary to help another source to manufacture spare parts for any item or component produced under this contract, except those excluded in paragraph

(c). The not-to-exceed prices and delivery times cited in the contract schedule apply.

(c) Exclusions: The following are excluded from the operation of this clause:

(1) Items sold in substantial quantities to the public or interchangeable items manufactured by two or more competing suppliers.

(2) Items already under license to third parties.

(3) Data which the contractor is legally precluded from licensing.

(4) Description of Other Technical Data Excluded

(i) _____(Include any other ._____

(ii) _____negotiated items)_____

(d) The not-to-exceed prices stated in paragraph (b) may be adjusted in accordance with paragraph (e) and (g) if:

(1) The Government does not acquire direct license rights of the scope indicated.

(2) The Government acquires direct license rights and technical assistance for less than the full number of items, components or processes for which the price is established.

(3) The contractor is unable to substantiate that pertinent items, components or processes are subject to limited rights.

(e) Exercise of Option.

(1) When the Government desires to exercise the above option, it will notify the contractor in writing of the direct license rights data or technical assistance desired, including

233

the extent of and the desired terms and conditions of any license. The contractor will perform within the delivery period specified, without waiting for completion of final price negotiations or any appeal.

(2) When technical assistance is to be furnished to a licensee, any agreement reached will be subject to Government review.

(3) Within _____ days after receipt of order, the contractor will furnish a pricing proposal, to establish the final price for the license rights and technical assistance in paragraph (b). Technical assistance concerning particular items, components or processes should normally be separately priced. Normally, a price for direct license rights for the contract requirements should include a flat sum, a royalty rate and a maximum royalty sum. The flat sum will be paid when the licensee produces the item or component or demonstrates the process in an acceptable fashion. The flat sum will include the cost for furnishing such data or technical assistance. After the flat sum and royalties total the maximum royalty sum, the Government shall have an indefinite, paid-up, royalty free license.

(f) The essence of this option clause is to give the Government the ability to transfer technology within the time period necessary to meet schedules and before the technology becomes obsolete. The time spent during the pendency of conventional appeals may effectively deprive the Government of the benefits of this option. Accordingly:

234

(1) The contractor shall promptly furnish technical data and technical assistance according to the terms of any order entered under paragraph (e).

(2) Appeals may be filed under the Disputes clause at the time of the entry of the order.

(g) Subcontract provisions:

(1) This clause, in its entirety, shall be included in all hardware subcontracts of any tier, unless excused in writing by the contracting officer; this clause does not apply to any items excluded in paragraph (c).

(2) The word "contractor" appearing in this clause includes "subcontractors" unless otherwise indicated.

(3) The Government may negotiate any request for greater rights directly with a subcontractor. The prime contractor consents to the processing of an appeal by any subcontractor of any tier in the name of the prime contractor under the Disputes clause from any decision of the contracting officer concerning rights in technical data. Costs of the appeal are the responsibility of the subcontractor.

(4) The contractor shall use its best efforts to negotiate the provisions of this clause into subcontracts and resolve any and all problems relating to identification, pricing and submission of data.

(h) In any follow-on contract awarded to the contractor for this system, the contractor agrees:

(1) To accept technical data provisions that grant the Government the same rights in technical data and options as are granted in this clause.

(2) Not to assert any right adverse to the Government that would not have been asserted under this clause.

Following are changes needed to DOD FAR SUP Subpart 27.4 to implement the model clause for direct licensing. All changes are in addition to those proposed in Appendix 1.
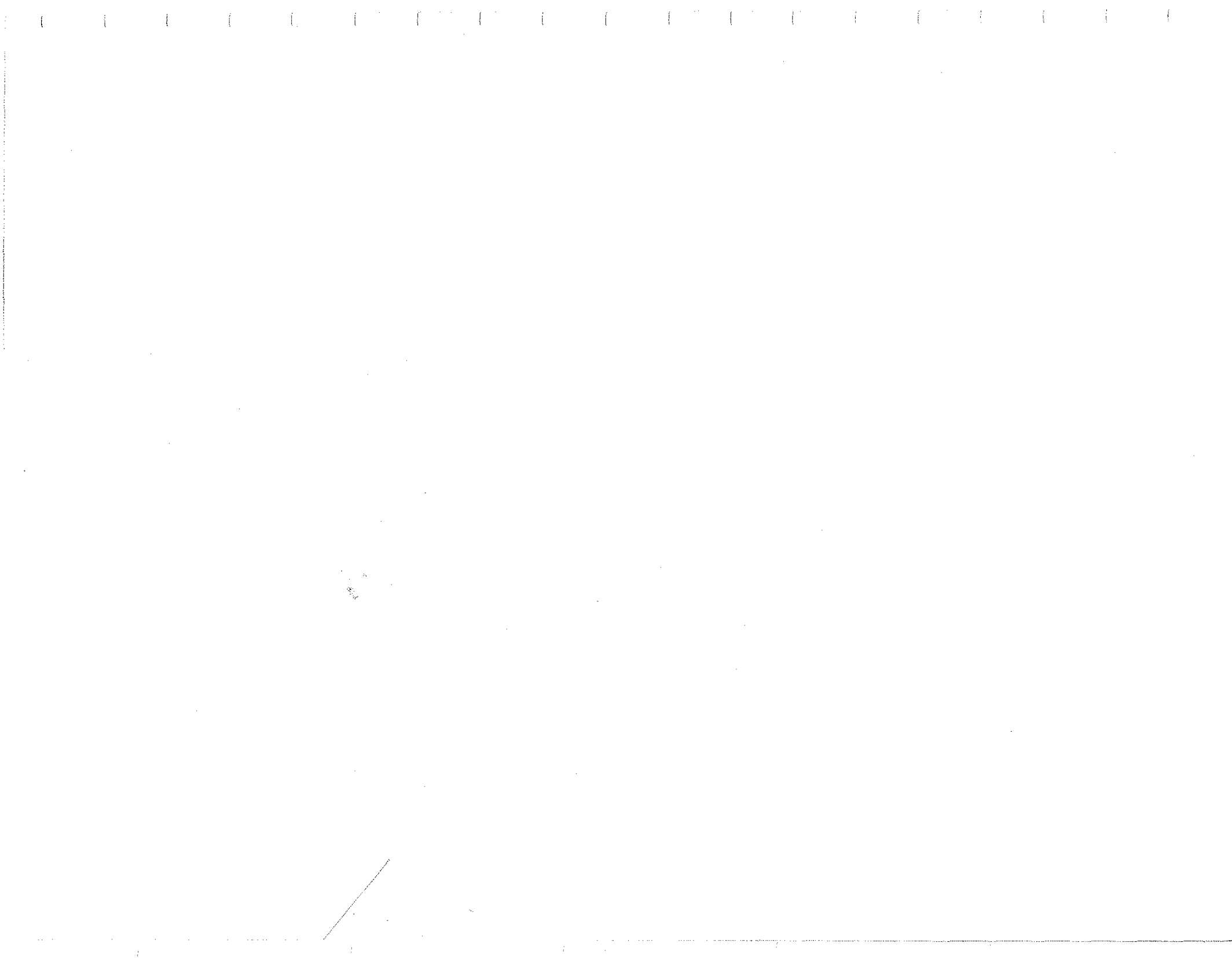
27.403-3(g) <u>Licensing</u>. The Government is precluded from using limited rights data for competitive acquisition of spare parts without the written permission of the party furnishing such technical data. Buying unlimited rights to this data can be prohibitively expensive and is not always in the long-term best interests of either the Government or industry. A middle ground exists in acquiring rights to licensing. Through this negotiated procedure, DOD can acquire Government rights to have other contractors produce spare parts or can require a contractor to directly license another contractor or contractors. The preferred method is direct licensing. In return for this right the Government pays a fair price for the license. Contracting Officers may include a clause in solicitations and contracts to acquire optional license rights. [The model clause at 52.227-70XX, Agreement to License and Assist Designated Parties to Use Technical Data for Spare Parts Manufacturing, should be adapted to meet specific circumstances.] License rights shall not be obtained for items sold in substantial quantities to the public, interchangeable items manufactured by two or more competing suppliers or items already under license to third

237

parties. In determining whether to negotiate license rights or the amount to be paid for license rights contracting officers should consider as a minimum the following factors:

(1) The benefit estimated to be received.

(2) Any detriment to a competitive advantage (in terms of potential for future business, whether commercial or Governmental) suffered by the contractor as a result of the acquisition.

(3) The degree to which the contractor's original investment in the pertinent item, component or process has been recouped.

[27.412(w) The contracting officer shall insert the clause at 52.227-70XX, Agreement to License and Assist Designated Parties to Use Technical Data for Spare Parts Manufacturing, in solicitations and contracts in accordance with 27.403-3(g).]

238

DEPARTMENT OF DEFENSE

48 CFR Parts 227 and 252

Department of Defense Federal Acquisition Regulation Supplement; Technical Data

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule and request for comment.

SUMMARY: DoD FAR Supplement Subpart 227.4 and related clauses in DFARS Part 252 are being revised to comply with Pub. L. 98-525, the Defense Procurement Reform Act, 1984, and Pub. L. 98-577, the Small Business and Federal Procurement Competition Enhancement Act. The coverage has now been finalized by the DAR Council and is being published as a proposed rule for public comment.

DATE: Written comments on this proposed rule must be received by October 9, 1985. Please cite DAR Case 84-187 in all correspondence on this subject.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Executive Secretary. DASD(P-DARS) c/o OUSDRE(M&RS) Room 3D139 Pentagon, Washington, D.C. 20301-3062.

FOR FURTHER INFORMATION CONTACT: Charles W. Lloyd, Executive Secretary, DAR Council DASD(P-DARS) c/o OUSDRE(M&RS), Room 3D139 Pentagon, Washington, D.C. 20301-3062. Telephone (202) 697-7266.

SUPPLEMENTARY INFORMATION: The proposed coverage consists of a complete rewrite of DFARS Subpart 227.4 to accommodate language in Pub. L. 98-525, the Defense Procurement Reform Act, Pub. L. 98-577, the Small Business and Federal Procurement Competition Enhancement Act. Major changes are as follows:

a. The coverage has been reorganized to group related topics closer together and to clarify the regulation.

b. The phrase "developed at private expense" has been defined. This definition establishes the legitimate proprietary interest of the contracting parties as required by Section 2320 of Pub.L. 98-525.

c. The Definition of "limited rights" has been revised to clarify the Government's right to have an independent third party review limited rights technical data for the Government.

d. New coverage has been added defining license rights and implementing guidance on the acquisition of license rights and directed licensing of technology. Related clauses have been added and revised.

e. The policy in Public Law 98-525, Section 1202(6) has been implemented.

f. New coverage has been added concerning the expiration of limited rights legends and the use of options to acquire rights in technical data.

g. The coverage on computer software has been merged into the coverage on technical data where appropriate.

h. The "predetermination of rights in technical data" procedures have been revised and renamed "prenotification of rights in technical data and computer software."

Regulatory Flexibility Act

The proposed change to DFARS Subpart 227.4 appears not to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because it imposes no new requirements which would require such entities to change their business practices, incur additional costs or otherwise affect their competitive position. The rule does not contain information collection requirements which require approval of OMB under 44 U.S.C. 3501 et seq.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Owen L. Green,
Acting Executive Secretary. Defense Acquisition, Regulatory Council.

Therefore, it is proposed that 48 CFR Parts 227 and 252 be amended as follows:

PART 227—PATENTS, DATA AND COPYRIGHTS

1. The authority citation for 48 CFR Part 227 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

2. Subpart 227.4, consisting of sections 227.470 through 227.480, is revised to read as follows:

Subpart 227.4—Rights in Data and Copyrights

227.470   Scope of subpart.

(a) This subpart sets forth Department of Defense policies and procedures and prescribes solicitation provisions and contract clauses concerning rights in technical data, other data, computer software, and copyrights as well as requirements for the acquisition of technical data and computer software. This subpart also sets forth policies and procedures and prescribes solicitation provisions and contract clauses concerning data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

(b) This subpart does not encompass rights in computer software acquired under GSA ADP schedule contracts.

Such rights are governed by the terms of the GSA contracts.

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 process 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 the form or method of recording.

"Developed at private expense", as used in this subpart, means that completed development was accomplished without direct Government payment, at a time when no Government contract required performance of the development effort,

and was not developed as a part of performing a Government contract. The word "developed", as used in the phrase "developed at private expense", means brought to the point of practical application; i.e., to be considered "developed" an item or component must have been constructed, a process practiced, or computer software used, and in each case it must have been tested so as to clearly demonstrate that it performs the objective for which it was developed. When, in applying these criteria, an item, component, process or software package does not meet the test because the entire item, component, process, or software package was not developed at private expense, separate elements thereof which do meet the criteria will be considered to have been developed at private expense. Further, in applying the foregoing criteria, when an item, component, process or computer software which has been developed at private expense is modified or revised to meet Government requirements specified in a contract, modification of the item, component, process or computer software shall not be considered to have been developed at private expense.

"License rights", (a) as used in section 227.481, i.e., SBIR program contracts, means rights to use, duplicate, or disclose technical data or 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; and

(b) as used elsewhere in this subpart, means rights of the Government to use, duplicate, or disclose, in whole or in part and in any manner, for purposes stated in the contract or in a separate licensing agreement, technical data furnished with limited rights and computer software furnished with restricted rights, and to have or permit others to use such technical data or computer software on behalf of the Government for such purposes.

"Limited rights", (a) as used in section 227.481, i.e., SBIR program contracts, 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: (1) Released or disclosed in whole or in part outside the Government, (2) 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 (3) used by a party other than the Government; and

(b) as used elsewhere 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: (1) Released or disclosed in whole or in part outside the Government, (2) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for reproduction of the computer software, or (3) used by a party other than the Government, except for:

(i) Emergency repair or overhaul work, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided*, that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release, or disclosure;

(ii) Release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of paragraph (b)(1) above; or

(iii) Release to a contractor retained by the Government to review technical data, provided that the release or disclosure thereof shall be subject to a prohibition against further use, release, or disclosure.

"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 into 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 provisions 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 paragraphs (a) to (d) above that are listed or described in a contract or in a license agreement made a part of a contract.

"Technical data", as used in this subpart, means recorded information, regardless of the form or method of recording, of a scientific or technical nature. Technical data includes computer software documentation, but does not include computer software or financial, administrative, cost, pricing or management data, or other information incidental to contract administration.

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

"Unpublished", as used in this subpart, means that which has not been released to the public nor 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 Policy.

(a) The Department of Defense shall acquire only such technical data and computer software and rights therein as are essential to meet the Government's missions, including the interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(b) Consistent with section 1202(6) of Pub. L. 98–525, the Department of Defense shall not require an offeror, as a condition for obtaining a contract, to provide technical data pertaining to the design, development, or manufacture of existing products or processes developed at private expense and offered or to be offered for sale, license, or lease in substantial quantities to the public at established catalog or market prices; unless such data is necessary for the Government to operate or maintain the product or use the process if obtained as an element of performance under a contract. However, contracting officers may negotiate to obtain such technical data with the right to disclosure and use it if acquisition of the technical data would be advantageous to the Government. Likewise, an offeror's willingness to provide this technical data, along with appropriate rights, may be evaluated as part of a source selection.

(c) There are many purposes for acquiring technical data or computer software and the rights therein. Examples of purposes for which the rights to technical data or computer software may be used are: development of new sources for existing weapon

systems, competitive reprocurement purposes, procurement to enhance industrial mobilization, modification, upgrade, non-emergency overhaul, and in-house manufacture. However, before a decision is made to obtain rights in technical data or computer software, in accordance with 227.473–2, the contracting officer shall determine that it is in the best interest of the Government.

(d) Any contract that requires technical data or computer software and rights therein shall identify these items in the contract schedule as separately priced line items, shall provide a separate delivery schedule, when applicable, and shall include the appropriate rights in technical data or computer software clauses.

227.472–1 Rights in technical data and computer software.

(a) *Unlimited Rights Technical Data.* Technical data in the following categories shall be acquired with unlimited rights:

(1) Technical data resulting directly from performance of experimental, developmental, or research work specified as an element of performance in a Government contract or subcontract;

(2) Technical data necessary to enable others to manufacture end-items, components and modifications, or to enable them to perform processes, when the end-items, components, modifications or processes have been, or are being developed under Government contracts or subcontracts in which experimental, developmental or research work was specified as an element of contract performance. This category excludes technical data pertaining to items, components or processes developed at private expense;

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

(4) Technical data pertaining to end-items, components or processes, prepared or required to be delivered under any Government contract or subcontract, for the purpose of identifying sources, size, configuration, mating and attachment characteristics, and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(5) Manuals of instructional materials prepared or required to be delivered under a Government contract or subcontract for installation, operation, maintenance or training purposes; and

(6) Technical data which is in the public domain or has been or is normally released or disclosed by the contractor or subcontractor without restriction on further disclosure. "In the public domain" means available to the public without copyright or other restriction of any kind.

(b) *Limited Rights Technical Data.* (1) Except as provided in paragraph (a) above, unpublished technical data pertaining to items, components, processes, or computer software developed at private expense will be acquired with limited rights, provided that the data is identified as limited rights data in accordance with paragraph (b)(2) of the clause at 252.227-7013, Rights in Technical Data and Computer Software. A claim to limited rights will be honored only as long as the data continues to meet these requirements.

(2) Technical data pertaining to items, components, or processes developed at private expense may be called for, required, or otherwise furnished in accordance with policy in paragraphs (b)(1), (3), (4), (5), and (6) above and, as such, it will be acquired with unlimited rights.

(3) A subcontractor may furnish limited rights technical data directly to the Government rather than through the prime contractor.

(c) *Unlimited Rights Computer Software.* (1) Computer software in the following categories shall be acquired with unlimited rights:

(i) Computer software resulting directly from or generated as part of the performance of experimental, developmental, or research work specified as an element of performance in a Government contract or subcontract;

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

(iii) Computer data bases, prepared under a Government contract or subcontract, consisting of (A) information supplied by the Government, (B) information in which the Government has unlimited rights, or (C) 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 software; and

(v) Computer software which is in the public domain or has been or is

normally furnished by the contractor or subcontractor without restriction.

(2) When the Government has unlimited rights in computer software, (i) it has the unlimited rights in the associated computer software documentation, and (ii) no payment shall be made to a contractor for using such software in performance of a Government contract or for later delivery to the Government of such software. *Provided, however.* That the contractor shall be entitled to compensation for converting the software into the prescribed form for reproduction and delivery to the Government.

(d) *Restricted Rights Computer Software.* (1) The Department of Defense shall acquire only such rights to use, duplicate, and disclose computer software developed at private expense as necessary to meet Government needs. Such rights should be designed to allow the Government flexibility while, at the same time, adequately preserving the rights of the contractor. Computer software developed at private expense may be purchased or leased. Restrictions may be negotiated with respect to the right of the Government to use, duplicate, or disclose computer software developed at private expense. As a minimum, however, the Government shall have the rights provided in the definition of restricted rights in section 227.471.

(2) Patented or copyrighted computer software will not be subject to any agreement prohibiting the Government from infringing a patent or copyright. Title 28, United States Code, section 1498 provides that the Government is liable only for reasonable compensation for use of a patented invention or for infringement of copyright. However, see section 227.473-2(g).

(3) When computer software is developed at private expense and acquired with restricted rights, the associated computer software documentation will be acquired with limited rights to the extent provided in the definition of limited rights in section 227.471, and will not be used for preparing the same or similar computer software.

(4) Commercial computer software and related documentation developed at private expense may be leased or a license to use may be purchased by the Government subject to the restrictions in (b)(3)(i) of the clause at 252.227-7013, Rights in Technical Data and Computer Software.

(5) A subcontractor may furnish restricted rights computer software directly to the Government rather than through the prime contractor.

(e) *Solicitation Provision and Contract Clause.* 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—

(1) When all technical data to be delivered is to be acquired with unlimited rights pursuant to the policy at 227.473-2(a);

(2) When existing works are to be acquired in accordance with section 227.476;

(3) When special works are to be acquired in accordance with section 227.475;

(4) When the work will be performed by foreign sources outside the United States, its territories, possessions, or Puerto Rico;

(5) When performance will be limited solely to architect-engineer services or construction;

(6) When the contract is awarded under the DoD Small Business Innovation Research Program (SBIR Program).

(f) *Contract Schedule Items Requiring Experimental, Developmental or Research Work.* 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 252.227-7018, 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, developmental, or research work as an element of performance.

227.473 Procedures for technical data and computer software.

227.473-1 Identification of limited rights in technical data and restricted rights in computer software.

(a) *Prenotification of Rights in Technical Data and Computer Software.* (1) In order for the Government to make informed judgments concerning the competitive reprocurement potential of privately developed items, components processes or computer software that may be delivered under a resultant contract, offerors shall identify to the maximum extent practicable in their response to solicitations such privately developed items, components, processes, or computer software and the associated data which they:

(i) intend to deliver with limited or restricted rights;

(ii) intend to deliver with unlimited rights; or

(iii) have not yet determined will be delivered with unlimited, limited or restricted rights.

If delivery of technical data or computer software under the contract is anticipated, the provision at 252.227-7035, Prenotification of Rights in Technical Data and Computer Software, shall be included in the solicitation.

(2) This requirement for prenotification shall not be construed as an agreement concerning rights in technical data or computer software identified by an offeror except as specifically provided by an agreement in a resultant contract.

(b) *Notice of Certain Limited or Restricted Rights.* (1) If continuing information is desired under a contract about a contractor's intention to use in the performance of the contract any item, component, process or computer software for which technical data would be subject to limited rights or computer software would be subject to restricted rights, the contractor may be required to advise the contracting officer of this fact promptly. If possible, the schedule should indicate the specific areas to which limited or restricted rights data is of concern and the notice requirement should only address those areas.

(2) When the provision at 252.227-7035, Prenotification of Rights in Technical Data and Computer Software, is included in a solicitation, the clause at 252.227-7013 with its Alternate I shall be included in any resultant contract.

(3) Under this clause, 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 (see 227.473-1(a)), 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.

(4) Subsequent to contractor notification, if the contracting officer agrees that certain technical data is subject to limited rights or certain computer software is subject to restricted rights, the contracting officer may then determine whether to

negotiate for the purchase of unlimited rights in such data 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 item, component, process or computer software; or negotiating for the acquisition of rights in technical data using any of the methods addressed in 227.473-2.

227.473-2 Obtaining rights in technical data and computer software.

Various techniques for obtaining rights in data are available. These approaches include specific acquisition of unlimited rights in technical data, licensing of rights, obtaining rights through options in the contract and negotiating a time limitation on limited or restricted rights in data. Contract clauses and the schedule establish the type and form of technical data and computer software to be delivered.

(a) *Specific Acquisition of Unlimited Rights in Technical Data.* (1) Notwithstanding section 227.472-1 (b) and (d) or any other provisions of this section, the Government may acquire unlimited rights in any limited rights technical data. The contracting officer shall insert the clause at 252.227-7015, Rights in Technical Data—Specific Acquisition, in solicitations and contracts when all technical data is to be acquired with unlimited rights.

(b) *Acquisition of License Rights in Technical Data and Computer Software.* (1) The acquisition of license rights is the acquisition by the Government of a license to use limited rights data or restricted rights computer software for the purpose(s) stated in the contract or in the license agreement under which the data was furnished. License rights do not grant the Government the right to have or permit others to use such data or software unless specifically provided for in the contract or agreement.

(2) Technical data and computer software acquired with license rights shall not be released outside the Government unless the recipient of the data agrees in writing to protect the data from unauthorized disclosure and to use the data only for the purpose(s) for which it was furnished. When license rights technical data or restricted rights computer software is contemplated for use in a future contract, the contracting officer shall include in the solicitation a statement that license rights data is contemplated for use in the proposed action and that recipients of such data shall be required to sign nondisclosure and non-use agreements. Contracting officers may consider for use non-disclosure and non-use agreements

provided by the originators of the data. When technical data or computer software is to be acquired under a contract with license rights, the clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate IV shall be included in the contract.

(c) *Direct Licensing.* (1) Another method of enhancing competitive acquisition of items, components, processes, or computer software developed at private expense is to require contractors to directly transfer to another source data and technical assistance to enable the second source to produce the item, component, process or computer software. This method is similar to Leader Company contracting set forth at FAR 17.4 It permits contractors to retain direct control over use of their limited and restricted rights data being transferred to the second source.

(2) When direct licensing is to be used, the clause at 252.227-7036, Direct Licensing, shall be included in the solicitation and contract. This clause may be modified as appropriate to the objectives and circumstances of the specific acquisition.

(d) *Options.* Contracting officers are authorized to include options in contracts to acquire technical data and computer software and rights therein plus options to require contractors to directly license technology to other sources. For example, an option may be included in a contract to acquire unlimited rights in limited rights technical data pursuant to the clause at 252.227-7015, Rights in Technical Data—Specific Acquisition, or to acquire license rights in limited rights technical data pursuant to the clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate IV. An option may also be included in a contract to establish a time period for the expiration of limited rights or restricted rights legends pursuant to the clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate III, or for requiring a contractor to directly license technology, including technical data and computer software, to another manufacturer for the purpose of establishing an additional source of supply pursuant to the clause at 252.227-7036, Direct Licensing.

(e) *Expiration of Limited and Restricted Rights.* (1) Consistent with section 2320(c), Title 10, of the United States Code, the Department of Defense may negotiate a time limitation on limited rights in technical data. Additionally, a time limitation on restricted rights in computer software

243

may be negotiated. When a time limitation is to be negotiated. the negotiation objective shall not exceed 7 years.

(2) Time limits shall be negotiated on a case-by-case basis. This negotiated period shall balance contractor economic interests in the data with the Government's need for competition and an enhanced defense industrial base Factors that should be considered in determining a reasonable time period are:

(i) the anticipated Government need for reprocuring or modifying contract items and components.

(ii) the useful life of the technology incorporated in the manufacture. operation and maintenance of these items and components.

(iii) the contractor's return on investment in these items and components, and

(iv) the Government benefits to be realized by competing future acquisitions and modifications of these items and components.

(3) The time period and the type of rights to be obtained by the Government shall be specified in the contract.

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

(5) If it is determined that only a portion of the limited or restricted 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 III to the basic clause at 252.227-7013. Rights in Technical Data and Computer Software. may be appropriately modified to limit its application only to that portion.

(f) *Acquisition of Rights in Technical Data Furnished on a Restricted Basis in Support of a Proposal.* When the Government contemplates awarding a contract based upon a proposal that was submitted on a restricted basis. the contracting officer shall ascertain whether to acquire rights to use all or part of the technical data furnished with the proposal. If such rights are to be acquired. the contracting officer shall

negotiate with the offeror in accordance with the procedures set forth in section 227.473.

(g) *Acquisition of Rights in Technical Data for Foreign Sources in Contracts to be Performed Outside the United States.* Normally. the clause at 252.227-7032. Rights in Technical Data and Computer Software (Foreign). is used in solicitations and contracts with foreign sources. except that the clause shall not be used in contracts for special works (see section 227.475). contracts for existing works (see section 227.476). or contracts for Canadian purchases (see Subpart 225.71. Canadian Purchases). This clause should be inserted when the Government is to acquire unlimited rights in all technical data. including reports. drawings and blueprints. and all computer software. specified to be delivered to the Government. The clause at 252.227-7013. Rights in Technical Data and Computer Software. shall be inserted when the same rights are to be obtained as would be obtained if contracting with United States firms. Notwithstanding any other provisions in this Subpart. the clause may be modified to meet the requirements necessary for and peculiar to the foreign procurement. *provided* it agrees with the policies and principles in this Subpart.

227.473-3 Other technical data procedures.

(a) *Establishing the Government's Rights to use Technical Data.* All technical data shall be acquired subject to the rights established in the appropriate Rights in Technical Data clauses. Except as provided in FAR Section 48.105 and in FAR Subpart 36.6 no other clauses. directives. standards. specifications or other implementation shall be included. directly or by reference. to enlarge or diminish such rights. The Government's acceptance of technical data subject to limited rights does not impair any rights in such data to which the Government is otherwise entitled or impair the Government's right to use similar or identical data acquired from other sources.

(b) *Marking of Technical Data.* (1) Technical data delivered to the Government shall be marked in accordance with 227.474-4. Each piece of technical data submitted with limited rights shall be marked with—

(i) The authorized restrictive legend;

(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. and

(iii) An explanation of the indication used to identify limited rights data. The Government shall include such identifying markings on all

reproductions thereof. unless the Government cancels such markings pursuant to paragraphs (b)(2) or (b)(3) below.

(2) The contractor has the responsibility to assure that no restrictive markings are placed on data except in accordance with the clause at 252.227-7013. Rights in Technical Data and Computer Software. 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 and Computer Software shall also be included in the contract. The contractor's procedures required by this clause shall be reviewed periodically by the Contract Administration Office. In addition to the rights afforded to the Government by the clause at 252.227-7018 the following actions are available to insure proper marking of data:

(i) The procedures of the clause at FAR 252.227-14. Validation of Restrictive Markings on Technical Data. may be invoked if the contractor or any subcontractor fails to follow the requirement and procedures of the clause at 252.227-7013. Rights in technical Data and Computer Software. or any alternate. or the clause at 252.227-7025. Rights in Technical Data and Computer Software SBIR Program.

(ii) Failure to follow proper marking procedures may also be deemed to render technical data nonconforming and subject to FAR Section 46.202 and to withholding of payments under the clause at 252.227-7030. Technical Data—Withholding of Payments.

(iii) When a pre-award survey is requested by the purchasing office, the quality assurance review may include as an item of special inquiry an examination of the prospective contractor's procedures for complying with the clause at 252.227-7018. Restrictive Markings in Technical Data and Computer Software.

(iv) The contractor's procedures for complying with the "Restrictive Markings on Technical Data and Computer Software" clause may be reviewed when holding a postaward conference.

(c) *Unmarked or Improperly Marked Technical Data.* (1) Pursuant to the validation procedures of FAR 27.409 and the clause at FAR 52.227-14. Validation of Restrictive markings on Technical Data. the Government has the right to require a contractor or subcontractor to justify in writing the validity of

restrictive markings on technical data delivered or required to be delivered under a contract or subcontract. The contracting officer has the right to require the contractor or subcontractor to furnish clear and convincing evidence to justify the current validity of the marking.

(2) Technical data received without restrictive legends shall be deemed to have been furnished with unlimited rights. However, within six months after delivery of such data the contractor or subcontractor may request permission to place restrictive markings on such data at its own expense and the Government may so permit if the contractor or subcontractor:

(i) demonstrates that the omission of the restrictive markings was inadvertent,

(ii) establishes pursuant to paragraph (c)(1) above that the use of the markings is authorized, and

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

(3) If technical data is delivered with restrictive markings and the contractor or the subcontractor is not authorized by the terms of the contract to furnish technical data with limited rights, license rights, or with a time period for the expiration of limited rights legends: the technical data shall be used with limited rights, license rights, or with a time period for the expiration of limited rights legends, until such markings may be cancelled or ignored in accordance with the procedures of the clause at FAR 52.227-14, Validation of Restrictive Markings on Technical Data.

227.473-4 Other computer software procedures.

(a) *General.* (1) Except as provided at 227.474-1, Data Requirements, any computer software to be purchased under a contract shall be listed on the Contract Data Requirements List (DD Form 1423). Also, if a contract requires the conversion of data to machine-readable form, the editing or revision of existing programs, or the preparation of computer software documentation, the products of this work, if required to be delivered, shall be included on the DD Form 1423.

(2) The clause at 252.227-7013, Rights in Technical Data and Computer Software, shall be included in every contract under which computer software may be originated, developed, or delivered. This clause establishes the circumstances under which the Government obtains unlimited rights in both technical data and computer software. In negotiated contracts where the clause at 252.227-7013, Rights in

Technical Data and Computer Software, is required, the provision at 252.227-7019, Identification of Restricted Rights Computer Software, shall be included in the solicitation. Also, see 227.473-3(b)(2).

(3) Contracts under which computer software developed at private expense is purchased or leased shall explicitly set forth the rights necessary to meet Government needs and restrictions applicable to the Government as to use, duplication and disclosure of the software. Computer software developed at private expense may be needed, or the owner of such software will only sell or lease it, for specific or limited purposes such as for internal agency use, or for use in a specific activity, installation or service location. In any event, the contract must clearly define any restrictions on the right of the Government to use such computer software, but such restrictions will be acceptable only if they will permit the Government to fulfill the need for which such software is being procured. The recital of restrictions may be complete within itself or it may reference the contractor's license or other agreement setting forth restrictions. If referencing is employed, a copy of the license or agreement must be attached to the contract. The minimum rights are provided in the Rights in Technical Data and Computer Software clause at 252.227-7013, and need not be included in the recital.

(4) When computer software developed at private expense is modified or enhanced as a necessary part of performing a contract, only that portion which is recognizable as the original product will be deemed to be computer software developed at private expense.

(5) The scope of the restrictions placed on the Government, or conversely, the scope to which the Government may use such software shall be taken into account in determining the reasonableness of the contract price for the computer software.

(b) *Marking of Computer Software.* (1) Because of the widely-varying restrictions which are likely to be encountered in the purchase or lease of computer software developed at private expense, a standard recital setting forth specific restrictions and rights suitable for all cases is not feasible. If the standard set of restrictions and rights set forth in the clause at 252.227-7013(b)(3)(ii) is not appropriate, contracting officers shall consult counsel when a contractor requests the Government to accept other restrictions on the use of such software.

(2) To apprise user personnel of the restrictions on use, duplication or disclosure agreed to by the Government with respect to privately developed computer software sold or leased to the Government, the contractor is required to place the following legend on such software:

Restricted Rights Legend

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

For commercial computer software and documentation, the contract number may be omitted and replaced by the legend in paragraph (b)(3)(B) of the Rights in Technical Data and Computer Software clause at 52.227-7013, and the contractor's address added. The Government shall include the same restrictive markings on all its reproductions of the computer software unless the Government cancels such markings pursuant to the procedures in 227.473-4(c).

(3) A statement setting forth the restrictions imposed on the Government to use, duplicate, and disclose computer software subject to restricted rights is required to be prominently displayed in human-readable form in the computer software documentation. The reference to the clause at 252.227-7013, Rights in Technical Data and Computer Software, in the Restricted Rights Legend on commercial computer software and documentation satisfies this requirement.

(4) Except as provided in paragraph (a) above, computer software and computer software documentation delivered to the Government pursuant to a contract requirement must be identified with the number of the prime contract and the name of the contractor.

(5) All markings, (notice, legends, identifications, etc.) concerning restrictions on the use, duplication, or disclosure of computer software required or authorized by the terms of the contract under which delivery is made are required to be in human-readable form that can be readily and visually perceived and, in addition, may be in machine-readable form as appropriate and feasible under the circumstances. Such markings shall be affixed by the contractor to the computer software prior to delivery of the software to the Government.

(6) The human-readable markings may be applied to card decks, magnetic tape reels, or disc packs. This may be, in the case of a card deck, on a notice card even though the cards of the deck do not contain printed material, in the case of a card deck packaged in a container

intended as a permanent receptacle for the cards, on the container; in the case of a tape, on the tape reel or on the surface of the leader and trailer of the tape; and in the case of a disc pack, on the hub of the disc.

(c) *Unmarked or Improperly Marked Computer Software.* (1) No restrictive markings shall be placed upon computer software unless restrictions are set forth in the contract prior to delivery of the software. Copyright notices as specified in Title 17, United States Code. Sections 401 and 402 are not considered "restrictive markings." The Government may require the contractor to identify the contractual provision setting forth such restrictions before accepting computer software with restrictive markings. If computer software is received with a restrictive marking, and there is a question whether the marking is authorized by the contract, the software shall be used subject to the asserted restrictions pending written inquiry to the contractor. If no response to an inquiry has been received within 60 days, or if the response fails to identify the restrictions set forth in the contract, the cognizant Government personnel shall cancel or ignore the marking, notify the contractor accordingly in writing, and thereafter use the software with unlimited rights.

(2) Computer software received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, the contractor may request permission to place restrictive markings on such software at his own expense, and the Government may so permit, if the contractor establishes that the markings are authorized by the contract and demonstrates that the omission was inadvertent. Failure of the contractor to mark such computer software prior to delivery to the Government shall relieve the Government of liability for any use, duplication or disclosure of such computer software.

(3) If computer software authorized by the contract to be furnished with restrictions is received with restrictive markings not in the form prescribed in the contract, the software should be used in accordance with the restrictions provided in the contract 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 and so notify the contractor.

227.474 Delivery of technical data.

227.474-1 Data requirements.

(a) The clause at 252.227-7031. Data Requirements, shall be included in all solicitations and contracts, except that the clause need not be included in—

(1) any contract, of which the aggregate amount involved does not exceed $25,000 and in any blanket purchase agreement and purchase order utilizing the DD Form 1155 (however, the DD Form 1423 shall be used with orders issued under a basic ordering agreement);

(2) any contract awarded to a contractor outside the United States, except those under Subpart 252.71, Canadian Purchases;

(3) any research or exploratory development contract when reports are the only deliverable item(s) under the contract;

(4) any service type contract, when the contracting officer determines that the use of the DD Form 1423 (Contract Data Requirements List) is impractical for use with respect to records prepared by a contractor in performing operation and maintenance under the contract;

(5) any contract under which construction and architectural drawings and specifications are the only deliverable items;

(6) any contract for commercial items when the only deliverable data is such an item, or would be packaged or furnished with such items in accordance with customary trade practices;

(7) any contract for items containing material which, by virtue of its potentially dangerous nature, requires controls to assure adequate safety to life and property, when the only deliverable data is the Materials Safety Data Sheet (MSDS) submitted in compliance with Federal Standard 313A and the clause at FAR 52.223-3. Hazardous Material Identification and Material Safety Data, and when such clause is included in the contract; or

(8) any contract that has no deliverable data except manuals for training, operation, and maintenance.

(b) The clause at 252.227-7031. Data Requirements, states that the contractor is required to deliver only the data items listed on the DD Form 1423, the data items identified in and deliverable under any contract clause of Subpart 252.2 and FAR Subpart 52.2 and made a part of the contract, and manuals to be utilized in training, operation, and maintenance and covered by a specific contract line item and exhibit.

(c) Other than the data items falling within the exceptions set forth in paragraph (a) above, the data items identified in and deliverable under any

contract clause of Subpart 252.2 and FAR Subpart 52.2 made a part of the contract, and manuals covered by specific contract line items; the requirement for delivery of any data items under the contract can be established only by listing such data items on the DD Form 1423. The clause at 252.227-7031. Data Requirements, shall be inserted in all contracts in which the DD Form 1423 is used. The DD Form 1423 need not be used to list data or software requirements falling within the exceptions set forth in paragraph (a) above.

227.474-2 Deferred delivery and deferred ordering.

(a) *Policy.* (1) Technical data and computer software is expensive to prepare, maintain and update. Every effort, therefore, should be made to avoid placing a requirement upon a contractor to prepare and deliver technical data or software unless the need is positively determined. By delaying the delivery of technical data or software until needed for a specific purpose, storage requirements within DD for technical data and computer software items are reduced, the handling of technical data and software superseded by updated versions is greatly decreased and the purchase of technical data or software which may become obsolete by pending hardware changes is minimized.

(2) Economy in the purchase of technical data and software and the probability of greater currency may be achieved by deferring the delivery, and in some cases, deferring the ordering of technical data or software until an operational need is determined, or until stability of design or production is reached during contract performance.

(i) When the need for, but not the time of, delivery can be determined, deferred delivery shall be used. When deferred delivery is used, it is expected that the contractor will price the technical data and software at the time of contracting and incur the cost of preparation prior to the call for delivery. Therefore, it is important that deferred ordering rather than deferred delivery be used where the need for technical data or software is doubtful.

(ii) When it is expected that technical data or computer software may be required, but the precise need at time of contracting has not been determined, deferred ordering shall be used to avoid the cost of preparation, but allow the ordering of the technical data or software at some future point in contract performance should the need arise.

246

(iii) Whether the technique of deferred delivery or deferred ordering is used, the receipt of technical data or software by the Government should be scheduled to coincide with specific and planned use of technical data or software.

(b) *Deferred Delivery.* Deferred delivery refers to the practice of timing the delivery or technical data or computer software specified in a contract to a firm, operational need. This technique should be used only when a technical data or software requirement can be determined at the time of contracting but the time or place of delivery is not firm. The delivery dates should be scheduled to coincide with the needs of the Government. The contractor, however, must be notified sufficiently in advance of a delivery date to enable him to provide the technical data or software in specified form on time. Thus, in any contract the Government may defer the delivery of all or any portion of the technical data or computer software specified in the contract until the actual need can be determined. The Government may require the contractor to deliver any such data or software, or portions thereof, at any time or within two years after either acceptance of all items (other than data and software) under the contract or termination of the contract, whichever is later. However, the contractor's obligation to deliver technical data pertaining to any item obtained from a subcontractor shall cease two years after the date on which he accepts the item from the subcontractor. Contracting officers may extend, but not shorten this two year period. The Government's rights in deferred delivery data and software are as prescribed in the contract under which the data or software is to be delivered. When the delivery of technical data or computer software is to be deferred in accordance with this subsection, the clause at 252.227-7026, Deferred Delivery of Technical Data or Computer Software, shall be included in the contract.

(c) *Deferred Ordering.* Deferred ordering refers to the practice of delaying the ordering of technical data or computer software generated in the performance of the contract until such time as a need can be established and the requirements can be specifically identified for delivery under the contract. In many instances, it is difficult to determine before contract award exactly what data or software is needed. The information available during that period may suggest the need for some data or software, but further information may be needed to identify

the specific data or software items. In these situations, and also when it is desired to delay the ordering of technical data or computer software until such time as the production design becomes firm, the clause at 252.227-7027, Deferred Ordering of Technical Data or Computer Software, shall be included in solicitations and contracts. Under these circumstances, the deliverable technical data or computer software is not listed on the DD Form 1423 until the specific need is determined. Whenever the clause at 252.227-7027, Deferred Ordering of Technical Data or Computer Software, is used, the clause at 252.227-7013, Rights in Technical Data and Computer Software, shall also be included. When data or software items are ordered, the delivery dates shall be negotiated and the contractor shall be compensated for converting the data or software into the prescribed form, for reproduction and delivery to the Government. Compensation to the contractor shall not include the cost of generating such data or software since it was generated in the performance of work for which the Government has already agreed to pay the contractor. Contracting officers may extend, but not shorten the item period for exercise of deferred ordering of technical data or computer software pursuant to the clause at 252.227-7027, Deferred Ordering of Technical Data of Computer Software. To assist in identifying technical data and computer software for deferred ordering a contract may include a requirement to prepare and deliver a Data Accession List which lists all technical data and computer software generated under the contract. A Data Item Description suitable for this purpose is contained in the list of approved Data Item Descriptions.

227.474-3 Technical data certifications.

(a) The provision at 252.227-7028, Certification of Technical Data—Prior Delivery, shall be included in all solicitations which may result in a negotiated contract when information is needed to establish whether an offeror has delivered or is obligated to delivery to the Government under any contract or subcontract the same or substantially the same technical data included in the offer (see 215.406 and FAR 15.406-5(a)). This solicitation provision requires the offeror to submit with the offer a certification as to whether the same or substantially the same technical data included in the offer has been delivered or is obligated to be delivered to the Government under any contract or subcontract. If so, the offeror is required to identify one such contract or

subcontract under which such technical data was delivered or will be delivered. and the place of such delivery.

(b) If technical data is required to be delivered under a contract, the clause at 252.227-7037, Certification of Technical Data Conformity, shall be included in solicitations and any resultant contract.

(1) This clause requires the contractor to certify in writing that technical data delivered under the contract is complete. accurate, and complies with all requirements of the contract. The clause states that technical data deliverable under the contract may be reviewed by the Government both before and after Government acceptance. The clause also contains some illustrative examples of such reviews.

(2) If upon delivery the technical data is determined not to be complete. accurate, and in compliance with all requirements of the contract, the contracting officer shall consult with counsel regarding possible civil remedies and criminal sanctions available to the Government.

227.474-4 Identification of technical data.

(a) Technical data that is delivered under a contract shall be marked with the name of the contractor, the contract number and the name of any subcontractor who generated any part of the data. This marking requirement provides the basis for identifying the rights of the contractor and the Government in technical data.

(b) The clause at 252.227-7029, Identification of Technical Data, shall be included in solicitations and in any resultant contract under which technical data is to be delivered. Technical data marked in the manner permitted by paragraph (b)(2) of the clause at 252.227-7013, Rights in Technical Data and Computer Software, complies with this requirement.

272.474-5 Technical data—Withholding of payment.

(a) Timely delivery of technical data, delivery without deficiencies (including having no restrictive markings unless specifically authorized by the contract), and delivery with the required certification are particularly important to the operation and maintenance of equipment, as well as to the competitive procurement of follow-on quantities of contract items and components. The clause at 252.227-7030, Technical Data—Withholding of Payment, is designed to assure timely delivery and proper marking of technical data, delivery without deficiencies, and delivery with the required certification. This clause shall be included in all solicitations and

247

any resulting contract when it is anticipated that technical data will be delivered under the contract. The clause permits a contracting officer, at any time before technical data is accepted by the Government, to withhold payment not exceeding 10 percent of the total contract price or amount, but also permits the contracting officer to specify a lesser amount if circumstances warrant. A case-by-case determination of the amount to be withheld shall be made by the contracting officer after considering the estimated value of the technical data to the Government. No amount shall be withheld when the failure to make timely delivery, affix proper markings, deliver without deficiencies, or deliver without the required certification arises out of causes beyond the control and without the fault or negligence of the contractor.

(b) Withholding of payment under paragraph (b) of the clause should be accomplished only when the contractor has failed to make timely delivery of technical data, to deliver technical data without deficiencies, or to deliver technical data without the required certification, or when the contracting officer reasonably believes that late delivery, delivery with deficiencies, or delivery without required certification under this contract will occur. The amount of withholding should be based on the estimated value of the technical data to the Government.

227.474-7 Warranties of technical data.

The factors contained in section 246.708, Warranties of Technical Data, shall be considered in deciding whether to provide for warranties of technical data delivered under contracts calling for technical data relating to spare parts is to be delivered. When a warranty of technical data is to be used, the clause at 252.246-7001 shall be included in the solicitation and contract.

227.474-7 Delivery of technical data to foreign governments.

Limited rights include the right of the Government to deliver technical data to foreign governments as the national interest of the United States may require, subject to the same limitations which the Government accepts for itself. When the Government proposes to make technical data subject to limited rights available for use by a foreign government, it will to the maximum extent practicable, give reasonable notice thereof to the contractor or subcontractor whose name appears on the data.

227.475 Contracts for acquisition of special works.

(a) The clause at 252.227-7020, Rights in Data—Special Works, shall be included in all contracts for special works, including technical data and computer software, where ownership and control by the Government is desired. Examples include contracts— (1) primarily for the production of audiovisual works, including motion pictures or television recordings, with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptions, and the like; (2) for histories of the respective Departments or services or units thereof; (3) for the respective Departments or services or units thereof; (4) for works pertaining to recruiting, morale, training, or career guidance; (5) for surveys of Government establishments; (6) for works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties; and (7) primarily for production of technical reports, studies, or similar documents.

(b) Contracts for audiovisual works may include limitations in connection with music licenses, talent releases, and the like which are consistent with the purpose for which the works are acquired.

227.476 Contracts of acquisition of existing works.

(a) *Off-the-Shelf Purchase of Books and Similar Items.* Notwithstanding any other instructions contained in this part, no contract clause contained in this part need be included in contracts for the separate, sole procurement of data, other than motion pictures, in the exact form in which such material exists prior to the initiation of a request for purchase (such as the off-the-shelf purchases of existing products), unless the right to reproduce such technical data is an objective of the contract.

(b) *Purchase of Existing Audiovisual Works.* (1) The clause at 252.227-7021, Rights in Data—Existing Works, shall be used in contracts exclusively for the procurement of existing motion pictures, television recordings, or other audiovisual works. The contract may set forth limitations consistent with the purposes for which the material required by the contract is being procured. Examples of these limitations are—(i) means of exhibition or transmission; (ii) time; (iii) type of audience; and (iv) geographic location. Paragraph (c) of the clause should be modified to make the indemnity coextensive with the rights acquired under paragraph (b) of the clause as limited by the contract.

(2) In contracts which call for the modification of existing motion pictures, television records, or other audiovisual works through editing, translation, or addition of subject matter, the clause at 252.227-7020, Rights in Data—Special Works, appropriately modified, shall be used.

227.477 Contracts limiting Government's right of publication for sale to the general public.

Alternate II may be added to the clause at 252.227-7013, Rights in Technical Data and Computer Software, for use in research contracts when the contracting officer determines, after consultation with counsel, that public dissemination of a work, or certain designated parts of a work, specified to be delivered under the contract, is in the best interest of the Government and would be facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government. Alternate II shall not be used otherwise.

227.478 Architect-engineer and construction contracts.

227.478-1 General.

This section sets forth policies and procedures, and also prescribes solicitation provisions and contract clauses pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

227.478-2 Acquisition and use of plans, specifications, and drawings.

(a) *Architectural Designs and Data Clauses for Architect-Engineer or Construction Contracts*—(1) *Plans and Specifications and As-Built Drawings.* (i) Except as provided in paragraph (a)(1)(ii) below, insert the clause at 252.227-7022, Government Rights (Unlimited), in solicitations and contracts calling for architect-engineer services and in contracts for construction which also contains requirements for architect-engineer services.

(ii) When the purpose of a contract for architect-engineer services, or, a contract for construction which also contains requirements for architect-engineer services, is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, esthetic or other special reasons the Government does not want duplicated by anyone else, the Government may desire to acquire exclusive control of the data pertaining to such design. When the

2 4P

contracting officer determines that it is desirable to maintain exclusive control over the design and data, the clause at 252.227–7023, Drawings and Other Data to Become Property of Government, shall be included in solicitations and contracts. If the contract is for architect-engineer services, the clause at 252.227–7022 shall be deleted and the clause at 252.227–7023 substituted. If the contract is for construction which also contains requirements for architect-engineer services, only the clause at 252.227–7023 shall be included.

(2) *Shop Drawings for Construction.* In acquiring shop drawings for construction, the Government shall obtain the unlimited right to use and reproduce such drawings, but shall not exclude a similar right in the designer or others. Accordingly, in solicitations and contracts calling for delivery of such drawings, insert the clause at 252.227–7033, Rights in Shop Drawings.

227.476–3 Contracts for construction supplies and research and development work.

The solicitation provisions and contract clauses prescribed in this Subpart for the acquisition of other than construction or architect-engineer services, are applicable when the acquisition is limited to either (a) construction supplies or materials as such, as distinguished from construction as defined in FAR 36.102; (b) experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or (c) both. The right of the Government and others to use, duplicate, or disclose such technical data, other data, or computer software will be determined by "Rights in Technical Data and Computer Software" clause.

227.476–4 Mixed contracts.

When solicitations and resulting contracts call for (a) supplies or materials, (b) experimental, developmental or research work, or (c) both: in addition to calling for construction or architect-engineer work, a contracting officer shall include in the solicitation and resultant contract both the provisions and clauses prescribed in this Subpart for the acquisition of other than construction or architect-engineer services as well as the appropriate provisions and clauses prescribed for construction or architect-engineer services. In such cases, the solicitations and resulting contracts shall clearly indicate which of the solicitation provisions and contract clauses apply only to the supplies or materials being

acquired, or to the experimental, developmental, or research work, or to both, and which of the solicitation provisions and contracts clauses apply only to the construction or architect-engineer work.

227.476–5 Approval of restricted designs.

(a) Specifications for construction should allow for maximum latitude in the use of various types of commercially available products, materials, equipment, or processes which will meet objective Government requirements. However, Government requirements may necessitate, or the architect-engineer may contemplate the use of structures, products, materials, equipment, or processes which are available only from a sole source. In such event, the architect-engineer should report to the contracting officer the items known to be sole source, and the reasons therefor, and advise the contracting officer of the extent to which such items are considered necessary to meet the Government's requirements. This will facilitate timely planning and arrangements for the use of sole source items, or where appropriate, consideration of alternate items.

(b) This procedure is not intended to restrict the use of patented or copyrighted items, but is meant to give the Government an opportunity to consider whether the specifications being drawn by the architect-engineer, are unnecessarily restricted to a single item. The procedure is primarily for use in instances where the proposed design is expected to be conventional or standard or where the design may be used in subsequent acquisitions. For this purpose, the clause at 252.227–7024, Notice of Approval of Restricted Designs, may be inserted in architect-engineer contracts.

227.479 Copyrights.

(a) In general, the copyright law gives an owner of a copyright the exclusive rights to—

(1) Reproduce the copyrighted work in copies or phonorecords;

(2) Prepare derivative works;

(3) Distribute copies of phonorecords to the public;

(4) Perform the copyrighted work publicly; and

(5) Display the copyrighted work publicly.

(b) In view of the exclusive rights in paragraphs (a)(1)–(5) above, any technical data, other data, or computer software that is protected under the copyright law is not in the public domain, even though it may have been published, because acts inconsistent with these rights may not be exercised

without a license from the copyright owner.

(c) Department of Defense policy allows a contractor to copyright any work of authorship first prepared, produced, originated, developed, or generated under a contract, unless the work is designated a "special work", in which case ownership and control of the work is retained by the Government and the contractor is precluded from asserting any rights or claim to copyright in the work. Department of Defense policy also requires that the contractor grant to the Government and authorize the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes, in any work of authorship (other than a "special work") first prepared, produced, originated, developed, or generated in performance of a contract. Additionally, for works in which a contractor already owns a copyright (not first prepared during performance of a contract), Department of Defense policy requires that the contractor grant to the Government and authorize the Government to grant to others the same license acquired by the Government under the contract.

(d) Under the clause at 252.227–7013, Rights in Technical Data and Computer Software, the contractor grants to the Government and authorizes the Government to grant to others a nonexclusive, paid-up worldwide license for Government purposes, under any copyright owned by the contractor in any technical data or computer software prepared for or acquired by the Government under the contract. Under the clause at 252.227–7020, Rights in Data—Special Works, any work first produced in the performance of the contract becomes the sole property of the Government, and the contractor agrees not to assert any rights or establish any claim to copyright in such work. Under this clause, the contractor similarly grants to the Government and authorizes the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any portion of a work which is not first produced in the performance of the contract, but in which copyright is owned by the contractor and incorporated in the work furnished under the contract.

(e) Under both of the clauses at 252.227–7013 and 252.227–7020, unless written approval of the contracting officer is obtained, the contractor also agrees not to include in any work prepared, produced, originated, developed, generated, or acquired under the contract, any work of authorship in

which copyright is not owned by the contractor, without acquiring for the Government and those acting by or on behalf of the Government a nonexclusive, paid-up, worldwide license for Government purposes in the copyright work.

272.480 Rights in technical data and software developed under the Small Business Innovation Research Program (SBIR Program).

(a) Pub. L. 97–219, the "Small Business Innovation Development Act of 1982", requires the Department of Defense to establish a Small Business Innovation Research Program (SBIR Program). Small Business Administration (SBA) Policy Directive No. 65–01 provides guidance for conducting the SBIR program.

(b) Data and computer software generated under an SBIR program contract shall not be disclosed outside the Government for two years after contract completion, except—

(1) when necessary for program evaluation, or

(2) when the contractor consents in writing to additional disclosure. The contracting officer may agree to a different time period than two years in appropriate cases. Upon expiration of the period of non-disclosure, the Government shall have a nonexclusive, worldwide, royalty-free license in technical data and computer software for Government use.

(c) Copyrights in technical data and computer software generated under an SBIR program contract shall, when agreed to in writing by the contracting officer, be owned by the contractor. The Government should obtain a royalty-free license under any copyright. Each publication of copyrighted material should contain an appropriate acknowledgement and disclaimer statement.

(d) The clause at 252.227–7025, Rights in Technical Data and Computer Software (SBIR Program), shall be included in all contracts awarded under the SBIR Program in which technical data or computer software are required to be prepared, originated, developed, generated or delivered. The clause permits technical data to be acquired with license rights, unlimited rights or limited rights; and computer software to be acquired with license rights, unlimited rights or restricted rights. The clause shall only be used in contracts awarded under the SBIR Program.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority for Part 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35 and DoD FAR Supplement 201.301.

4. Sections 252.227–7013, 252–227–7015, 252–227–7016, and 252–227–7018 through 252.227–7034 are revised, sections 252.227–7014 and 252–227–7017 are removed, and sections 252–227–7035 through 252–227–7037 are added as follows:

252.227–7013 Rights in technical data and computer software.

As prescribed at 227.472–1(e), insert the following clause.

Rights in Technical Data and Computer Software (Aug. 1985)

(a) *Definitions.* "Commercial Computer Software", as used in this clause, 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 as established market or catalog prices.

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

"Computer Program", as used in this clause, 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 designed to satisfy the requirements of a particular user.

"Computer Software", as used in this clause, means computer programs and computer data bases.

"Computer Software Documentation", as used in this clause, means technical data, including computer listings and printouts, in human-readable form which (1) documents the design or details of computer software, (2) explains the capabilities of the software, or (3) provides operating instructions for using the software to obtain desired results from a computer.

"Developed at private expense", as used in this subpart, means that completed

development was accomplished without direct Government payment at a time when no Government contract required performance of the development effort, and was not developed as a part of performing a Government contract. The word "developed", as used in the phrase "developed at private expense" means brought to the point of practical application; i.e., to be considered "developed" an item or component must have been constructed, a process practiced, or computer software used, and in each case it must have been tested so as to clearly demonstrate that it performs the objective for which it was developed. When, in applying these criteria, an item, component, process or software package does not meet the test because the entire item, component, process, or software package is not developed at private expense, separate elements thereof which do meet the criteria will be considered to have been developed at private expense. Further, in applying the foregoing criteria, when an item, component, process or computer software which has been developed at private expense is modified or revised to meet Government requirements specified in a contract, modification of the item, component, process or computer software shall not be considered to have been developed at private expense.

"License Rights," as used in this clause, means rights of the Government to use, duplicate, or disclose, in whole or in part and in any manner, for purposes stated in this contract or in a separate licensing agreement, technical data furnished with limited rights and computer software furnished with restricted rights, and to have or permit others to use such technical data or computer software on behalf of the Government for such purposes.

"Limited Rights", as used in this clause, 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 (1) released or disclosed in whole or in part outside the Government, (2) used in whole or part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software, or (3) used by a party other than the Government, except for:

(i) Emergency repair or overhaul work, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided* that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release, or disclosure;

(ii) Release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government under the conditions of (i) above; or

(iii) Release to a contractor retained by the Government to review technical data, provided that the release or disclosure thereof shall be subject to a prohibition against further use, release, or disclosure.

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

(1) 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;

(2) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(3) Copy computer programs for safekeeping (archives) or backup purposes; and

(4) Modify computer software, or combine it with other software, subject to the provisions 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 this contract or described in a license or agreement made a part of this contract.

"Technical Data", as used in this clause, means recorded information, regardless of the form or method of recording, of a scientific or technical nature. Technical data includes computer software documentation, but does not include computer software or financial, administrative, cost, pricing, or management data, or other information incidental to contract administration.

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

"Unpublished", as used in this clause means that 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 data to or for the Government under a contract does not, in itself, constitute release to the public.

(b) *Government Rights.*—(1) *Unlimited Rights.* The Government shall have unlimited rights in:

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

(ii) Computer software required to be originated or developed under a Government contract, or generated as a 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) Technical data necessary to enable manufacture of end-items, components, modifications or processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental,

developmental or research work is, or was specified as an element of contract performance; except technical data pertaining to items, components, processes, or computer software developed at private expense (but see (b)(2)(ii) below);

(v) Technical data or 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 data or computer software;

(vi) Technical data pertaining to end-items, components or processes, prepared or required to be delivered under this or any other Government contract or subcontract, for the purposes of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, e.g. specification control drawings, catalog sheets, envelope drawings, etc.);

(vii) Manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance or training purposes;

(viii) Technical data or computer software which is in the public domain, or has been or is normally released or disclosed by the Contractor or subcontractor without restriction on further disclosure; and

(ix) Technical data or computer software listed or described in an agreement incorporated into the schedule of this contract which the parties have predetermined, on the basis of paragraphs (i) through (viii) above, and agreed will be furnished with unlimited rights.

(2) *Limited Rights.* The Government shall have limited rights in:

Unpublished technical data pertaining to items, components or processes developed at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data may be included in the data referred to in (b)(1)(i), (vi), (vii), and (viii) above.

Limited rights shall be effective only so long as the technical data remains unpublished and provided that only the portion or portions of each piece of data to which limited rights are to be asserted pursuant to (2)(i) and (ii) above are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below in which is inserted:

(i) The number of the prime contract under which the technical data is to be delivered,

(ii) The name of the Contractor and any subcontractor by whom the technical data was generated, and

(iii) An explanation of the method used to identify limited rights data.

Limited Rights Legend

Contract No. ———.
Contractor: ———.

Explanation of Limited Rights Data Identification Method Used

———————————

Those portions of this technical data indicated as limited rights data shall not,

without the written permission of the above Contractor, be either (a) used, released or disclosed in whole or in part outside the Government, (b) 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 (c) used by a party other than the Government, except for: (1) Emergency repair or overhaul work, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided* that the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; (2) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (1) above; or (3) release or disclosure thereof to the contactor retained by the Government to review data, with such release being subject to a prohibition against further use, release or disclosure. The 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.

(3) *Restricted Rights.* (i) The Government shall have restricted rights in computer software, developed at private expense and 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 unless 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 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 (b)(3)(ii) of the Rights in Technical Data and Computer Software clause at 252.227-7013

(Name of Contractor and Address)
When acquired by the Government, commercial computer software and related documentation containing this legend shall be subject to the following:

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

(B) Use 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 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 obtains 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.

(E) If the Contractor, within sixty (60) days after a written request, fails to substantiate by clear and convincing evidence that computer software and documentation marked with this legend are commercial items and were developed at private expense, or if the Contractor fails to refute evidence presented by the Government that the software is in the public domain, the Government may cancel or ignore the restrictive legend and use the software with unlimited rights. Such written requests shall be addressed to the Contractor identified in the legend.

(4) No legend shall be marked on, nor shall any limitation or restriction on right of use be asserted as to, any data or computer software which the Contractor has previously delivered to the Government without restrictions. The limited or restricted rights provided for by this paragraph shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(c) *Copyright.* (1) In addition to the rights granted under the provisions of paragraph (b) 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 paragraph (a) above. 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 definitions of "limited rights" in paragraph (a) above. With respect to computer software which the parties have agreed in accordance with paragraph (b)(3) above 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 in paragraph (c)(1).

(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 authorship 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).

(d) *Removal of Unauthorized Markings from Computer Software.* 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:

(1) The Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings, or

(2) The Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings by clear and convincing evidence.

(e) *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.

(f) *Limitation on Charges for Data and Computer Software.* The Contractor recognizes that the Government or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data or computer software on account of such a contract. The contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data or computer software which the Government has to right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproductions, handling, mailing, and similar administrative costs incident to the furnishing of such data or computer software. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(g) *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 limited rights, a subcontractor may fulfill such 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 subcontracts as economic leverage to acquire rights in technical data or computer software from their subcontractors for themselves.

(End of clause)

Alternate I (Aug 1985)

As prescribed at 227.473-1(b), add the following paragraph to the basic clause:

Notice of Certain Limited or Restricted Rights

(h)(1) Except as otherwise provided herein, the Contractor will promptly notify the Contracting Officer in writing if the Contractor or a subcontractor intends to use in the performance of this contract any item, component, process, or computer software developed at private expense. The notification shall include an identification of

the items, components, processes or computer software and the associated data pertaining thereto.

(2) Notification is not required with respect to:

(i) Items, components, processes and computer software for which notification was previously given in his contract pursuant to the clause at DFARS 252.227–7035, Prenotification of Rights in Technical Data and Computer Software, or

(ii) Standard commercial items which are manufacturerd by more than one source of supply.

(3) Except as otherwise provided herein, Contracting Officer approval is not necessary for the Contractor to use the subject item, component, process, or computer software in the performance of the contract.

Alternate II (May 1983)

As prescribed at 227.477, 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 twenty-four (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 right 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 paragraph (c)(1) of this clause. As to all such data not so published by the Contractor, this paragraph shall be of no force or effect.

Alternate III (Aug 1985)

As prescribed at 227.473–2(e), add the following paragraph to the basic clause:

( ) (i) Notwithstanding any other provision of this contract the Government shall have (specify type of rights here, i.e., unlimited, license) rights in limited rights technical data and restricted rights computer sofware furnished under this contract effective on the day immediately following the date specified in the contract for the expiration of the limited and restricted rights legends. Such expiration date shall be marked on each piece of limited and restricted rights data furnished under the contract.

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

Limited Rights Legend (Subject to Expiration)

Contract No.————.
Contractor:————.
    The following statement shall also be added to the legend:

Limited rights shall become (specify type of rights here, i.e., unlimited, license) rights on (insert expiration date).

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

(iii) Computer software subject to the expiration or restricted rights shall be marked with the restricted rights legend set forth in paragraph (b)(3)(i) above with the title of the legend modified to read:

Restricted Rights Legend (Subject to Expiration)

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

The following statement shall also be added to the legend:

Restricted rights shall become (specify type or rights here, i.e., unlimited, license) rights on (insert expiration date).

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

Alternate IV (Aug 1985)

As prescribed at 227.473–2(b), add the following subparagraph to the basic clause as subparagraph (b)(5):

(5) License Rights. (i) Technical data delivered under this contract shall be acquired with license rights.

(ii) The Government may use, duplicate, or disclose the technical data for purposes stated in this contract, and may have or permit others to use such data on behalf of the Government for such purposes. License rights do not grant to the Government the rights to use such data for commercial purposes or the rights to have or permit others to use such data for commercial purposes. The Government assumes no liability for use, duplication, or disclosure of such data by others for commercial purposes. Disclosure of such data to others and use of such data by others on behalf of the Government for the purposes stated in this contract shall be subject to a prohibition against further use, release or disclosure.

(iii) Technical data acquired by the Government with license rights pursuant to this paragraph 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:

License Rights Legend

The legend shall be revised by deleting the words "Limited Rights" wherever they appear and by including in their place the words "License Rights".

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

252.227–7014 [Reserved]

252.227–7015 Rights in technical data—Specific acquisition.

As prescribed at 227.473–2(a), insert the following clause:

Rights in Techincal Data—Specific Acquisition (Aug 1985)

(a) Definition. "Technical Data", as used in this clause, means recorded information,

regardless of the form or method of recording, of a scientific or technical nature. Technical data includes computer software documentation, but does not include computer software or financial, administrative, cost, pricing, or management data, or other information incidental to contract administration.

(b) Government Rights. The Government may duplicate, use and disclose in any manner and for any purpose whatsoever, and have others so do, all or any part of the technical data delivered by the Contractor to the Government under this contract.

(c) Copyright. (1) In addition to the rights granted under the provisions of (b) above, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world 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 of 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.

(2) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in technical data 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 in subparagraph (c)(1) above.

(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 authorship 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 252.227–7015 (date).

(d) 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.

(e) Limitation on Charges for Data. The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived throughout the Military Assistance Program or otherwise through the United

States Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(End of clause)

252.227-7016 Contract schedule items requiring experimental, developmental, or research work.

As prescribed at 227.472-1(f), insert the following clause:

Contract Schedule Items Requiring Experimental, Developmental, or Research Work (Aug. 1985)

For purposes of defining the nature of the work and the scope of rights in data granted to the Government pursuant to the "Rights in Technical Data and Computer Software" clause of this contract, it is understood and agreed that items (list applicable schedule line items or sub-line items or data exhibit numbers) require the performance of experimental, developmental, or research work or require computer software to be originated or developed under a Government contract or generated as a part of performing a Government contract.

(End of clause)

252.227-7017 [Reserved]

252.227-7018 Restrictive markings on technical data and computer software.

As prescribed at 227.473-3(b)(2), insert the following clause:

Restrictive Markings on Technical Data and Computer Software (Aug. 1985)

(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 and computer software required to be delivered hereunder only when authorized by the terms of the "Rights in Technical Data and Computer Software" clause of this contract. The Contractor shall assure that subcontractors have sufficient procedures to assure that only authorized markings are used. Contractor and subcontractor procedures shall be in writing. The Contractor shall also maintain a quality assurance system to assure compliance with the clause.

(b) The Contractor shall maintain (1) records to show how the procedures of paragraph (a) above were applied in determining that the markings are authorized, as well as (1) such records as are reasonably necessary to show pursuant to subparagraph (d)(2) of the "Rights in Technical Data and Computer Software" clause that restrictive markings used in any piece of technical data or computer software delivered under this

contract are authorized, and that the data continues to meet the definition of limited rights or restricted rights.

(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 the Contractor's organization for determining whether restrictive markings are to be placed on technical data and computer software to be delivered under this contract. The Contractor hereby authorizes direct contact between the Government and such person(s) in resolving questions involving technical data and computer software compliance and restrictive markings.

(d) The Contracting Officer may evaluate or verify the Contractor's procedures to determine their effectiveness. Upon request, a copy of the written procedures shall be furnished. The failure of the Contracting Officer to evaluate or verify such procedures shall not relieve the Contractor of the responsibility for complying with paragraphs (a) and (b) above.

(e)(1) If the Contractor fails to make a good faith effort to institute the procedures of paragraphs (a) and (b) above, any limited rights markings on technical data and restricted right markings on computer software delivered under this contract may be cancelled or ignored by the Contracting Officer. The Contracting Officer shall give written notice to the Contractor of the action taken, including identification of the data or software on which markings have been cancelled or ignored, and thereafter may use such data or software with unlimited rights.

(2) The Contracting Officer may give written notification to the Contractor of any failure to maintain or follow the established procedures, or of any material deficiency in the procedures, and state a period of time not less than thirty (30) days within which the Contractor shall complete corrective action. If corrective action with respect to restrictive markings is not completed within the specified time, restrictive markings on any technical data and computer software being prepared for delivery or delivered under this contract during that period shall be presumed to be unauthorized by the terms thereof and the Contracting Officer may cancel or ignore such markings if the Contractor is unable to substantiate the markings in accordance with the procedures of paragraph (d) of the clause at 252.227-7013, Rights in Technical Data and Computer Software, or with respect to technical data and procedures in the clause at FAR 52.227-14.

(f) Notwithstanding any provisions of this contract concerning inspection and acceptance, the acceptance by the Government of technical data or computer software with restrictive legends shall not be construed as a waiver of any rights accruing to the Government.

(g) This clause, including this paragraph (g), shall be included in each subcontract under which technical data is required to be delivered or computer software may be originated, developed or generated. When so inserted, "Contractor" shall be changed to "Subcontractor".

(End of clause)

252.227-7019 Identification of restricted rights computer software.

As prescribed at 227.473-4(a)(3), insert the following provision:

Identification of Restricted Rights Computer Software (Apr. 1977)

The Offeror's attention is called to the requirement in the "Rights in Technical Data and Computer Software" clause that any restrictions on the Government concerning use or disclosure of computer software that was developed at private expense and is to be delivered under the contract must be set forth in an agreement made a part of the contract, either negotiated prior to award or included in a modification of the contract before such delivery. Therefore, the Offeror is requested to identify in his proposal any computer software which was developed at private expense and upon the use of which he desires to negotiate restrictions, and to state the nature of the proposed restriction. If no such computer software is identified, it will be assumed that all deliverable computer software will be subject to unlimited rights.

(End of Provision)

252.227-7020 Rights in data—Special works.

As prescribed at 227.475, insert the following clause:

Rights in Data—Special Works (Mar. 1979)

(a) the term "works" as used herein, includes literary, musical, and dramatic works; pantomines and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of similar nature. The term does not include financial reports, costs analyses, and other information incidental to contract administration.

(b) All works first produced in the performance of this contract shall be the sole property of the Government, which shall be considered the "person for whom the work was prepared", for the purpose of authorship in any copyrightable work under section 201(b) of Title 17, United States Code, and the Government shall own all of the rights comprised in the copyright. The Contractor agrees not to assert or authorize others to assert any rights, or establish any claim to copyright, in such works. The Contractor, unless directed to the contrary by the Contracting Officer, shall place on any such works delivered under this contract the following notice:

c (Year date of delivery) United States Government as represented by the Secretary of (department). All rights reserved.

In the case of a phonorecord, the c will be repaced by P.

(c) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world: (1) To reproduce in copies or phonorecords, to prepare derivative works, to distribute copies or phonorecords, and to perform or display publicly any portion of a work which is not first produced in the performance of this contract, but in

which copyright is owned by the Contractor and which is incorporated in the work furnished under this contract, and (2) to authorize others to do so for Government purposes.

(d) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in any works prepared for or delivered to the Government under this contract any works of authorship in which copyright is not owned by the Contractor or the Government without acquiring for the Government any rights necessary to perfect a license of the scope set forth in paragraph (c) above.

(e) The Contractor shall indemnify and save and hold harmless the Government and its officers, agents and employees acting for the Government, against any liability, including costs and expenses (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, or use of any works furnished under this contract; or (2) based upon any libelous or other unlawful matter contained in such works.

(f) 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.

(g) Paragraphs (c) and (d) above are not applicable to material furnished to the Contractor by the Government and incorporated in the work furnished under the contract: Provided, such incorporated material is identified by the Contractor at the time of delivery of such work.

(End of clause)

252.227-7021   Rights in data—Existing works.

As prescribed at 227.476, insert the following clause:

Rights in Data—Existing Works (Mar. 1979)

(a) The term "works", as used herein, includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural work; sound recordings; and works of a similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to distribute, perform publicly, and display publicly the works called for under this contract; and (2) to authorize others to do so for Government purposes.

(c) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicly arising out of the creation, delivery, or use of any works furnished under this contract; or (2) based upon any libelous or other unlawful matter contained in those works.

(End of clause)

252.227-7022   Government rights (unlimited).

As prescribed at 227.478-2(a)(1), insert the following clause:

Government Rights (Unlimited) (Mar. 1979)

(a) The Government shall have unlimited rights in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor, for a period of three (3) years after completion of the project, agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

252.227-7023   Drawings and other data to become property of Government.

As prescribed at 227.478-2(a)(1)(ii), insert the following clause:

Drawings and Other Data To Become Property of Government (Mar. 1979)

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor, for a period of three (3) years after completion of the project, agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have right to retain copies of all works beyond such period.

(End of clause)

252.227-7024   Notice and approval of restricted designs.

As prescribed at 227.478-5, insert the following clause:

Notice and Approval of Restricted Designs (Apr. 1984)

In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment that are readily available through Government or competitive commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Contractor shall not produce a design or specification that

requires in this construction work the use of structures, products, materials, construction equipment or processes that are known by the Contractor to be available only from a sole source. The Contractor shall promptly report any such design or specification to the Contracting Officer and given the reason why it is considered necessary to so restrict the design or specification.

(End of clause)

252.227-7025   Rights in technical data and computer software (SBIR Program).

As prescribed at 227.480, insert the following clause:

Rights in Technical Data and Computer Software (SBIR Program) (Aug. 1985)

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

"Computer program", as used in this clause, 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 may be either machine-dependent or machine-independent, and may be general purpose in nature or designed to satisfy the requirements of a particular user.

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

"Computer software documentation", as used in this clause, means technical data, including computer listings and printouts, in human readable form which (1) documents the design or details of computer software, (2) explains the capabilities of the software, or (3) provides operating instructions for using the software to obtain desired results from a computer.

"License rights", as used in this clause, means rights to use, duplicate, or disclose technical data or 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. License rights do not grant to the Government the right to have or permit others to use technical data or computer software for commercial purposes.

"Limited rights", as used in this clause, means right 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 (1) Released or disclosed in whole or in part outside the Government, (2) used in whole or part by the Government for manufacture, or in the case of computer software documentation for preparing the same or similar computer software, or (3) used by a party other than the Government.

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

(1) 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;

(2) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(3) Copy computer programs for safekeeping (archives) or backup purposes; and

(4) 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 this contract or described in a license agreement made a part of this contract.

"Technical data", as used in this clause, means recorded information, regardless of the form or method of recording, of a scientific or technical nature. Technical data includes computer software documentation, but does not include computer software or financial, administrative, cost, pricing, or management data, or other information incidental to contract administration.

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

(b) *Government Rights*—(1) *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 this contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have license rights in:

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

(ii) Computer software required to be originated or developed under this contract or any subcontract hereunder, or generated as a necessary part of performing this contract or any subcontract hereunder;

(iii) Technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this contract or any subcontract hereunder in which experimental, developmental or research work is, or was specified as an element of contract performance; except technical data pertaining to items, components, processes or computer software developed at private expense (but see subparagraph (b)(2)(i) below);

(iv) Technical data or computer software prepared or required to be delivered under this contract or any subcontract hereunder and constituting correction or changes to Government-furnished data or computer software;

(v) Technical data pertaining to end-items, components or processes, prepared or

required to be delivered under this contract or any subcontract hereunder for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(vi) Manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance, or training purposes; and

(vii) Any other technical data or computer software prepared or required to be delivered under this contract or any subcontract hereunder, other than technical data furnished with limited or unlimited rights pursuant to subparagraphs (b) (2) and (4) below or computer software furnished with restricted or unlimited rights pursuant to subparagraphs (b) (3) and (4) below.

License rights shall be effective with respect to the technical data identified in subparagraphs (b)(1) (i), (iii), (iv), (v), (vi), and (vii) above only if each piece of data is marked with the License Rights Legend below in which is inserted the number of the prime contract under which the data is to be delivered, the name of the Contractor and any subcontractor by whom the data was generated, and the period in which the data is subject to limited rights, and shall be effective with respect to the computer software identified in subparagraphs (b)(1) (i), (ii), (iv) and (vii) above only if each unit of software is marked with an abbreviated License Rights Legend reciting that the use, duplication, or disclosure of the software is subject to the same license rights restriction included in the same contract (identified by number) with the same Contractor (identified by name):

License Rights Legend

Contract No. ——

Contractor or Subcontractor: ——

For a period of two (2) years after the delivery and acceptance of the last deliverable item under this contract, this technical data shall not, without the written permission of the above Contractor, be either (A) used, released or disclosed in whole or in part outside the Government, (B) used in whole or in part by the Government for manufacture, or (C) used by a party other than the Government. After the expiration of the two (2) year period, the Government may use, duplicate, or disclose the data, in whole or in part and in any manner, for Government purposes only, and may have or permit others to do so for Government purposes only. All rights to use or duplicate the data for commercial purposes are retained by the Contractor, and others to whom this data may be disclosed agree to abide by this commercial purposes limitation. The Government assumes no liability for use or disclosure of the data by others for commercial purposes. This legend shall be included on any reproduction of this data, in whole or in part.

(2) *Limited Rights.* The Government shall have limited rights in:

(i) Unpublished technical data pertaining to items, components or processes developed at

private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data as may be included in the data referred to in subparagraphs (b)(1) (i), (iv), (v), and (vi) above. The word *unpublished*, as applied to technical data and computer software documentation, means that 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.

Limited Rights shall be effective with respect to the technical data mentioned in subparagraph (b)(2)(i) above only so long as the technical data remains unpublished and only if each piece of data is marked with the Limited Rights Legend below in which is inserted the number of the prime contract under which the data is to be delivered and the name of the Contractor and any subcontractor by whom the data was generated:

Limited Rights Legend

Contract No. ——

Contractor or subcontractor: ——

This technical data shall not, without the written permission of the above Contractor, be either (A) used, released or disclosed in whole or in part outside the Government, (B) used in whole or in part by the Government for manufacture, or (C) used by a party other than the Government. This legend shall be included on any reproduction of this data, in whole or in part.

(3) *Restricted Rights.* The Government shall have restricted rights in privately developed computer software, listed or described in a license 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.

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

256

(i) Technical data or computer software required to be prepared or delivered under this contract 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) Technical data or computer software that is in the public domain or has been or is normally released or disclosed by the Contractor or any subcontractor 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.

(5) No legend shall be marked on, nor shall any limitation or restriction on rights of use be asserted as to any technical data or computer software which the Contractor or any subcontractor has previously delivered to the Government without restriction. The license, limited or restricted rights provided for by this paragraph (b) shall not impair the right of the Government to use similar or identical technical data or computer software acquired from other sources.

(c) *Copyright.* (1) The Contractor is hereby granted permission to assert or establish claim to or ownership of copyright in any work of authorship prepared for or acquired by the Government under this contract. In addition to the rights granted in paragraph (b) above, the Contractor hereby grants to the Government a nonexclusive, irrevocable, paid-up license throughout the world of the scope set forth below, under any such copyright 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. All published works for which claim to or ownership of copyright has been asserted or established shall contain an appropriate credit line identifying Government support. With respect to technical data and computer software in which the Government has license rights or computer software in which the Government has license rights or unlimited rights, the license shall be of the same scope as the rights set forth in the definitions of "license rights" and "unlimited rights" in paragraph (a) above. 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" in paragraph (a) above. 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 in paragraph (c)(1).

(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 authorship 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:

The material may be reproduced by or for the U.S. Government pursuant to copyright license.

(d) *Removal of Unauthorized Markings from Computer Software.* 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:

(1) The Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the marking, or

(2) The Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings by clear and convincing evidence.

(e) *Omitted Markings.* Technical data and computer software delivered to the Government without any of the legends or markings specified in paragraph (b) above or that are not copyrighted shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the use, duplication or disclosure of such data and software. However, to the extent the data and software have been disclosed without restriction outside the Government, the Contractor may request, within six (6) months after delivery of such data and software, permission to place restrictive legends on such data and software at the Contractor's expense and the Government may so permit if the Contractor:

(1) Demonstrates that the omission of the restrictive legends was inadvertent;

(2) Establishes pursuant to paragraph (d) above that the use of the markings is authorized; and

(3) Acknowledges that the Government has no liability with respect to the use or disclosure of such data and software that was received prior to the addition of the restrictive markings.

(f) *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.

(g) *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 right in that 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 limited rights pursuant to paragraph (b)(2) above, a subcontractor may fulfill such 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 subcontracts as economic leverage to acquire rights in technical data or computer software from their subcontractors for themselves.

(End of clause)

252.227-7026   Deferred delivery of technical data or computer software.

As prescribed at 227.474-2(b), insert the following clause:

Deferred Delivery of Technical Data or Computer Software (Nov 1976)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all times (other than technical data or computer software) to be delivered under this contract or termination of this contract, whichever is later, the delivery of any technical data or computer software item identified in this contract as "deferred delivery" data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date the Contractor accepts the last delivery of that item from that subcontractor for use in performing the contract.

(End of clause)

252.227-7027   Deferred ordering of technical data or computer software.

As prescribed at 227.474-2(c), insert the following clause:

Deferred Ordering of Technical Data or Computer Software (Nov 1976)

In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technial data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software (as defined in the "Rights in Technical Data and Computer Software" clause of this contract) generated in the performance of this contract or any subcontract hereunder. When such technical data or computer software is ordered, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The obligation to deliver such technical data of a subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that from that subcontractor under this contract. The Government's rights to use said data or

computer software shall be pursuant to the "Rights in Technical Data and Computer Software" clause of this contract.

(End of clause)

252.227-7028 Certification of technical data—prior delivery.

As prescribed at 227.474-3(a), insert the following provision:

Certification of Technical Data—Prior Delivery (Aug 1985)

The Offeror shall submit with this offer a certification as to whether the same or substantially the same technical data included in this offer has been delivered or is obligated to be delivered to the Government under any contract or subcontract. If so, the Offeror shall identify in this offer one such contract or subcontract under which such technical data was delivered or is obligated to be delivered and the place of delivery.

(End of provision)

252.227-7029 Identification of technical data.

As prescribed at 227.474-4, insert the following clause:

Identification of Technical Data (Mar 1975)

Technical data (as defined in the "Rights in Technical Data and Computer Software" clause of this contract) delivered under this contract shall be marked with the number of this contract, name of Contractor, and name of subcontractor who generated the data.

(End of clause)

252.227-7030 Technical data—withholding of payment.

As prescribed at 227.474-5, insert the following clause:

Technical Data—Withholding of Payment (Aug 1985)

(a) If "technical data" (as defined in the clause of this contract entitled "Rights in Technical Data and Computer Software") or any part thereof, specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), or is not delivered with required certification, the Contracting Officer may, at any time during contract performance before such data is accepted by the Government, withhold payment to the Contractor ten percent (10%) of the total contract price, unless a lesser withholding is specified in the contract. Payment shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arise out of causes beyond the control and without the fault or negligence of the Contractor.

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be delivered under this contract has not been accepted, the Contracting Officer may withhold from further payment such sum as he considers appropriate not exceeding ten

percent (10%) of the total contract price or amount unless a lesser withholding limit is specified in the contract.

(c) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.

(End of clause)

252.227-7031 Data requirements.

As prescribed at 227.474-1, insert the following clause:

Data Requirements (Aug 1985)

(a) "Data", as used in this clause, means recorded information, regardless of the form or method of the recording.

(b) The Contractor is required to deliver only the data items listed on the DD Form 1423 (Contract Data Requirements List), data items identified in and deliverable under any contract clause of FAR Subpart 52.2 and DoD FAR Supplement Subpart 252.2 made a part of the contract, and manuals to be utilized in training, operations, and maintenance and covered by a specific contract line item.

(End of clause)

252.227-7032 Rights in technical data and computer software (foreign).

As prescribed at 227.473-2(g), insert the following clause:

Rights in Technical Data and Computer Software (Foreign) (Jun 1975)

The United States Government may duplicate, use, and disclose in any manner for any purposes whatsoever, including delivery to other governments for the furtherance of mutual defense of the United States Government and other governments, all technical data, including reports, drawings and blueprints, and all computer software, specified to be delivered by the Contractor to the United States Government under this contract.

(End of clause)

252.227-7033 Rights in shop drawings.

As prescribed at 227.478-2(a)(2), insert the following clause:

Rights in Shop Drawings (Apr 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor, or any lower-tier subcontractor pursuant to a construction contract, showing in detail: (1) The proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose, in any manner and for any purpose, shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

252.227-7034 Patents—subcontracts.

As prescribed at 227.304-4, insert the following clause:

Patents—Subcontracts (Apr 1984)

The Contractor will include the clause at FAR 52.227-12, Patent Rights—Retention by the Contractor (Long Form), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by other than a small business firm or nonprofit organization.

(End of clause)

252.227-7035 Prenotification of rights in technical data and computer software.

As prescribed at 227.473-1(a), insert the following provision:

Prenotification of Rights in Technical Data and Computer Software (Aug 1985)

(a) 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 may be required to be delivered under a resultant contract, Offerors shall identify to the maximum extent practicable in their response to this solicitation such privately developed items, components, processes, or computer software and the associated data pertaining thereto which they:

(1) Intend to deliver with limited or restricted rights;

(2) Intend to deliver with unlimited rights; or

(3) Have not yet determined will be delivered with unlimited, limited or restricted rights.

This requirement for identification or prenotification shall include that technical data pertaining to the design, development, or production of privately developed items, components, processes or computer software that are offered or to be offered for sale in substantial quantities to the public based upon established catalog or market prices. This identification need not be made as to technical data which relates to standard commercial items which are manufactured by more than one source of supply. At the request of the Contracting Officer, the Offeror agrees to furnish clear and convincing evidence that the data which will be so identified comes within the definition of limited rights technical data or restricted rights computer software.

(b) This requirement for prenotification shall not be construed as an agreement concerning rights in technical data or computer software identified by an Offeror except as specifically provided in an agreement made a part of the resultant contract. The Government expressly reserves its right to challenge the validity of the technical data under FAR 52.227-14 and computer software under DFARS 252.227-7013, notwithstanding such an agreement.

(End of provision)

252.227-7036 Direct licensing

As prescribed at 227.473-2(c), insert the following clause:

Direct Licensing (Aug 1985)

(a) *Government Rights.* The Government shall have the right to direct the Contractor to license technology to other manufacturers for the purpose of establishing additional sources of supply. This technology may encompass technical data, computer software, technical assistance, special tooling, special manufacturing equipment, training, analysis of problems, or anything else needed to establish an additional source of supply.

(b) *Time Limit for Exercise of Direct License Right.* Exercise of this right will be by modification to this contract any time up to ——— years after the last scheduled delivery under the contract. The not-to-exceed prices and delivery schedule in the contract shall apply.

(c) *Exclusions.* The following are excluded from the operation of this clause:

(1) Items, components, or computer software sold in substantial quantities to the public based upon established catalog or market prices, or interchangeable items manufactured by two or more competing suppliers;

(2) Items, components, processes, or computer software already under license to third parties: *Provided,* the Government agrees that the third parties are viable competitive sources for such items, components, processes, or computer software;

(3) Technical data which the Contractor is legally precluded from licensing; and

(4) Other excluded items, components, or processes and the technical data pertaining thereto, and excluded computer software as described or listed below:

(Description or list)

(d) *Adjustments to Prices.* The prices referred to on paragraph (b) shall be reduced if the Contractor is unable to substantiate that certain items, components, processes or computer software is subject to limited or restricted rights.

(e) *Exercise of Direct License Right.* (1) When the Government desires to exercise its rights under this clause, it will direct the Contractor in writing to license the technology in question to another source, including the exent of and the desired terms and conditions of any license.

(2) When technology is to be licensed, any license agreement between the Contractor

and another source will be subject to Government review and approval.

(3) Within thirty (30) days after exercise of the direct license right, the Contractor will furnish a pricing proposal to establish the final price for the license. Technical assistance concerning particular items, components, processes and computer software should normally be separately priced. Normally, a price for a directed license should include a flat sum, a royalty rate, and a maximum royalty amount. The flat sum will include the cost of transferring the technology. After the flat sum and royalties total the maximum royalty amount, the Government shall have an irrevocable, paid-up license.

(f) *Timely Transfer of Technology.* The Contractor will promptly license and transfer the technology according to the terms of the modificaiton exercising this direct license right.

(g) *Disputes.* Failure to agree to any price adjustment shall be a dispute under the Dispute clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as modified.

(h) *Subcontracts.* (1) This clause in its entirety shall be included in all subcontracts at any tier, unless excused in writing by the Contracting Officer. This clause does not apply to any items, components, processes, or computer software excluded in paragraph (c).

(2) The word "Contractor" appearing in this clause includes "subcontractors" unless otherwise indicated.

(3) The Government may direct any subcontractor to license technology to another source. The prime Contractor consents to the processing of an appeal by any subcontractor in the name of the prime Contractor under the Disputes clause from any decision of the Contracting Officer concerning this clause. The Contractor shall use its best effort to resolve any and all problems relating to identification, pricing and submission of technical data and computer software.

(i) *Follow-on Contracts.* In any follow-up contract awarded to the Contractor for further production of the items, components, processes, or computer software delivered under this contract, the Contractor agrees:.

(1) to accept contractual provisions that grant the Government the same rights and options as are granted in this clause; and

(2) not to assert any right adverse to the Government that could not have been asserted under this clause.

(End of clause)

252.227–7037 Certification of technical data conformity.

As prescribed at 227.474–3(b), insert the following clause:

Certification of Technical Data Conformity (Aug 1985)

(a) All technical data delivered under this contract shall be accompanied by the following written certification:

The Contractor, ———, hereby certifies that the technical data delivered herewith under Contract No. ——— is complete, accurate, and complies with all requirements of the contract. The Contractor expects the Government to rely on this certification in accepting the technical data.

Date _____

Name and Title of Certifying Official

This written certification shall be dated and the certifying official (identified by name and title) shall be duly authorized to bind the Contractor by the certification.

(b) The Contractor shall identify, by name and title, each individual (official) authorized by the Contractor to certify in writing that the technical data is complete, accurate, and complies with all rquirements of the contract. The Contractor hereby authorizes direct contact with the authorized individual responsible for certification of technical data. The authorized individual shall be familiar with the Contractor's technical data conformity procedures and their application to the technical data to be certified and delivered.

(c) Technical data delivered under this contract may be subject to reviews by the Government during preparation and prior to acceptance. Technical data is also subject to reviews by the Government subsequent to acceptance. Such reviews may be conducted as a function ancillary to other reviews, such as in-process reviews or configuration audit review.

(End of clause)

[FR Doc. 85–21888 Filed 9–9–1985; 8:45 am]

BILLING CODE 3810–01–M

259

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 2402 and 41 U.S.C. 253(g) require that subcontractors not be unreasonably precluded from making direct sales to the Government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation. [FAC 84-11, 50 FR 35475, 8/30/85, effective 8/30/85]

[¶ 29,615.10]

3.503-2 Contract clause.

The clause at 52.203-6, Restrictions on Subcontractor Sales to the Government shall be inserted in solicitations and contracts for supplies or services. [FAC 84-11, 50 FR 35475, 8/30/85, effective 8/30/85]

52.203-6 Restrictions on Subcontractor Sales to the Government.

As prescribed in 3.503-2, insert the following clause:

RESTRICTIONS ON CONTRACTOR
SALES TO THE GOVERNMENT
(JUL 1985)

(a) Except as provided in (b) below, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) above does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract.
(End of clause)

[FAC 84-11, 50 FR 35479, 8/30/85, effective 8/30/85]

261

small disadvantaged business interests will be recognized and protected.

(b) The Director of Small and Disadvantaged Business Utilization serves as the agency focal point for interfacing with SBA.

19.402 Small Business Administration procurement center representatives.

(a) The SBA may assign one or more procurement center representatives to any contracting activity or contract administration office to carry out SBA policies and programs. Assigned SBA procurement center representatives are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its procurement center representatives security clearances required by the contracting agency.

(b) Upon their request and subject to applicable acquisition and security regulations, contracting officers shall give SBA procurement center representatives access to all reasonably obtainable contract information that is directly pertinent to their official duties.

(c) The duties assigned by SBA to its procurement center representatives include the following:

(1) Reviewing proposed acquisitions to recommend (i) the setting aside of selected acquisitions not unilaterally set aside by the contracting officer, (ii) new qualified small and small disadvantaged business sources, and (iii) breakout of components for competitive acquisitions.

(2) Recommending concerns for inclusion on solicitation mailing lists or on a list of concerns to be solicited in a specific acquisition.

(3) Appealing to the chief of the contracting office any contracting officer's determination not to solicit a concern recommended by the SBA for a particular acquisition, when not doing so results in no small business being solicited.

(4) Conducting periodic reviews of the contracting activity to which assigned to ascertain whether it is complying with the small business policies in this regulation.

(5) Sponsoring and participating in conferences and training designed to increase small business participation in the contracting activities of the office.

19.403 Small Business Administration breakout procurement center representatives.

(a) The SBA is required by Sec. 403 of Public Law 98-577 to assign a breakout procurement center representative to each major procurement center. A major procurement center means a procurement center of the Department of Defense that awarded contracts for items other than commercial items totaling at least $150,000,000 in the preceding fiscal year, and other procurement centers as designated by the Administrator, SBA. The SBA breakout procurement center representative is an advocate for (1) the appropriate use of full and open competition, and (2) the breakout of items, when appropriate and while maintaining the integrity of the system in which such items are used. The SBA breakout procurement center representative is in addition to the SBA procurement center representative (see 19.402). When an SBA breakout procurement center representative is assigned, the SBA is required to assign at least two collocated small business technical advisors. Assigned SBA breakout procurement center representatives and technical advisors are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its breakout procurement center representatives and technical advisors security clearances required by the contracting agency.

(b) Contracting officers shall comply with 19.402(b) in their relationships with SBA breakout procurement center representatives and SBA small business technical advisors.

(c) The SBA breakout procurement center representative is authorized to—

(1) Attend any provisioning conference or similar evaluation session during which determinations are made as to whether requirements are to be acquired using other than full and open competition and make recommendations with respect to such requirements to the members of such conference or session;

(2) Review, at any time, restrictions on competition previously imposed on items through acquisition method coding or similar procedures and recommend to personnel of the appropriate activity the prompt reevaluation of such limitations;

(3) Review restrictions on competition arising out of restrictions on the rights of the United States in technical data and, when appropriate, recommend that personnel of the appropriate activity initiate a review of the validity of such an asserted restriction;

(4) Obtain from any governmental source, and make available to personnel of the appropriate center, unlimited-rights technical data necessary for the preparation of a competitive solicitation package for any item of supply or service previously acquired noncompetitively due to the unavailability of such technical data;

(5) Have access to the unclassified procurement records and other data of the procurement center;

(6) Receive unsolicited engineering proposals and, when appropriate—

(i) Conduct a value analysis of such proposal to determine whether it, if adopted, will result in lower costs to the United States without substantially impeding legitimate acquisition objectives and forward to personnel of the appropriate center recommendations with respect to such proposal; or

(ii) Forward such proposals without analysis to personnel of the center responsible for reviewing them who shall furnish the breakout procurement

center representative with information regarding the proposal's disposition;

(7) Review the systems that account for the acquisition and management of technical data within the procurement center to ensure that such systems provide the maximum availability and access to data needed for the preparation of offers to sell to the United States those supplies to which such data pertain which potential offerors are entitled to receive; and

(8) Appeal a failure by the procurement center to act favorably on any recommendation made pursuant to subparagraphs (c)(1) through (7) of this section. Such appeal must be in writing and specifically recite both the circumstances of the appeal and the basis of the recommendation. The appeal shall be decided by a person within the employ of the procurement center who is at least one supervisory level above the person who initially failed to act favorably on the recommendation. Such appeal shall be decided within 30 calendar days of its receipt by the procurement center. All such decisions shall be final.

(d) The duties of the SBA small business technical advisors are to assist the SBA breakout procurement center representative in carrying out the activities described in (c)(1) through (7) above and to assist the SBA procurement center representatives (see FAR 19.402).

(The next page is 19-11.)

BNA's

PATENT, TRADEMARK & COPYRIGHT JOURNAL

PROPOSED SUBPART 27.4 OF FAR

Therefore, 48 CFR Parts 27 and 52 are amended as set forth below.

The authority citation for 48 CFR Parts 27 and 52 continues to read as follows:
   1. Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137, and 42 U.S.C. 2453(c).

PART 27 — PATENTS, DATA, AND COPYRIGHTS
   2. Subpart 27.4 is revised to read as follows:

SUBPART 27.4 — RIGHTS IN DATA AND COPYRIGHTS

27.400 Scope of subpart.
27.401 Definitions.
27.402 Policy.
27.403 Data Rights — General.
27.404 Basic Rights in Data.
27.405 Other data rights provisions.
27.406 Acquisition of data.
27.407 Rights to technical data in successful proposals.
27.408 Co-sponsored research and development activities.
27.409 Solicitation provisions and contract clauses.

27.400 Scope of subpart.
   The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart sets forth civilian agency and National Aeronautics and Space Administration (NASA) policies, procedures, and instructions with respect to (a) rights in data and copyrights and (b) acquisition of data. However, these policies, procedures, and instructions are not required to be applicable to NASA solicitations until May 1, 1986 (or until such other date as the NASA FAR Supplement is revised to accommodate the policies, procedures, and instructions contained in this subpart). Due to the special mission needs of the Department of Defense (DOD) and as required by 10 U.S.C. 2320, the remainder of the DOD policies, procedures, and instructions with respect to rights in data and copyrights and acquisition of data are contained in the DOD FAR Supplement.

27.401 Definitions.
   "Computer software," as used in this subpart, means computer programs, computer data bases, and documentation thereof.
   "Data," as used in this subpart, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

   "Form, fit, and function data," as used in this subpart, means data relating to, and sufficient to enable physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements, except that for computer software it specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.
   "Limited rights," as used in this subpart, means the rights of the Government in limited rights data, as set forth in a Limited Rights Notice if included in a data rights clause of the contract.
   "Limited rights data," as used in this subpart, means data that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications thereof. (Agencies may, however, adopt the following alternate definition:
   "Limited rights data," as used in this subpart, means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404(c).)
   "Restricted computer software," as used in this subpart, means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is published copyrighted computer software, including minor modifications of such computer software.
   "Restricted rights," as used in this subpart, means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice, if included in a data rights clause of the contract, or as otherwise may be included or incorporated in the contract.
   "Technical data," as used in this subpart, means data (other than computer software) which are of a scientific or technical nature.
   "Unlimited rights," as used in this subpart, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

27.402 Policy.
   It is necessary for the departments and agencies, in order to carry out their missions and programs, to acquire or obtain access to many kinds of data produced during or used in the performance of their contracts. Such data are required to: obtain competition among suppliers; fulfill certain responsibilities for disseminating and publishing the results of their activities; ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical informa-

tion to foster subsequent technological developments; and meet other programmatic and statutory requirements. Further, for defense purposes, such data are also required to meet specialized acquisition needs and ensure logistics support. At the same time, the Government recognizes that its contractors may have a legitimate proprietary interest (e.g., a property right or other valid economic interest) in data resulting from private investment. Protection of such data from unauthorized use and disclosure is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the contractor's commercial position, and preclude impairment of the Government's ability to obtain access to or use of such data. The protection of such data by the Government is also necessary to encourage qualified contractors to participate in Government programs and apply innovative concepts to such programs. In light of the above considerations, in applying these policies, agencies shall strike a balance between the Government's need and the contractor's legitimate proprietary interest.

27.403 Data Rights — General.

All contracts that require data to be produced, furnished, or acquired must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, duplication, and disclosure of such data, except certain contracts resulting from sealed bidding that require only existing data (other than limited rights data and restricted computer software) to be delivered and reproduction rights are not needed for such data. As a general rule the data rights clause at 52.227-14, Rights in Data — General, including *Alternates* I, II, III, IV, and V, where determined to be appropriate as discussed in 27.404, is to be used for that purpose. However, in certain types of contracts, the particular subject matter of a contract, or the intended use of the data may require the use of other prescribed clauses, or may not require the use of any prescribed clause, as discussed in 27.405.

27.404 Basic Rights in Data Clause.

(a) *Unlimited Rights Data.* Under the clause at 52.227-14, Rights in Data — General, the Government acquires unlimited rights in the following data, (except as provided in 27.404(f) for copyrighted data) (1) data first produced in the performance of a contract (except to the extent such data constitute minor modifications to data that are limited rights data or restricted computer software); (2) form, fit, and function data delivered under contract; (3) data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract; and (4) all other data delivered under the contract other than data that qualify as limited rights data or restricted computer software (see paragraph (b) below). If any of the foregoing data are published copyrighted data with the notice of 17 U.S.C. 401 or 402, the Government acquires them under a copyright license, as set

forth in 27.404(f) below, rather than with unlimited rights.

(b) *Limited Rights Data and Restricted Computer Software.* The clause at 52.227-14, Rights in Data — General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding such data from delivery to the Government and delivering form, fit, and function data in lieu thereof. However, when an agency has a need to obtain delivery of limited rights data or restricted computer software, the clause may be used with its *Alternates* II or III. These alternates allow an agency to specify in a contract, delivery of such data, with limited rights or restricted rights, and allow authorized notices to be placed on such data. These alternatives enable an agency selectively to request the delivery of such data with limited rights or restricted rights, either by specifying such delivery in the contract or by specific request.

(c) *Alternate Definition of Limited Rights Data.* In the clause at 52.227-14, Rights in Data — General, in order for data to qualify as limited-rights data, in addition to being data that either embody a trade secret or are data that are commercial or financial and confidential or privileged, such data must also pertain to items, components, or processes developed at private expense, including minor modifications thereof. However, an agency may adopt for general use or in specific circumstances the alternate definition of limited rights data set forth in *Alternate* 1. The alternate definition does not require that such data pertain to items, components, or processes developed at private expense; but rather that such data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(d) *Protection of Limited Rights Data Specified for Delivery.*

(1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data — General, by use of *Alternate* II, which *Alternate* adds subparagraph (g)(2) to the clause to enable the Government to require delivery of limited rights data rather than allowing the contractor to withhold such data. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in subparagraph (g)(2) (*Alternate* II). Such limited rights data will not, without permission of the contractor, be used by the Government for purposes of manufacture, and will not be disclosed outside the government except for certain specific purposes as may be set forth in the Notice, and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes which may be adopted by an agency and added to the Limited Rights Notice of subparagraph (g)(2) of the clause (*Alternate* II):

(i) Use by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use by other contractors participating in the Government's program of which the specific contract is a part, for information and use in connection with the work performed under each contract.

266

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such Government.

(2) As an aid in determining whether the clause should be used with its *Alternate* II, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data — General. This representation requests that an offeror state, in response to a solicitation, whether limited rights data are likely to be used in meeting the data requirements set forth in the solicitation. In addition, the need for *Alternate* II should be considered during the negotiation of a contract, particularly if the negotiation is based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data-General, without *Alternate* II does not preclude this *Alternate* from being used subsequently by modification during contract performance, should the need arise for delivery of limited rights data that have been withheld or identified as withholdable.

(e) *Protection of Restricted Computer Software Specified for Delivery.*

(1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data — General, by use of *Alternate* III, which *Alternate* adds subparagraph (g)(3) to the clause to enable the Government to require delivery of restricted computer software rather than allowing the contractor to withhold such restricted computer software. The restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in subparagraph (g)(3) (*Alternate* III). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be—

(i) Used or copied for use in or with the computer for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(ii) Used or copied for use in or with a backup computer if the computer or computers for which it is acquired are inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights;

(v) Disclosed and reproduced by support contractors or their subcontractors, subject to the same restriction under which the Government acquired the software; and

(vi) Used in accordance with (e)(1)(i) through (v) above, without disclosure prohibitions, if the computer software is published copyrighted computer software.

(2) The restricted rights set forth in paragraph (e)(1) above are the minimum rights the government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of subparagraph (g)(3) (*Alternate* III) of the clause. However, either greater or lesser rights, consistent with the purchase and needs for which the software is to be acquired, may be specified by the contracting officer in a particular contract or prescribed in agency regulations. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause are to be expressly stated in the contract or, in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(3) As an aid in determining whether the clause should be used with its *Alternate* III, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data — General. This representation requests that an offeror state, in response to a solicitation, whether restricted computer software is likely to be used in meeting the data requirements set forth in the solicitation. In addition, the need for *Alternate* III should be considered during negotiation of a contract, particularly if negotiation is based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data — General, without *Alternate* III does not preclude this *Alternate* from being used subsequently by modification during contract performance, should the need arise for the delivery of restricted computer software that has been withheld or identified as withholdable.

(f) *Copyright of Data First Produced in the Performance of a Contract.*

(1) In order to enhance the transfer or dissemination of information produced at government expense, contractors are authorized to establish claim to copyright for technical or scientific journal articles based n data first produced in the performance of work under a contract containing the clause at 52.227-14, Rights in Data — General. However, for all other data or works, the permission of the contracting officer is required for copyright to be claimed. Nothing in subparagraph (c)(1) of the clause shall preclude the copyright of derivative works based upon data first produced in the performance of a contract.

(2) Usually, permission for a contractor to establish claim to copyright for data first produced under the contract will be granted when copyright protection will enhance the appropriate transfer or dissemination of such data or the commercialization of such products or processes to which it pertains. The request for permission must be made in writing, and may be made either at the time of award or subsequently during contract performance. It should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be granted unless — (1) the data consist of a report that represents the official views of

267

the agency or that the agency is required by statute to prepare; (ii) the data are intended primarily for internal use by the Government; (iii) the data are of the type that the agency itself distributes to the public under an established program; or (iv) the government determines that limitation on distribution of the data is in the national interest.

(3) If an agency determines to grant blanket permission for contractors to establish claim to copyright to all data first produced in the performance of the contract without a request being made by the contractor, the contracting officer is authorized to use the clause with its *Alternate* IV, which alternate provides a substitute paragraph (c)(1) in the clause granting such blanket permission. When this Alternate is used, the contract may specifically exclude items or categories of data from the blanket permission granted. However, such exclusion does not prevent a contractor from making a subsequent request for permission in accordance with the provisions of the clause.

(4) Whenever a contractor establishes claim to copyright subsisting in data first produced in the performance of a contract, the Government normally is granted a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all such data, as set forth in subparagraph (c)(1) of the clause at 52.227-14, Rights in Data — General. However, agencies may on a case-by-case basis, or on a class basis if provided in implementing regulations, obtain on equitable terms a license of lesser scope than set forth in subparagraph (c)(1) of the clause if the agency determines that such lesser license will substantially enhance the transfer or dissemination of any data first produced under the contract, and will not interfere with the Government's use of the data as contemplated by the contract.

(g) *Release, Publication, and Use of Data.* (1) In paragraph (d) of the clause at 52.227-14, Rights in Data — General, subparagraph (d)(1) recognizes the fact that normally the contractor has the right to use, release to others, reproduce, distribute, or publish data first produced in the performance of a contract, except to the extent such data may be subject to the Federal export control laws and regulations. In addition, to the extent the contractor is given access to data that is necessary for the performance of the contract from the Government or others acting on behalf of the Government, and the data contains restrictive markings, subparagraph (d)(2) provides an agreement with the contractor to treat the data in accordance with the markings, unless otherwise specifically authorized by the contracting officer.

(2) Agencies may, however, place limitations or restrictions in agency implementing regulations on the contractor's right to use, release to others, reproduce, distribute, or publish any data first produced in the performance of the contract either by adding a subparagraph (d)(3) to the clause or by express limitations in the contract. In the latter case, the limitations or restrictions should be referenced in the clause. Such restrictions are not to be imposed unless they are determined to be necessary in the furtherance of

agency mission objectives, needed to support specific agency programs, or necessary to meet statutory requirements.

(h) *Unauthorized Marking of Data.* Except for validation of restrictive markings on technical data under contracts for major systems, or for support of major systems by agencies subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949, the Government has, in accordance with paragraph (e) of the clause at 52.227-14, Rights in Data — General, the right to either return to the contractor data containing markings not authorized by that clause, or to cancel or ignore such markings. However, markings will not be canceled or ignored without making written inquiry of the contractor and affording the contractor at least 60 days to substantiate the propriety of the markings. Failure of the contractor to respond to the contracting officer's inquiry within the time afforded may, however, result in Government action to cancel or ignore the markings. The contracting officer will also give the contractor notice of any determination made based on any response by the contractor. Any such determination to cancel or ignore the markings shall be a final decision under the Contract Disputes Act. Should the contractor dispute the final decision of the contracting officer, the contracting officer shall continue to honor the markings until resolution of the dispute under the provision of the Contract Disputes Act.

(i) *Inspection of Data at the Contractor's Facility.* Contracting officers may obtain the right to inspect data at the contractor's facility by use of *Alternate* V, which adds paragraph (j) to provide that right in the clause at 52.227-14, Rights in Data — General. Agencies may also adopt *Alternate* V for general use. The data subject to inspection may be data withheld or withholdable under subparagraph (g)(1) of the clause, or any data specifically used in the performance of the contract. Such inspection may be made by the contracting officer or designee for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised at all reasonable times up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) (*Alternate* V). If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternative representative.

27.405 Other data rights provisions.

(a) *Production of special works.*

(1) The clause at 52.226-17, Rights in Data — Special Works, is to be used in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may

268

arise out of the content, performance, or disclosure of the data. Examples are contracts for—

(i) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptations, and the like;

(ii) Histories of the respective agencies, departments, services, or units thereof;

(iii) Surveys of Government establishments;

(iv) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(v) The compilation of reports, studies, surveys, or similar documents that do not involve research, development, or experimental work performed by the contractor;

(vi) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(vii) Investigatory reports; or

(vii) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(3) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved such liability will not arise.

(b) *Rights relating to existing data other than limited rights data.*

(1) *Existing audiovisual and similar works.* The clause at 52.227-18, Rights in Data — Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are (i) means of exhibition or transmission, (ii) time, (iii) type of audience, and (iv) geographical location. If the contract requires that works of the type indicated above are to be modified

through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form) the clause at 52.227-17, Rights in Data — Special Works, is to be used. (See 27.405(a).)

(2) *Separate acquisition of existing computer software.* (i) If the contract is for the separate acquisition of existing computer software (i.e., privately developed software normally vended commercially under a license or lease agreement restricting its use, disclosure, or reproduction), the clause at 52.227-19, Commercial Computer Software — Restricted Rights, may be used. In any event the contract must specifically address the Government's rights to use, disclose, and reproduce the software and must contain terms obtaining sufficient rights for the Government to fulfill the need for which the software is being acquired. The restricted rights set forth at 27.404(e), if the clause is not used, should be used as a guide and are usually the minimum the Government should accept. When using such clause the contract or purchase order may expressly state any additions to, or limitations on, the restricted rights set forth in subparagraph (d)(2) of the clause. If the computer software is to be acquired with unlimited rights, the contract must also so state. In addition, the contract must adequately describe the computer programs and/or data bases, the form (tapes, punch cards, disk pack, and the like), and all the necessary documentation pertaining thereto. If the acquisition is by lease or license, the disposition of the computer software (by returning to the vendor or destroying) at the end of the term of the lease or license must be addressed.

(ii) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, such agreement shall be reviewed to assure that it is consistent with (a) above. Caution should be exercised in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract, and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227-19, Commercial Computer Software — Restricted Rights, is used, inconsistencies in the vendor's standard commercial agreement are reconciled by that clause.

(iii) If a prime contractor under a contract containing the clause at 52.227-14, Rights in Data — General, with subparagraph (g)(3) (*Alternate* III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of subparagraph (g)(3) in a collateral agreement incorporated in and made part of the contract.

(3) *Other existing works.* Except for existing audiovisual and similar works pursuant to paragraph (b)(1) above, and existing computer software pursuant to paragraph (b)(2) above, no clause contained in this subpart is required to be included in (i) contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which such

269

items exist prior to the request for purchase (i.e. the off-the-shelf purchase of such items) unless reproduction rights of such items are to be obtained; or (ii) contracts that require only existing data (other than limited rights data) to be delivered, are to be obtained (e.g., contracts resulting from sealed bidding) when such items or data are delivered without disclosure prohibitions, unless reproduction rights are to be obtained. If the reproduction rights are to be obtained in any contract of the type described, such rights must be specifically set forth in the contract.

27.406 Acquisition of data.

(a) *General.* (1) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements are subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(2) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data, shall be specified in the contract. Further, and to the extent feasible, in major system acquisitions, data requirements shall be set out as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with paragraph (a)(1) above, develop their own contract schedule provisions in agency procedures (including data requirements lists) for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(b) *Additional data requirements.* Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at the time of contracting, the clause at 52.227-16, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. Data may be ordered under this clause at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contractor may be relieved of retention requirements for specified data items by the contracting officer at any time during the retention period required by the clause. Agencies shall give consideration to not ordering additional computer software under this clause for the sole purpose of disseminating or marketing it to the public, if the contractor shows that it is undertaking or has definite plans for the prompt dissemination or mar-

keting of the software to the public on reasonable terms, especially if this will provide the contractor additional incentive to make improvements to the software at its own expense. This should not preclude an agency from including a summary description of computer software available from a contractor in any data dissemination programs which it operates with a statement as to how the potential user can obtain it through the contractor, licensee, or assignee. In cases where the contracting officer orders software for internal purposes, they shall give consideration, consistent with the Government's needs, to not ordering particular source codes, algorithms, processes, formulae or flow charts of the software if the contractor shows that this will aid its efforts to commercialize the software. Any data ordered under this clause will be subject to the Rights in Data — General clause in the contract, and data authorized to be withheld under that clause will not be required to be delivered under this Additional Data Requirements clause, except as provided in *Alternate* II or *Alternate* III, if included in the contract. (c) Acceptability of technical data delivered under a contract shall be in accordance with the appropriate contract provision set out in Subpart 46.3, and the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment — Major Systems, when it is included in the contract. (See paragraph (d) below.)

(d) *Major system acquisition.* (1) In order to assure that technical data needed to support a major system acquisition are timely delivered and are complete, accurate, and satisfy the requirements of the contract concerning the data, the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment — Major Systems, is to be included in contracts for or in support of a major system (as the term "major system" is defined in Section 4 of the Office of Federal Procurement Policy Act, as amended by Pub.L. 98-577), including every detailed design, development, or production contract for a major system acquisition and contracts for any individual part, component, subassembly, assembly, or subsystems integral to the major system, and other property which may be replaced during the service life of the system, and including spare parts and replenishment spare parts.

(2) The clause at 52.227-21, Technical Data, Certification, Revision, and Withholding of Payment — Major Systems, requires the contractor, upon delivery of any technical data made subject to the clause in the contract, to certify that such data are complete, accurate, and comply with contract requirements. It also provides for corrections of any deficiencies in the data, as well as for the ability of the contracting officer to request revisions of the data to reflect engineering design changes made during performance of the contract and affecting form, fit, and function of the items the data depict. Further included is the authority for the contracting officer to withhold payment under the contract to assure timely delivery of the technical data and/or assure correction if the technical data are not complete, accurate, and in compliance with contract requirements.

270

(3) When the clause at 52.227-21, Technical Data, Certification, Revision, and Withholding of Payment — Major Systems, is used, the section of the contract specifying data delivery requirements (see paragraph (a)(2) above) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of such technical data, the contracting officer or designee shall review the technical data and the contractor's certification relating thereto to assure that the data are complete, accurate, and comply with contract requirements. If not, the contractor is to be requested to correct the deficiencies, and payment may be withheld until such is done. Final payment should not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(4) In a contract for or in support of a major system awarded by an executive agency subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949, the contracting officer shall include contractual provisions requiring, as an element of performance under the contract, the delivery of any technical data, other than computer software, relating to the major system or supplies for the major system procured or to be procured by the Government, which are to be developed exclusively with Federal funds in the performance of the contract if the delivery of such technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at 52.227-22, Major System — Minimum Rights, is to be included in such contracts in addition to the clause at 52.227-14, Rights in Data — General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98-577 in technical data developed exclusively with Federal funds. In any contract to which this paragraph (d)(4) applies, technical data, other than computer software, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the United States as an element of performance under the contract), shall not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

27.407 Rights to technical data in successful proposals.

(a) Contracting officers may, as consideration of contract award, desire to acquire unlimited rights in technical data (but not commercial or financial information) contained in a successful proposal upon which a contract award is based. However, the prospective contractor may (1) advise the contracting officer that the technical data, or portion thereof, (to be identified by the prospective contractor) are covered by any restrictive notice regarding the disclosure and use of proposed information authorized by Subpart 15.4 or

15.5 (or any agency supplement thereto), and request that such protection be maintained; or (2) establish to the contracting officer's satisfaction that identified portions of the technical data do not relate directly to or will not be utilized in the work to be performed under the contract and request that such portions be excluded from the Government's rights.

(b) If unlimited rights to technical data in successful proposals, as set forth in paragraph (a) above, are to be acquired, it shall be by use of the clause at 52.227-23, Rights to Proposal Data (Technical). Any excluded technical data will be identified by inserting appropriate proposal page numbers in the clause. Such exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in subpart 15.4 or 15.5 (or agency supplements thereto) relating to proposal information (i.e., will be used for evaluation purposes only). If the clause at 52.227-23, Rights to Proposal Data (Technical), is included in a contract, the prospective contractor must be specifically afforded the opportunity to exclude technical data as set forth in paragraph (a) above, and the contract file must reflect that fact. If there is need to have access to any of the excluded technical data during contract performance, consideration should be given to their acquisition as limited rights data, if they so qualify, in accordance with 27.404(d).

27.408 Co-sponsored research and development activities.

In contracts involving co-sponsored research and development wherein the contractor is required to make substantial contributions of funds or resources (i.e., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, a contracting officer may limit the acquisition of or acquire less than unlimited rights to any data developed and delivered under such contract. Agencies may regulate the use of this authority in their supplements. Basically such rights will, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and will address any disclosure limitations or restrictions to be imposed on the data. Since the purpose of the co-sponsored research, the legitimate proprietary interest of the contractor, the needs of the Government, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government in data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, such clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (i.e., Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work elements to be performed under the con-

27/

tract. Further, such clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies which will be available, in any event, to the public for their direct use. Such clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements.

27.409 Solicitation provisions and contract clauses.

(a)(i) The contracting officer shall insert the clause at 52.227-14, Rights in Data — General, (see 27.404), in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is —

(1) For the production of special works of the type set forth in 27.405(a), but the clause at 52.227-14, Rights in Data — General, shall be included in the contract and made applicable to data other than special works, as appropriate;

(2) For the separate acquisition of existing works, as described in 27.405(b);

(3) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (see paragraph (n) (below);

(4) For architect-engineer services or construction work, in which case agencies may utilize the clause at 52.227-17, Rights in Data — Special Works, or may prescribe different clauses;

(5) A Small Business Innovation Research contract (see 27.409(1) below.)

(6) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work, in which case agencies may prescribe different clauses. (See paragraph (p) below.)

(ii) Paragraph (e)(2) of the clause at 52.227-14, Rights in Data — General, may be deleted or reserved by an agency not subject to the Federal Property and Administrative Services Act.

(b) If an agency determines, in accordance with 27.404(c), to adopt the alternate definition of "Limited Rights Data" in paragraph (a) of the clause, the clause shall be used with its *Alternate I.*

(c) In accordance with 27.404(d), if a contracting officer needs to obtain the delivery of limited rights data, the clause shall be used with its *Alternate II.* The contracting officer shall, when *Alternate II* is used, assure that the purposes, if any, for which limited rights data are to be disclosed outside the Government are included in the "Limited Rights Notice" of subparagraph (g)(2) of the clause. The contract may exclude identified items of data from delivery under subparagraph (g)(2) of the clause. *Alternate II* may be used at the time of contracting or subsequently by modification to the contract if the need to acquire limited rights data arises during contract performance.

(d) In accordance with 27.406(e), if a contracting officer needs to obtain the delivery of restricted computer software, the clause shall be used with its *Alter-*

nate III. Any greater or lesser rights regarding the use, duplication, or disclosure or restricted computer software than those set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause must be specified in the contract and the notice modified accordingly. *Alternate III* may be used at the time of contracting, or subsequently by modification to the contract, if the need to acquire restricted computer software arises during contract performance.

(e) In accordance with 27.404(f), if any agency in accordance with its procedures determines to grant blanket permission for the contractor to establish claim to copyright to all data first produced in the performance of a contract without a request being made by the contractor, the clause shall be used with its *Alternate IV*, which *Alternate* provides a substitute paragraph (c)(1) in the clause granting such blanket permission. When this *Alternate* is used, the contract may specifically exclude items or categories of data from the blanket permission granted. However, such exclusion does not prevent a contractor from making a subsequent request for permission.

(f) In accordance with 27.404(i), if a contracting officer needs to have the right to inspect certain data at a contractor's facility or if by an agency generally, the clause shall be used with its *Alternate V. Alternate V* adds a paragraph (j) to the clause to provide for such inspection right, including the limitations thereon. Inspection may be made at all reasonable times up to three years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not to be subject to inspection under paragraph (j) of the clause. If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

(g) In accordance with 27.404(d)(2), if the contracting officer desires to have an offeror state in response to a solicitation, to the extent feasible, whether limited rights data or restricted computer software are likely to be used in meeting the data requirements set forth in the solicitation, the contracting officer shall insert in the solicitation the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software. The contractor's response will provide an aid in determining whether the clause should be used with *Alternate II* and/or *Alternate III*.

(h) The contracting officer shall normally insert the clause at 52.227-16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. (See 27.406(b).) This clause may also be used in other contracts when considered appropriate. If the clause at 52.227-14, Rights in Data — General, is used in the contract with its *Alternates II or III*, the contracting officer may permit the contractor to identify data the contractor does not wish to deliver, and may specifically exclude in the contract any requirement that such data be delivered under paragraphs

272

(g)(2) or (g)(3) of that clause or ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the Additional Data Requirements clause by deleting the term "or specifically used" in subparagraph (a) thereof if delivery of such data is not necessary to meet the Government's requirements for data.

(i) In accordance with 27.405(d), the contracting officer shall insert the clause at 52.227-17, Rights in Data — Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405(a). The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released or reproduced by the contractor for other than contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(j) The contracting officer shall insert the clause at 52.227-18, Rights in Data — Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.403(b)(1). The contract may set forth limitations consistent with the purposes for which the work is being acquired. The clause at 52.227-17, Rights in Data — Special Works, shall be used if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(k) In accordance with 27.405(b)(2), if the contract is for the separate acquisition of existing computer software, the clause at 52.227-19, Commercial Computer Software-Restricted Rights, may be used in the solicitation and contract. In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405(b)(2).

(1) If the contract is a Small Business Innovation Research (SBIR) contract, the clause at 52.227-20, Rights in Data — SBIR Program, shall be used in all Phase II contracts awarded under the Small Business Innovation Research Program established pursuant to. Pub. L. 97-219 (The Small Business Innovation Development Act of 1982). This clause is limited to use solely in contracts awarded under the SBIR Program, and is the only data rights clause to be used in Phase II contracts. It may also be used in Phase I SBIR contracts, or an agency may prescribe a different clause for such contracts.

(m) While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e., the off-the-shelf purchase of such items), if reproduc-

tion rights are to be acquired the contract shall include terms addressing such rights. (See 27.405(b)(3).)

(n) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts to be performed outside the United States, its possessions, and Puerto Rico.

(o) Agencies may prescribe in their procedures the clause at 52.227-17, Rights in Data — Special Works, or prescribe, as appropriate, clauses consistent with the policy in 27.402 in contracts for architect-engineer services and construction work.

(p) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts for management, operation, design, or construction of Government-owned research, development, or production facilities.

(q) In accordance with 27.406(d), the contracting officer shall insert the clause at 52.227-21, Technical Data Certification Revision, and Withholding of Payment — Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. When used, this clause requires that the technical data to which it applies be specified in the contract. (See 27.406(d).)

(r) In the case of agencies subject to the Federal Property Administrative Services Act, the contracting officer shall insert the clause at 52.227-21, Major System — Minimum Rights, in contracts for major systems or contracts in support of major systems.

(s) In accordance with 24.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon which a contract award is based, the contracting officer shall insert the clause at 52.227-23, Rights to Proposed Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation of the proposal in the contract; this clause must be used and the procedures of 27.407 must be followed.

PART 52 — SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.227-14 is added to read as follows: 52.227-14 Rights in Data — General.

As prescribed in 27.409(a), insert the following clause with any appropriate alternates:

RIGHTS IN DATA — GENERAL (JUL 1985)

(a) Definitions.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

"Form, fit, and function data," as used in this clause, means data relating to, and sufficient to enable, physical and functional interchangeability; as well as data identifying source, size, configuration, mating, and attachment characteristics, functional

characteristics. and performance requirements, except that for computer software it specifically excludes the source codes, algorithm, process, formulae, and flow charts of the software.

"Limited rights data," as used in this clause, means data that embody trade secrets or are commercial or financial and confidential r privileged, but only to the extent that the data pertain to items. components, or processes developed at private expense, including minor modifications thereof.

"Technical data," as used in this clause, means data (other than computer software) which are of a scientific or technical nature.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret, is commercial or financial data which is confidential or privileged, or is published copyrighted computer software.

"Unlimited rights," as used in this clause, means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purposes, and to have or permit others to do so.

"Limited rights," as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) The Contractor shall have the right to—

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph (d) below;

(ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add or correct limited rights or restricted rights notices and to take other appropriate action, in accordance with paragraphs (e) and (f) below: and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) *Copyright.* (1) *Data first produced in the performance of this contract.* Unless provided otherwise in subparagraph (d) below, the Contractor may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in scientific and technical articles based on or derived from data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of the Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 to the data when such data are delivered to the Government, and include the notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquired on its behalf, a license of the same scope as set forth in subparagraph (1) above; *provided,* however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) below if included in this contract or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.

(3) The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Release, publication and use of data.* (1) The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except to the extent such data may be subject to the Federal export control laws and regulations, or unless otherwise provided below in this paragraph or expressly set forth in this contract.

(2) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

274

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in subparagraphs (g)(2) or (g)(3) below and use of such is not authorized by this clause, the Contracting Officer may either return the data to the Contractor, or cancel or ignore the markings. However, the following procedures will be followed by the Contracting Officer prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Contractor concerning the propriety of the markings, providing the Contractor 60 days to respond;

(g) *Protection of limited rights data and restricted computer software.* (1) When data other than that listed in subdivisions (b)(1)(i), (ii), and (iii) above are specified to be delivered under this contract and qualify as either limited-rights data or restricted computer software, if the Contractor desires to continue protection of such data, shall withhold such data and not furnish them to the Government under this Contract. As a condition to this withholding, the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery to the Government is to be treated as limited rights data and not restricted computer software.

(2) [Reserved.]

(3) [Reserved.]

(h) *Subcontracting.* The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(i) *Relationship 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.

Alternate I (JUL 1985). As prescribed in 27.409(b), substitute the following definition for "Limited Rights Data" in paragraph (a) of the clause:

"Limited rights data," as used in this clause, means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Alternate II (JUL 1985). As prescribed in 27.409(c), insert the following subparagraph (g)(2) in the clause: (g)(2) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Contracting Officer may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, subject to

the provisions of paragraphs (e) and (f) above, in accordance with such Notice:

"LIMITED RIGHTS NOTICE (JUL 1985)

(a) These data are submitted with limited rights under Government contract No ..... (subcontract ....., if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

——— [Agencies may list additional purposes as set forth in 27.404(d)(1) or if none, so state]

(b) This Notice shall be marked on any reproduction of these data, in whole or in part."

(End of notice)

Alternate III (Date). As prescribed in 27.409(d), insert the following subparagraph (g)(3) in the clause:

(g)(3)(i) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld. If delivery of such computer software is so required, the Contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) above, in accordance with the Notice:

"RESTRICTED RIGHTS NOTICE (JUL 1985)

(a) This computer software is submitted with restricted rights under Government Contract No ..... (and subcontract ....., is approrpriate). It may not be used, reproduced, or disclosed by the Government except as provided below or as otherwise expressly stated in the contract.

(b) This computer software may be —

(1) Used or copied for use in or with the computer for which it was acquired, including use at any Government installation to which such computer may be transferred;

(2) Used with a backup computer if the computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software shall be subject to the same restricted rights; and

(5) Disclosed and reproduced for use by support contractors or their subcontractors in accordance with subparagraphs (1) through (4) above, provided the Government makes such disclosure subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software,

it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) above.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in the contract.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part."

(End of notice)

(ii) Where it is impractical to include the above Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

"RESTRICTED RIGHTS NOTICE (SHORT FORM (JUL 1985)

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No . . . . . (and subcontract . . . . . if appropriate) with . . . . . (name of Contractor and subcontractor)."

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401 or 402, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) above, unless the Contractor includes the following statement with such copyright notice: "Unpublished — rights reserved under the Copyright Laws."

Alternate IV (JUL 1985). As prescribed in 27.409(e), substitute the following subparagraph (c)(1) in the clause:

(c) *Copyright.* (1) *Data First Produced in the Performance of the Contact.* Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 to the data when such data are delivered to the Government, and include that notice, as well as acknowledgement of Government sponsorship, on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

Alternate V (JUL 1985) As prescribed in 27.409(f), add the following paragraph (j) to the clause:

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, at all reasonable times up to three years after acceptance of all items to be delivered under this contract, inspect at the Contractor's facility any data withheld pursuant to paragraph (g)(1) above, for purposes of verifying the Contractor's assertion pertaining to the limited rights or restricted rights status of the data or

for evaluating work performance. Where the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

4. Section 52.227-15 is added to read as follows:

52.227-15 Representation of Limited Rights Data and Restricted Computer Software.

As prescribed in 27.409-(g), insert the following provision in solicitations that include the clause at 52.227-14 Rights in Data — General:

REPRESENTATION OF LIMITED RIGHTS DATA AND
RESTRICTED COMPUTER SOFTWARE (JUL 1985)

(a) This solicitation sets forth the work to be performed if a contract award results, and the Government's known requirements for data (as defined in FAR 24.401). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227-16 of the FAR, if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data — General clause at 52.227-14 that is to be included in this contract. Under the latter clause, a Contractor may withhold from delivery data that qualify as limited-rights data or restricted computer software, and deliver form, fit, and function data in lieu thereof. The latter clause also may be used with its Alternates II and/or III to obtain delivery of limited-rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate. In addition, use of Alternate V with this latter clause provides the Government the right to inspect such data at the Contractor's facility.

(b) As an aid in determining the Government's need to include any of the aforementioned Alternates in the clause at 52.227-14, Rights in Data — General, the offeror's response to this solicitation shall, to the extent feasible, complete the representation below to either state that none of the data qualify as limited-rights data or restricted computer software, or identify which of the data qualifies as limited-rights data or restricted computer software. Any identification of limited-rights data or restricted computer software in the offeror's response is not determinative of the status of such data should a contract be awarded to the offeror.

REPRESENTATION CONCERNING DATA RIGHTS

Offeror has reviewed the requirements for the delivery of data or software and states (offeror check appropriate block) —

None of the data or software proposed for fulfilling such requirements qualifies as limited-rights data or restricted computer software.

Data or software proposed for fulfilling such requirements qualify as limited-rights data or restricted computer software and are identified as follows:

276

☐ Data or software proposed for fulfilling such requirements qualify as limited-rights data or restricted computer software and are identified as follows:

_____

_____

_____

NOTE: "Limited rights data" and "Restricted computer software" are defined in the contract clause entitled "Rights In Data—General."

(End of provision)

5. Section 52.227-16 is added to read as follows:

52.227-16 Additional Data Requirements.

As prescribed in 27.409(h), insert the following clause:

ADDITIONAL DATA REQUIREMENTS (JUL 1985)

(a) In addition to the data (as defined in the Rights in Data — General clause included in this contract) specified elsewhere in this contract to be delivered, the Contracting Officer may, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The Rights in Data — General clause included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Contractor to deliver any data the withholding of which is authorized by the Rights in Data — General clause of this contract, or data which are specifically identified in this contract as not subject to this clause.

(c) When data are to be delivered under this clause, the Contractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(d) The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in (a) above.

6. Section 52.227-17 is added to read as follows:

52.227-17 Rights in Data — Special Works.

As prescribed in 27.409(i), insert the following clause:

RIGHTS IN DATA — SPECIAL WORKS (JUL 1985)

(a) *Definitions.*

"Data," as used in this clause, means recorded information regardless of form or the medium on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

"Unlimited rights," as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have —

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) below for copyright.

(ii) The right to limit exercise of claim to copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in such data, in accordance with subparagraph (c)(1) below.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) below.

(2) The Contractor shall have, to the extent permission is granted in accordance with subparagraph (c)(1) below, the right to establish claim to copyright subsisting in data first produced in the performance of this contract.

(c) *Copyright.* (1) *Data first produced in the performance of this contract.* (i) The Contractor agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When claim to copyright is made, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 to such data when delivered to the Government, and include that notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in subdivision (i) above, the Contracting Officer may direct the Contractor to establish, or authorize the establishment of, claim to copyright in such data and to assign, or obtain the assignment of, such copyright to the Government or its designated assignee.

(2) *Data not first produced in the performance of this contract.*

The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contain the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above.

(d) *Release and use restrictions.* Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor shall the contractor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor

277

authorize others to do so, without written permission of the Contracting Officer.

(e) *Indemnity*. The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; nor do these provisions apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

7. Section 52.227-18 is added to read as follows:

52.227-18 Rights in Data — Existing Works.

As prescribed in 27.409(j), insert the following clause:

RIGHTS IN DATA — EXISTING WORKS (JUL 1985)

(a) Except as otherwise provided in this contract, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under this contract, or for which this clause is specifically made applicable.

(b) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

3. Section 52.227-19 is added to read as follows:

227-19 Commercial Computer Software — Restricted Rights

As prescribed in 27.409(k), insert the following clause:

COMMERCIAL COMPUTER SOFTWARE — RESTRICTED RIGHTS (JUL 1985)

Notwithstanding any provisions to the contrary contained in any license or use agreement pertaining to any restricted computer software (defined in 405(b)(2)) delivered under this contract, the Government shall have the lowing restricted rights;

(a) The restricted computer software delivered under this purchase order/contract may not be used, reproduced or disclosed by the Government except as provided below or otherwise expressly stated in the purchase order/contract.

(b) The restricted computer software may be—

(1) Used or copied for use in or with the computer for which it was acquired, cluding use at any Government installation to which such computer may be transferred;

(2) Used with a backup computer if the computer for which it was acquired inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined or adapted portions of the derivative software corporating restricted computer software shall be subject to the same restricted rights; and

(5) Disclosed and reproduced for use by support contractors or their subcontractors, subject to the same restrictions under which the Government acquired software is published.

(c) If the restricted computer software is published, copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in subparagraph (2) above.

(End of Clause)

9. Section 52.227-20 is added to read as follows:

52.227-20 Rights in Data — SBIR Program.

As prescribed in 27.409(1), insert the following clause:

RIGHTS IN DATA — SBIR PROGRAM (JUL 1985)

(a) *Definitions*.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

"Form, fit, and function data," a used in this clause, means data describing, and sufficient to enable, physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements except that for computer software it specifically excludes the source

2 78

code, algorithm, process, formulae, and flow charts of the software.

"Limited-rights data," as used in this clause, means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is published copyrighted computer software, including modifications of such computer software.

"SBIR data," as used in this clause, means data first produced by a Contractor that is a small business firm in performance of a small business innovation research contract issued under the authority of 15 U.S.C. 638 (Pub. L. 97-219, Small Business Innovation Development Act of 1982), which are not generally known, and without obligation as to its confidentiality have not been made available to others by the Contractor or are not already available to the Government.

"SBIR rights," as used in this clause, mean the rights in SBIR data set forth in the SBIR Notice of paragraph (d) of this clause.

"Technical data," as used in this clause, means that data which are of a scientific or technical nature.

"Unlimited rights," as used in this clause, means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in—

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d) below or for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) The Contractor shall have the right to—

(i) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) below;

(ii) Withhold from delivery those data which are limited-rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add, or correct limited-rights or restricted-rights notices and to take other appropriate action, in accordance with paragraphs (e) and (f) below; and

(iv) Establish claim to copyrights subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) *Copyright.* (1) *Data first produced in the performance of this contract.* Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. It claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 and 402 to the data when such data are delivered to the Government, and include that notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that are not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above.

(3) *Removal of notices.* The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Rights to SBIR data.* (1) The Contractor is authorized to affix the following "SBIR Rights Notice" to SBIR data delivered under this contract and the Government will thereafter treat the data, subject to the provisions of paragraph (e) and (f) below, in accordance with such Notice:

SBIR RIGHTS NOTICE (JUL 1985)

These SBIR data are furnished with SBIR rights under Contract No. _____ (and subcontract _____ if appropriate). For a period of 2 years after acceptance of all items to be delivered under this contract, the Government agrees to use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, such data may be disclosed for use by support Contractors. After the aforesaid 2-year period the Government has a royalty-free license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This Notice shall be affixed to any reproductions of these data, in whole or in part.

(End of notice)

(2) The Government's sole obligation with respect to any SBIR data shall be as set forth in this paragraph (d).

279

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in subparagraph (g)(2) or (g)(3) below and use of such is not authorized by this clause, the Contracting Officer may either return the data to the Contractor, or cancel or ignore the markings. However, the following procedures will be followed by the contracting Officer prior to cancelling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Contractor concerning the propriety of the markings, providing the Contractor 60 days to respond;

(ii) If the Contractor fails to respond within the 60 day period (or a longer time approved by the Contracting Officer for good cause shown) the markings shall be canceled or ignored.

(iii) If the Contractor considers the markings to be valid, it shall submit a claim asserting such validity to the Contracting Officer within 60 days from receipt of the written inquiry of the Contracting Officer. This claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.)

(iv) The Contracting Officer shall consider the Contractor's claim, if any, and decide whether the markings shall be canceled or ignored. If the Contracting Officer decides that the markings are valid, the Contracting Officer shall in writing so notify the Contractor. If the Contracting Officer decided that the markings are not valid, the Contracting Officer shall furnish to the Contractor a written decision, and such decision shall be final unless the Contractor appeals or files suit as provided by the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.)

(v) In any event, the Government shall continue to abide by the markings until final disposition of this claim.

(2) This paragraph (e) does not apply if this contract is for a major system or for support of a major system.

(f) *Omitted or incorrect markings.* (1) Data delivered to the Government without any notice authorized by paragraph (d) above, and without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data have not been disclosed without restriction outside the Government, the Contractor may request, within six months) or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also (i) permit correction, at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(g) *Protection of limited-rights data and restricted computer software.* When data other than that listed in subdivisions (b)(1)(i), (ii), and (iii) above are specified to be delivered under this contract and such data qualify as either limited-rights data or restricted computer software, the Contractor, if the Contractor desires to continue protection of such data, shall withhold such data and not furnish them to the Government under this contract. As a condition to this withholding the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof.

(h) *Subcontracting.* The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(i) *Relationship 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.

(End of clause).

10. Section 52.227-21 is added to read as follows:

52.227-21 Technical Data Certification, Revision, and Withholding of Payment — Major Systems.

As prescribed in 27.409(q), insert the following clause:

TECHNICAL DATA CERTIFICATION, REVISION, AND WITHHOLDING OF PAYMENT—MAJOR SYSTEMS (JUL 1985)

(a) *Scope of clause.* This clause shall apply to all technical data (as defined in the Rights in Data — General clause included in this contract) that have been specified in this contract as being subject to this clause. It shall apply to all such data delivered, or required to be delivered, at any time during contract performance or within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth herein. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) *Technical data certification.* (1) All technical data that are subject to this clause shall be accompanied by the following certification upon delivery:

TECHNICAL DATA CERTIFICATION (JUL 1985)

The Contractor, _____, hereby certifies that the technical data delivered herewith under Government contract No. _____ (and subcontract _____, if appropriate) are complete, accurate, and comply with the requirements of the contract concerning such technical data.

(End of certification)

(2) The Government shall rely on the above certification in accepting delivery of the technical data, and in consideration thereof may, at any time during the period covered by this clause, request correction of any deficiencies which are not in compliance with contract requirements. Such corrections shall be made at the expense of the Contractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data — General clause included in this contract.

(c) *Technical data revision.* The Contractor also agrees, at the request of the Contracting Officer, to revise technical data that are subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor will be compensated for any such revisions to the technical data made pursuant to this paragraph.

(d) *Withholding of payment.* (1) At any time before final payment under this contract the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion respecting any technical data that are subject to this clause, the Contractor fails to —

(i) Make timely delivery of such technical data as required by this contract;

(ii) Provide the certification required by subparagraph (b)(1) above;

(iii) Make the corrections required by subparagraph (b)(2) above; or

(iv) Make revisions requested under paragraph (c) above.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has delivered the data and/or has made the required corrections or revisions. Withholding shall not be made if the failure to make timely delivery, and/or the deficiencies relating to delivered data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

(3) The Contracting Officer may decrease or increase the sums withheld up to the sums authorized above. The amount under this paragraph shall be in addition to any withholding under any other terms of this contract. The withholding of any amount under this paragraph, or the subsequent payment thereof, shall not be construed as a waiver of any Government rights.

11. Section 52.227-22 is added to read as follows:

52.227-22 Major System — Minimum Rights.

As prescribed in 27.409(r), insert the following clause:

MAJOR SYSTEM — MINIMUM RIGHTS (JUL 1985)

Notwithstanding any other provision of this contract, the Government shall have unlimited rights in any technical data, other than computer software, developed in the performance of this contract and relating to a major system or supplies for a major system procured or to be procured by the Government, to the extent that delivery of such technical data is required as an element of performance under this contract. The rights of the Government under this clause are in addition to and not in lieu of its rights under the other provisions of this contract.

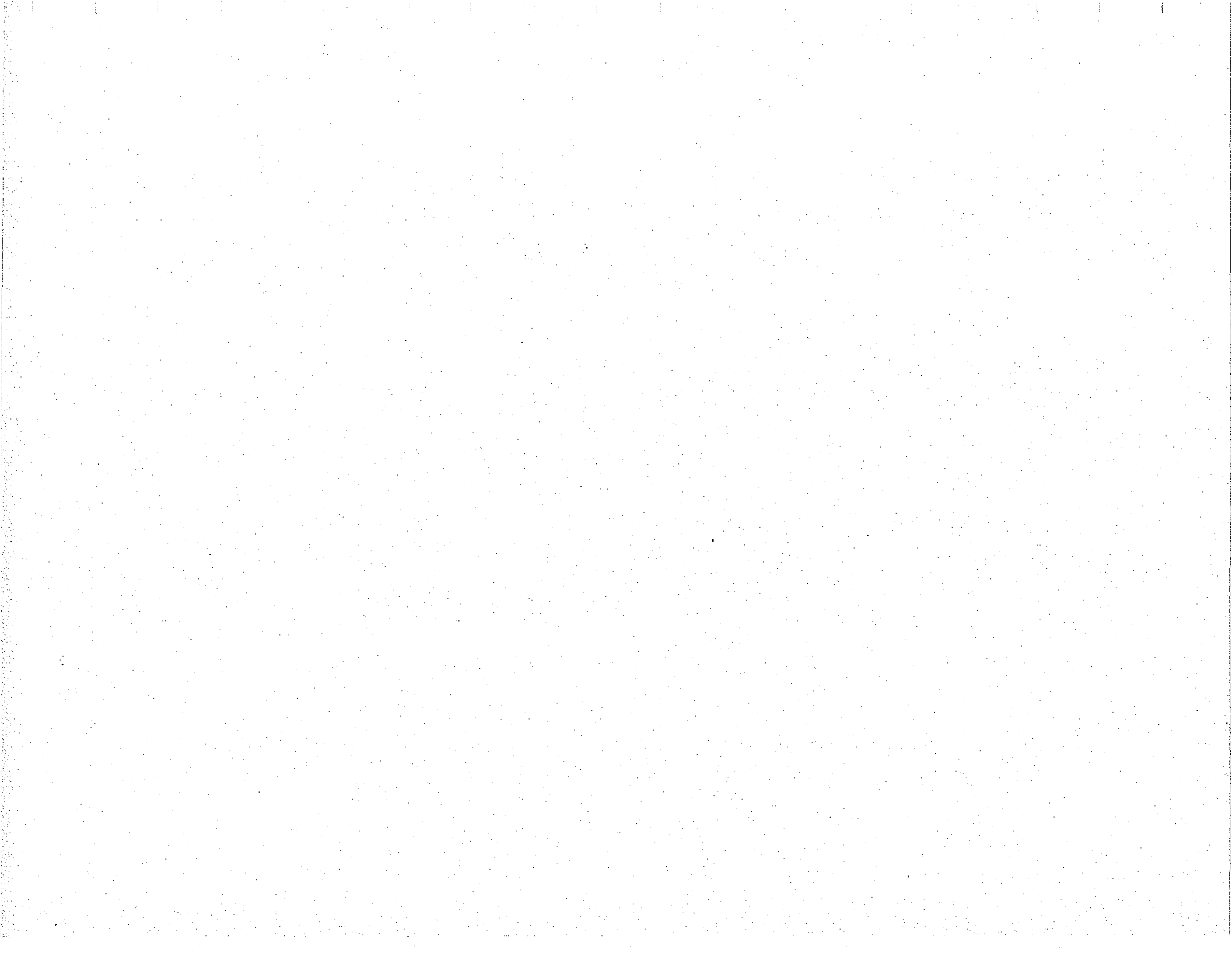Section 52.227-23 is added to read as follows:
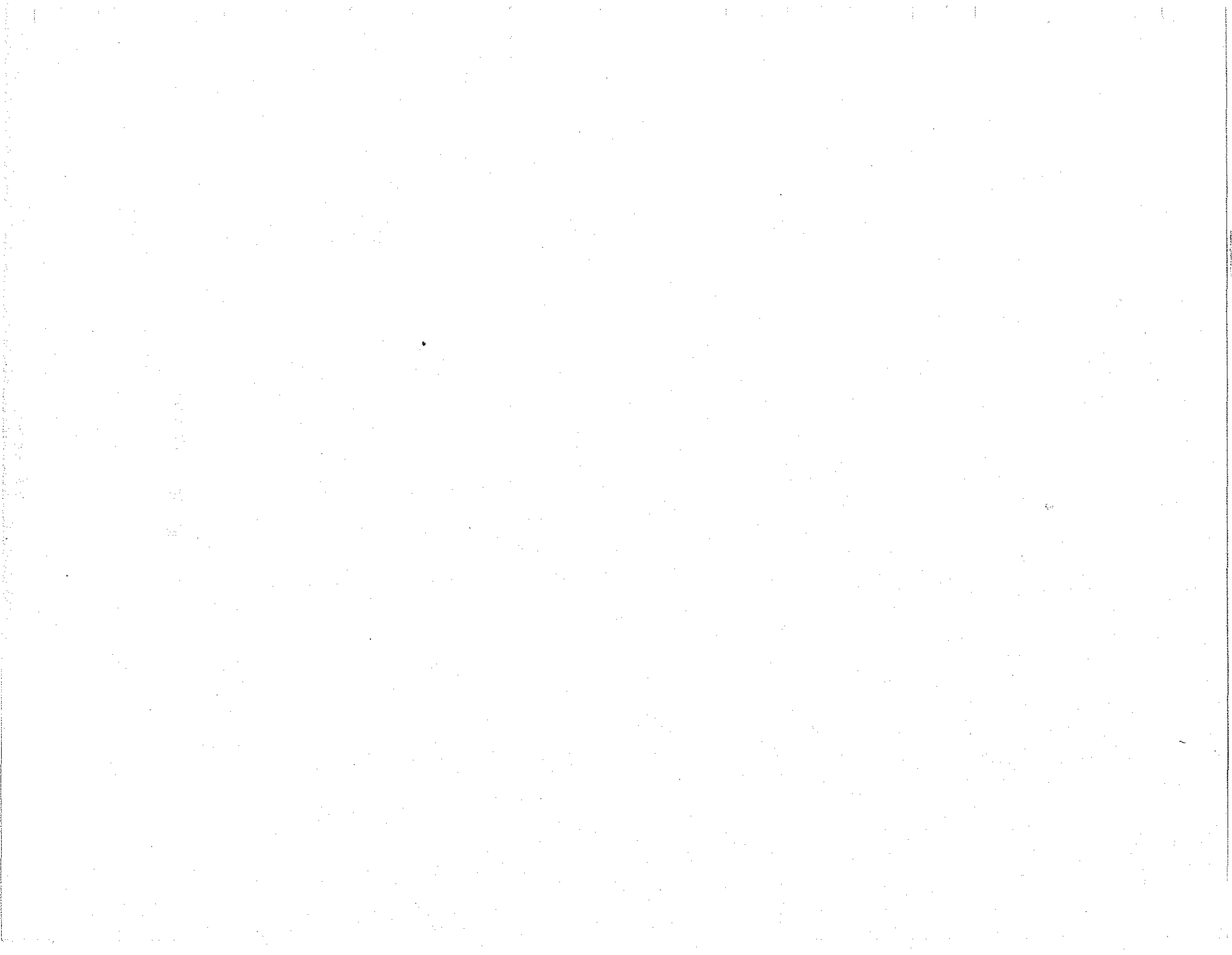
52.227-23 Rights to Proposal Data (Technical).

As prescribed in 27.409(s), insert the following clause:

RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUL 1985)

Except for data contained on pages _____, it is agreed that as a condition of award of this contract, and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the "Rights in Data — General" clause contained in this contract) in and to the technical data contained in the proposal dated _____, upon which this contract is based.

281

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 27 and 52

Federal Acquisition Regulation (FAR); Validation of Restrictive Markings on Technical Data

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule (Extension of comment period).

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a revision of the Federal Acquisition Regulation (FAR) to add sections 27.409, 27.410, and 52.227-24 concerning Validation of Restrictive Markings. FAR coverage was published as a proposed rule for public comment on October 3, 1985 (50 FR 40416), with corrections published on October 8, 1985 (50 FR 40984). The original date for submission of comments was November 4, 1985. The Councils have decided to extend the period for public comment on FAR coverage for Validation of Restrictive Markings on Technical Data to coincide with the comment period offered by the Department of Defense for related coverage in the DoD FAR Supplement.

COMMENT DATE: Written comments on the proposed FAR coverage for Validation of Restrictive Markings on Technical Data should be submitted to the FAR Secretariat by January 9, 1986, for consideration in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW, Room 4041, Washington, DC 20405.

Please cite FAR Case 85-47 in all correspondence related to this issue.

FOR FUTHER INFORMATION CONTACT: Ms. Margaret A. Willis, FAR Secretariat, Telephone (202) 523-4755.

Dated: October 25, 1985.

Lawrence J. Rizzi,

Director, Office of Federal Acquisition and Regulatory Policy.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 27 and 52

Federal Acquisition Regulation (FAR); Validation of Restrictive Markings on Technical Data

AGENCY: Department of Defense (DoD). General Services Administration (GSA). and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering a revision of the Federal Acquisition Regulation (FAR) that amends Subpart 27.4, Rights in Data and Copyrights.

COMMENT DATE: Comments should be submitted to the FAR Secretariat at the address shown below on or before November 4, 1985 to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW.. Room 4041, Washington, DC 20405.

Please cite FAR Case 85–47 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Margaret A. Willis, FAR Secretariat. Telephone (202) 523–4755.

SUPPLEMENTARY INFORMATION:

A. Background

Notice of availability for comment on a proposed rule to consider revision of Subpart 27.4 of the Federal Acquisition Regulation (FAR) was published in the Federal Register on August 15, 1985 (50 FR 32870). That proposed revision was not published in the Federal Register, however, the text was provided to interested parties as requested. It is now proposed to further amend that proposed revision of Subpart 27.4 by adding new sections 27.409 and 27.409–1, and the clause at 52.227–24, in order to establish policy concerning the validation of restrictive markings on technical data delivered to the Government, as required by Pub. L. 98–577 and Pub. L. 98–525. The subpart and clause establish policies and procedures by which, if a contracting officer has appropriate justification, the contracting officer may challenge the validity of restrictive markings on technical data

284

which a contractor has delivered to the Government. The subpart and clause also set out the rights and responsibilities of the contractor in responding to such a challenge.

B. Regulatory Flexibility Act

This proposed rule provides an inexpensive administrative procedure to determine the validity of restrictive markings for Government contracts, and it is not expected to have a significant economic impact on a substantial number of small entities because small entities should already retain necessary records in the normal course of their business activities to support the validity of restrictive markings on their technical data.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this proposed rule does not impose an additional reporting requirement on the public. The requirement to maintain records to justify the validity of the markings at 52.227–24, Validation of Restrictive Markings on Technical Data, would be incurred by persons in the normal course of their business activities and is thus exempt under 5 CFR Part 1320.

List of Subjects in 48 CFR Parts 27 and 52

Government procurement.

Dated: September 27, 1985.

Lawrence J. Rizzi,

Director, Office of Federal Acquisition and Regulatory Policy.

Therefore, it is proposed that 48 CFR Parts 27 and 52 be amended as set forth below.

1. The authority citation for 48 CFR Parts 27 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10.U.S.C. Chapter 137, and 42 U.S.C. 2453(c).

PART 27—PATENTS, DATA, AND COPYRIGHTS

2. Subpart 27.4 is amended by adding sections 27.409 and 27.409–1 to read as follows:

27.409 Validation of restrictive markings on technical data.

This section is applicable to the Department of Defense and to all civilian agencies except NASA, which is not subject to 41 U.S.C. 253d or 10 U.S.C. 2321.

27.409–1 Policy and procedures.

(a) *General.* 41 U.S.C. 253d and 10 U.S.C. 2321 set 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 required to be delivered under contracts or subcontracts for supplies or services (but see 27.409). 41 U.S.C. 418a and U.S.C. 2320 provide authority for the United States 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). 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; except that, for civilian agencies, not including NASA, these procedures should be followed only if the items being acquired are for, or in support of, a major system (as the term "major system" is defined in section 4 of the Office of Federal Procurement Policy Act, as amended by Pub. L. 98–577). The contractor or subcontractor of any tier must maintain records adequate to justify the validity of markings that impose restrictions on the right of 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. The records that justify the validity of the restrictive markings shall be maintained for as long as the contractor or subcontractor intends to assert the validity of the markings.

(b) *Prechallenge Review.* (1) The contracting officer may request the contractor or subcontractor to furnish to the contracting officer a written justification of any restriction asserted by the contrator or subcontractor on the right of the United States or others to use technical data. The contractor or subcontractor shall furnish such written justification to the contracting officer within 30 days after receipt of a written request or within such longer period as may be authorized in writing by the contracting officer. 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 raising the question provide written rationale for the assertion. The contracting officer should also request information and advice from the cognizant Government activity having control of the data on the validity of the markings.

(2) If the contracting officer, after reviewing the written justification

furnished pursuant to (b)(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 marked technical data relates, the contracting officer shall review the validity of the marking.

(3) As a part of the review, the contracting officer may request the contractor or subcontractor to furnish information in the records or otherwise in the possession or available to the contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or required to be delivered under the contract or subcontract. The contracting officer may request the contractor or subcontractor to furnish additional information such as a statement of facts accompanied by supporting documentation adequate to justify the validity of the marking. The contractor or subcontractor shall furnish such information to the contracting officer within 30 days after receipt of a written request or within such longer period as may be authorized [fails to provide the requested information. within 30 days after receipt of the contracting officer's written request or within such longer period as may be authorized in writing by the contracting officer, the contracting officer shall proceed in accordance with (c) of this section. *[handwritten: in writing by the contracting officer. If the contractor or subcontractor]*

(c) *Challenge.* (1) If after completion of the prechallenge review 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 notice shall include (i) the grounds for challenging the restrictive marking, (ii) a requirement for a written response within 60 days after receipt of the written notice justifying by clear and convincing evidence the current validity of the restrictive marking, (iii) a notice 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 33.207. regardless of dollar amount, and (iv) a notice 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.

(2) 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.

(3) 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 33.207 regardless of dollar amount.

(4) 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 challenges to the restrictive markings. This contracting officer shall coordinate with all the other contracting officers, formulate a 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.

[for responding to each of the challenge notices, and distribute such schedule]

(d) *Final Decision.—*(1) *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 failure of the contractor or subcontractor to respond to the challenge notice constitutes agreement with the Government action to strike or ignore the restrictive legends. The final decision shall be issued as a final decision under the Disputes clause at 52.233-1. This final decision is to be issued within 60 days after the expiration of the time period of (c)(1)(ii) or (2) above. Following the issuance of the final decision, the contracting officer may then strike or ignore the invalid restrictive markings.

(2) *Final Decision when Contractor or Subcontractor Responds.* (i) 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.

(ii) (A) 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.

(B) 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 (d)(2)(ii)(A) 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 (d)(2)(ii)(A) 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.

(C) 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 (d)(2)(ii)(A) 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 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 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 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.

(D) 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 an nondelegable basis, that *(1)* the Contractor has ~~filed to diligently~~ *[failed]* prosecute its appeal or *(2)* 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.

(e) *Appeal or Suit.* (1) 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 canceled, 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 markings 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.

(2) 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.

(f) *Survival of Right to Challenge*. The Government's right to challenge the validity of a restrictive marking is without limitation as to time and without regard as to final payment under the contract under which the data was delivered. However, if the contracting officer issues a decision sustaining the validity of a restrictive marking, the validity of such restrictive marking shall not again be challenged unless additional evidence not originally available to the contracting officer becomes available that would indicate the restrictive marking is invalid.

(g) *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.

3. Section 27.410 is amended by adding paragraph (t) to read as follows:

27.410 Solicitation provisions and contract clauses.

*   *   *   *   *

· (t) The contracting officer shall insert the clause at 52.227–24, Validation of Restrictive Markings on Technical Data, in solicitations and contracts which require the delivery of technical data; except that, for civilian agencies, not including NASA, the clause shall only be inserted in such solicitations and contracts if those solicitations and contracts are for, or in support of, a major system (as the term "major system" is defined in Section 4 of the Office of Federal Procurement Policy Act, as amended by Pub. L. 98–577). In solicitations and contracts having multiple tasks or work statements, these agencies may, in accordance with their regulations, also limit the application of the clause to the tasks or work statements which require delivery of technical data relating to a major system or supplies for a major system.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 52.227–24 is added to read as follows:

52.227–24 Validation of Restrictive Markings on Technical Data.

As prescribed in 27.410(t), insert the following clause:

Validation of Restrictive Markings on Technical Data (Oct 1985)

(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 shall maintain 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 the Contracting Officer a written justification for such restrictive markings. The records that justify the validity of the restrictive markings shall be maintained for as long as the Contractor or subcontractor intends to assert the validity of the markings.

(c) *Prechallenge review*. (1) The Contracting Officer may request the contractor or subcontractor to furnish to the Contracting Officer a written justification for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. The Contractor or subcontractor shall furnish such written justification to the Contracting Officer within thirty (30) days after receipt of a written request or within such longer period as may be authorized in writing by the Contracting Officer.

(2) If the Contracting Officer, after reviewing the written justification furnished pursuant to (b)(1) of this clause 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 marked technical data relates, the Contracting Officer may review the validity of the marking.

(3) As part of the review, the Contracting Officer may request the Contractor or subcontractor to furnish information in the records or otherwise in the possession of or available to the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or required to be delivered under the contract or subcontract. The Contracting Officer may request the Contractor or subcontractor to

furnish additional information such as a statement of facts accompanied by supporting documentation adequate to justify the validity of the marking. The Contractor or subcontractor shall furnish such information to the Contracting Officer within thirty (30) days after receipt of a written request or within such longer period as may be authorized in writing by the Contracting Officer.

(d) *Challenge*. (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if, after completing a prechallenge review, 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 include (i) the grounds for challenging the restrictive marking; (ii) a requirement for a written response within sixty (60) days after receipt of the written notice justifying by clear and convincing evidence the current validity of the restrictive marking; (iii) a notice 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 Federal Acquisition Regulation (FAR) 33.207, regardless of dollar amount; and (iv) a notice that failure to a respond to the challenge notice will constitute agreement by the Contractor or subcontractor with Government action to strike or ignore the restrictive legends.

(2) 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.

(3) 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.

(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, shall formulate and distribute to all interested parties a schedule for responding to each of the challenged 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. The Contractor or subcontractor hereby agrees that failure to respond to the challenge notice within the

287

time period of (d) (1)(ii) or (2) above, entitles the Government to cancel, correct, or ignore the restrictive markings and constitutes agreement with such Government action. This final decision shall be issued within sixty (60) days after the expiration of the time period of (d)(1)(ii) or (2) above.

(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. The final decison 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.

(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 decison 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 this 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 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 (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

open its suit within 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 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.

(iv) The Government agrees that it 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, following notice to the Contractor that (A) the Contractor has failed to diligently prosecute its appeal, or (B) 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 Contractor or subcontractor agrees that the agency may 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.

(g) *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 on the technical data shall be canceled, corrected, or ignored; and

(ii) If the 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 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) *Survival of right to challenge.* The Government retains its right to challenge the validity of a restrictive marking asserted under this contract without limitation as to time and without regards to final payment. However, after issuing a decision sustaining the vailidity of a restrictive marking, the Government agrees not to rechallenge the validity of a restrictive marking under this clause unless additional evidence not originally available to the Contracting Officer becomes available that indicates the restrictive marking is invalid.

(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 nor implies privity of contract between the Government and subcontractors.

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

[FR Doc. 85–23581 Filed 10–2–85; 8:45 am]
BILLING CODE 6820–61–M

PART 18-27--PATENTS, DATA, AND COPYRIGHTS

TABLE OF CONTENTS

SUBPART 18-27.4--DATA AND COPYRIGHTS

NASA/FAR SUPPLEMENT

SUBPART 18-27.4--DATA AND COPYRIGHTS

18-27.470 Scope of subpart.
This subpart sets forth NASA policy, procedures, and
solicitation provisions and contract clauses with respect to
(a) rights in data and copyrights and (b) the acquisition of
data, including the requirements of section 21 of the Office
of Federal Procurement Policy Act (as amended by section 301
of Pub. L. 98-577) relating to the rights in data and to the
acquisition of data that are applicable to NASA.
18-27.471 Definitions.
"Data," as used in this subpart, means recorded information,
regardless of form or the media on which it may be recorded.
The term includes technical data and computer software. The
term does not include information incidental to contract
administration, such as contract cost analyses or any
financial, business, and management information required for
contract administration purposes.
"Technical data", as used in this subpart, means that data
(other than computer software) which is of a scientific or
technical nature.
"Computer software," as used in this subpart, means computer
programs, computer data bases, and documentation thereof.
"Form, fit, and function data," as used in this subpart,
means data relating to items, components or processes that is
sufficient to enable physical and functional
interchangeability, as well as data identifying source, size,
configuration, mating and attachment characteristics,
functional characteristics, and performance requirements;
except that for computer software it specifically excludes the
algorithm, process, formulas, and flow charts of the software.
"Limited-rights data," as used in this subpart, means data
that embodies trade secrets or is commercial or financial and
confidential or privileged, to the extent that such data
pertains to items, components or processes developed at
private expense, including minor modifications thereof. (NASA
may, however, adopt when appropriate (see 18-27.473-2(b)) the
following alternate definition: "Limited-rights data," as
used in this subpart, means data developed at private expense
that embodies trade secrets or is commercial or financial and
confidential or privileged.)
"Limited rights," as used in this subpart, means the rights
of the Government in limited-rights data, as set forth in a
Limited Rights Notice if included in a data rights clause of
the contract.
"Restricted computer software," as used in this subpart,
means computer software developed at private expense and that
is a trade secret, is commercial or financial and confidential
or privileged, or is published copyrighted computer software,
including minor modifications of such computer software.
"Restricted rights," as used in this subpart, means the
rights of the Government in restricted computer software as

290

PATENTS, DATA, AND COPYRIGHTS

set forth in a Restricted Rights Notice if included in a data rights clause of the contract or as otherwise may be included or incorporated in the contract.

"Unlimited rights," as used in this subpart, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

18-27.472 Policy.

(a) It is necessary for NASA, in order to carry out its missions and programs, to acquire or obtain access to many kinds of data produced during or used in the performance of its contracts. Such data may be required to obtain competition among suppliers; fulfill certain responsibilities for disseminating and publishing the results of NASA activities; insure appropriate utilization of the results of NASA supported research, development, and demonstration activities; and meet other programmatic and statutory requirements. At the same time, NASA recognizes that its contractors may have a legitimate proprietary interest (e.g., a property right or other valid economic interest) in certain data resulting exclusively or partially from private investment, and that protection from unauthorized use and disclosure of this data is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the contractor's commercial position, and maintain NASA's ability to obtain access to or use of such data. The protection of this data by NASA is also necessary to encourage qualified contractors to participate in NASA programs and apply innovative concepts to such programs.

(b) The specific procedures and prescriptions for use of solicitation provisions and contract clauses set forth below are framed in light of the considerations in subparagraph (a) above to strike a balance between NASA's needs and the contractor's property rights and economic interests, and to implement those provisions of section 21 of the Office of Federal Procurement Policy Act, consistent with the foregoing, that are applicable to NASA. In applying these procedures and prescriptions it is important to recognize and maintain the conceptual distinction between those contract terms whose purpose is to define the respective rights and obligations of the Government and the contractor regarding the use, duplication and disclosure of that data which is developed, used, or delivered in the performance of a contract (i.e. data rights); and those contract terms whose purpose is to specify the data (in terms of both quantity and quality) that is to be delivered in the performance of a contract (i.e. data acquisition). Section 18-27.473 below relates to data rights; Section 18-27.474 below relates to data acquisition. Section 18-27.475 sets forth the solicitation provisions and contract

291

DATA AND COPYRIGHTS

clauses relating to both data rights and data acquisition in
accordance with the procedures of 18-27.473 and 18-27.474.
   18-27.473 Procedures--data rights.
   18-27.473-1 General.
   All contracts that require data be produced, furnished, or
acquired in meeting contract performance requirements must
contain terms that delineate the respective rights and
obligations of NASA and the contractor regarding the use,
duplication, and disclosure of such data, except certain
contracts resulting from sealed bidding that require only
existing or off-the-shelf data (other than limited-rights data
and restricted computer software) to be delivered and
reproduction rights are not needed for such data. As a general
rule, the data rights clause at 18-52.227-74, Rights in Data--
General, including Alternates I, II, and/or III where
determined appropriate as discussed in 18-27.473-2, is to be
used for this purpose. However, certain types of contracts,
the particular subject matter of a contract, or the intended
use of the data, may require the use of other prescribed
clauses or do not need a prescribed clause, as discussed in
18-27.473-3 or 4 (see also 18-27.474 for procedures relating
to data acquisition.)
   18-27.473-2 Basic rights in data clause.
   (a) Summary. The clause at 18-52.227-74, Rights in Data--
General, is structured to strike a balance between NASA's
needs for using, duplicating, and disclosing data involved in
or resulting from contract performance in order to carry out
its missions and programs and the contractor's needs to
protect property rights and valid economic interests in
certain data arising out of private investment. This clause
enables the contractor to protect from unauthorized use and
disclosure data that qualifies as limited-rights data or
restricted computer software. (See paragraph (b) below for an
alternate definition of limited-rights data.) This clause also
specifically delineates the categories or types of data that
NASA is to acquire with unlimited rights. (See paragraph (c)
below.) The contractor may protect qualifying limited-rights
data and restricted computer software under this clause by
either withholding such data from delivery to NASA; or when
NASA has a need to obtain delivery of limited-rights data or
restricted computer software, by delivering such data with
limited rights or restricted rights with authorized notices on
the data. (See paragraphs (d) and (e) below.) In addition,
this clause enables contractors to establish and/or maintain
copyright protection for data first produced and/or delivered
under the contract, subject to certain copyright license
rights. (See paragraph (g) below.) This clause also includes
procedures that apply when NASA questions whether notices on
data are authorized (see paragraph (h) below) or when a
contractor wishes to add or correct omitted or incorrect
notices on data (see paragraph (i) below); and addresses the

292

PATENTS, DATA, AND COPYRIGHTS

contractor's right to release, publish or use certain data
involved in contract performance (see paragraph (j) below).
    (b) Alternate definition of limited-rights data. In the
clause at 18-52.227-74, Rights in Data--General, in order for
data to qualify as limited-rights data, in addition to being
data that either embodies a trade secret or is data that is
commercial or financial and confidential or privileged, such
data must also pertain to items, components, or processes
developed at private expense, including minor modifications
thereof. However, where appropriate, NASA may determine to
adopt in the clause the alternate definition for limited-
rights data that does not require that such data pertain to
items, components, or processes developed at private expense;
but rather that the data that either embodies a trade secret
or that is commerical or financial and confidental or
privileged be produced at private expense in order to qualify
as limited-rights data. As an example, this alternate
definition may be used where the principal purpose of a
contract does not involve the development, use, or delivery of
items, components, or processes that are intended to be
acquired for use by or for the Government (either under the
contract in question or any anticipated follow-on contracts
relating to the same subject matter). Other examples include
contracts for market research and surveys, economic forecasts,
socio-economic reports, educational material, health and
safety information, management analysis, and related matters.
This alternate definition of limited-rights data may be
adopted, where appropriate, by using the clause with its
Alternate I. This Alternate I is to be used only with approval
of the Procurement Officer and concurrence of installation
Intellectual Property or Patent Counsel.
    (c) Unlimited-rights data. Under the clause at 18-52.227-74,
Rights in Data--General, the following data is acquired with
unlimited rights except as provided in paragraph (g) below for
copyrighted data: (1) data first produced in the performance
of contract, except to the extent such data constitutes minor
modifications to data that is limited-rights data or
restricted computer software; (2) form, fit, and function data
delivered under a contract; (3) data (except as may be
included with restricted computer software) that constitutes
manuals or instructional and training material for
installation, operation, or routine maintenance and repair of
items, components or processes delivered or furnished for use
under a contract; and (4) all other data delivered under a
contract unless such data qualifies as limited-rights data or
restricted computer software. If any of the foregoing data is
published copyrighted data with the notice of 17 U.S.C. 401 or
402, it is acquired under a copyright license as set forth in
paragraph (g) below rather than with unlimited rights.
    (d) Protection of limited-rights data. (1) The contractor
may protect data (other than unlimited-rights data or

293

DATA AND COPYRIGHTS

published copyrighted data) that qualifies as limited-rights data under the clause at 18-52.227-74, Rights in Data-- General, by withholding such data from delivery and providing form, fit, and function data in lieu thereof; or, if the clause is used with its Alternate II and delivery of the data is required, by delivering such data with limitations on its use and disclosure. The mode of protection afforded the contractor (i.e. withhold or deliver with limited rights) is provided for in paragraph (g) of the clause at 18-52.227-74, Rights in Data--General. Subparagraph (g)(1) of this clause allows the contractor to withhold limited-rights data and provide form, fit, and function data in lieu thereof. Alternate II adds subparagraph (g)(2) to this clause to enable NASA selectively to request the delivery of withheld or withholdable data with limited rights. The limitations on the Government's right to use and disclose limited-rights data when the clause is used with its Alternate II are set forth in a "Limited Rights Notice" that the contractor is required to affix to such data. The specific limitations in the Notice are described in subparagraph (2) below.

   (2) Limited-rights data delivered with the Limited Rights Notice contained in subparagraph (g)(2) (Alternate II) will not, without permission of the contractor, be used by the Government for purposes of manufacture, and will not be disclosed outside the Government except for certain limited purposes as may be included in the Notice, and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. Specific purposes which may be included in the Limited Rights Notice of subparagraph (g)(2) of the clause are set forth below. The purpose set forth in subdivision (i) below is to be included unless the contracting officer determines it is not necessary. The purposes set forth in subdivisions (ii) through (v) below may be included if determined necessary by the contracting officer. No other purposes are to be included without approval of the Procurement Officer and concurrence of installation Intellectual Property or Patent Counsel.

   (i) Use by support service contractors.
   (ii) Evaluation by nongovernment evaluators.
   (iii) Use by other contractors participating in the Government's program of which this contract is a part, for information and use in connection with the work performed under their contracts.
   (iv) Emergency repair or overhaul work.
   (v) Release to a foreign government, as the interests of the United States may require, for information or evaluation, or for emergency repair or overhaul work by or on behalf of such government.

   (3) As an aid in determining whether the clause should be used wih its Alternate II, the provision at 18-52.227-75, Representation of Limited-Rights Data and Restricted Computer |

294

PATENTS, DATA, AND COPYRIGHTS

Software, may be included in any solicitation containing the
clause at 18-52.227-74, Rights in Data--General. This
provision requests an offeror to state in a response to a
soliciation,. to the extent feasible, whether limited-rights
data or restricted computer software is likely to be used in
meeting the data requirements set forth in the solicitation.
In addition, the need for Alternate II should be considered
during the negotiations of a contract, particularly if
negotiations are based on an unsolicited proposal. However,
use of the clause at 18-52.227-74, Rights in Data--General,
without Alternate II does not preclude this Alternate from
being used subsequently by amendment during contract
performance should the need arise for delivery of limited-
rights data that has been withheld or identified as
withholdable. Installation Intellectual Property or Patent
Counsel should be consulted on questions regarding the use of
Alternate II.
    (e) Protection of restricted computer software.
    (1) The contractor may protect computer software that
qualifies as restricted computer software under the clause at
18-52.227-74, Rights in Data--General, by withholding such
data from delivery and providing form, fit, and function data
in lieu thereof; or if the clause is used with its Alternate
III and delivery of the software is required, by delivering
the software with restricted rights regarding its use,
disclosure, and reproduction. The mode of protection afforded
the contractor (i.e. withhold or deliver with restricted
rights) is provided for in paragraph (g) of the clause at 18-
52.227-74, Rights in Data--General. Subparagraph (g)(1) of
this clause allows the contractor to withhold restricted
computer software and provide form, fit, and function data in
lieu thereof. Alternate III adds subparagraph (g)(3) to this
clause to enable NASA selectively to obtain delivery of the
withheld or withholdable computer software with restricted
rights. It should be particularly noted that unlike other
data, computer software is also an end item in itself, such
that if it is withheld and form, fit, and function data is
provided in lieu thereof an operational program will not be
acquired. Thus, if delivery of restricted computer software is
anticipated to be needed to meet contract performance
requirements (see subparagraph (4) below), the contracting
officer should assure that the clause is used with its
Alternate III. The restrictions on the Government's right to
use, disclose, and reproduce restricted computer software when
the clause is used with its Alternate III are set forth in a
"Restricted Rights Notice" which the contractor is required to
affix to such computer software. When restricted computer
software delivered with such Notice is published copyrighted
computer software, it is acquired with a restricted copyright
license, without disclosure prohibitions, as also set forth in

DATA AND COPYRIGHTS

the Notice. The specific restrictions in the Notice are set forth below.

(2) Restricted computer software delivered with the Restricted Rights Notice of subparagraph (g)(3) (Alternate III) will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be --

(i) Used or copied for use in or with the computer for which it was acquired, including use at any Government installation to which such computer may be transferred;

(ii) Used or copied for use in or with a backup computer if the computer for which it is acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights; and

(v) Disclosed and reproduced by support contractors or their subcontractors, subject to the same restrictions under which the Government acquired the software.

(3) The restricted rights set forth in subparagraph (2) above are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of subparagraph (g)(3) (Alternate III) of the clause. However, either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired, may be either included in the Notice or specified in the contract. This should include obtaining appropriate rights for networking (i.e., loading the program into the memory of a host computer for use in or with multiple processors, computers, workstations, and terminals which may form a network or system located at a single site or be connected by communications to other networks or systems located at different sites), if such need exists. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause are to be expressly stated in the contract; or, with approval of the contracting officer, in a collateral agreement incorporated in and made part of the contract. (See 18-27.473-4(b).)

(4) As an aid in determining whether the clause should be used with its Alternate III, the provision at 18-52.227-75, Representation of Limited-Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 18-52.227-74, Rights in Data--General. This provision requests an offeror to state in a response to a solicitation, to the extent feasible, whether limited-rights data or restricted computer software is likely to be used in

296

PATENTS, DATA, AND COPYRIGHTS

meeting the data requirements set forth in the solicitation. In addition, the need for Alternate III should be considered during negotiations of a contract, particularly if negotiations are based on an unsolicited proposal. However, use of the clause at 18-52.227-74, Rights in Data--General, without Alternate III does not preclude this Alternate from being used subsequently by amendment during contract performance, should the need arise for the delivery of restricted computer software that has been withheld or identified as withholdable. Installation Intellectual Property or Patent Counsel should be consulted on questions regarding the use of Alternate III.

(5) Whenever data that would qualify as limited-rights data if delivered in human-readable form is formatted as a computer data base for the purposes of delivery under a contract containing the clause at 18-52.227-74, Rights in Data-General, such data is to be treated as limited-rights data subject to the Limited Rights Notice of subparagraph (g)(2) (Alternate II) of that clause, and not as restricted computer software subject to the Restricted Rights Notice of subparagraph (g)(3) (Alternate III) of that clause.

(f) License rights in data.

In certain contracts involving co-sponsored research and development wherein the contractor is required to make substantial contributions of funds or resources (i.e., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software developed or produced under the contract are not readily segregable, NASA may acquire license rights rather than unlimited rights to any data developed and delivered under such contract. Basically such license rights will, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and will address any disclosure limitations or restrictions to be imposed on the data. Since the purpose of the co-sponsored research, the legitmate proprietary interests of the contractor, the needs of NASA, and the respective contributions of both parties may vary, no specific clauses are prescribed but a License Rights in Data clause may be taylored to the circumstances consistent with the foregoing and the policy set forth in section 18-27.472. Use of a License Rights in Data clause must be authorized by the Procurement Officer and developed in consultation with installation Intellectual Property or Patent Counsel. As a guide, use is to be authorized only when the contribution of funds or potential repayment of non-recurring costs by the contractor is approximately 50% of the cost to the Government absent such cost sharing, and the respective contributions are not readily segregable for any work elements to be performed under the contract. Such clause may be used for all or for only specifically identified tasks or work

297

DATA AND COPYRIGHTS

elements under the contract. In the latter instance its use
will be in addition to whatever other data rights clause is
prescribed under this Subpart, with the contract specifically
identifying which clause is to apply to which tasks or work
elements.

    (g) Copyrighted data.
        (1) Data first produced in the performance of a
contract. (i) In order to enhance the transfer or
dissemination of information produced at Government expense,
contractors may be granted permission to establish claim to
copyright subsisting in data first produced in the performance
of work under a contract containing the clause at 18-52.227-
74, Rights in Data--General. This permission is normally
granted in subparagraph (c)(1) of the clause for scientific
and technical articles based on the work performed under the
contract and published or presented in academic, professional
and technical journals or conference papers. For all other
data, such permission may be granted by the contracting
officer, in consultation with installation Intellectual
Property or Patent Counsel, in accordance with the procedures
in subdivision (ii) below.

        (ii) Usually, permission for a contractor to establish
claim to copyright for data first produced under the contract
will be granted under subparagraph (c)(1) of the clause at 18-
52.227-74, Rights in Data--General, when copyright protection
will enhance the appropriate transfer or dissemination of such
data. The request for permission must be in writing, and may
be made either at the time of contracting or subsequently
during contract performance. It should identify the data
involved or furnish a copy of the data for which permission is
requested, as well as a statement as to the intended
publication or dissemination media or other purpose for which
copyright is desired. The request normally will be granted
unless (A) the data consists of a report that represents the
official views of the agency or that the agency is required by
statute to prepare, (B) the data is intended primarily for
internal use by the Government, (C) the data is of the type
that the agency itself distributes to the public under an
established program, or (D) the data is of a type that is
subject to limited distribution due to Government policy.

        (iii) Whenever a contractor establishes claim to
copyright subsisting in data first produced in the performance
of a contract, the Government normally is granted a paid-up,
nonexclusive, irrevocable, worldwide license to reproduce,
prepare derivative works, distribute copies to the public,
perform publicly and display publicly, by or on behalf of the
Government, for all such data, as set forth in subparagraph
(c)(1) of the clause at 18-52.227-74, Rights in Data--General.
However, NASA may on a case-by-case basis obtain on equitable
terms a license of lesser scope than set forth in subparagraph
(c)(1) of the clause if the contracting officer determines,

298

PATENTS, DATA, AND COPYRIGHTS

| with concurrence of installation Intellectual Property or
Patent Counsel, that such lesser license will substantially
enhance the transfer or dissemination of any data first
produced under the contract.

(2) <u>Data not first produced in the performance of a
contract.</u>

(i) Contractors are not to incorporate in data delivered
under a contract any data that is not first produced under the
contract and that is marked with the copyright notice of 17
U.S.C. 401 or 402, without either (A) acquiring for or
granting to the Government a paid-up, nonexclusive,
irrevocable, worldwide license to reproduce, prepare
derivative works, distribute copies to the public, and perform
publicly and display publicly, by or on behalf of the
Government, for all such data or (B) obtaining permission from
the contracting officer to do otherwise. However, if computer
software not first produced under contract is delivered with
the copyright notice of 17 U.S.C. 401 or 402, the Government's
license will be as set forth in subparagraph (g)(3) (Alternate
III) if included in the clause at 18-52.227-74, Rights in
Data--General, or as otherwise may be provided in a collateral
agreement incorporated in or made part of the contract.

(ii) Contractors delivering data with both an authorized
limited-rights or restricted-rights notice and the copyright
notice of 17 U.S.C. 401 or 402 should modify the copyright
notice to include the following (or similar) statement:
"Unpublished--all rights reserved under the copyright laws."
If this statement is omitted, the contractor may be afforded
an opportunity to correct it in accordance with 18-27.473-
2(h). Otherwise, data delivered with a copyright notice of 17
U.S.C. 401 or 402 may be presumed to be published copyrighted
data subject to the applicable license rights set forth in
subdivision (i) above, without disclosure limitations or
restrictions.

(iii) If contractor action causes limited-rights or
restricted-rights data to be published with the copyright
notice of 17 U.S.C. 401 or 402 after its delivery to the
Government, the Government is relieved of disclosure and use
limitations and restrictions regarding such data, and the
contractor should advise the Government, request that a
copyright notice be placed on the copies of the data delivered
to the Government, and acknowledge that the applicable
copyright license set forth in subparagraph (2) above applies.

| (h) <u>Unauthorized marking of data.</u> The Government has, in
accordance with paragraph (e) of the clause at 18-52.227-74,
Rights in Data--General, the right to either return to the
contractor data containing markings not authorized by
subparagraphs (g)(2) or (g)(3) of that clause, or to cancel or
ignore such markings. However, markings will not be cancelled
or ignored without making written inquiry of the contractor
and normally affording the contractor at least 30 days to

DATA AND COPYRIGHTS

substantiate the propriety of the markings. This 30-day
period may be shortened to a period of not less than 5 days
from the date of receipt of such inquiry by the contractor if
the contracting officer determines, with approval of the
Procurement Officer and concurrence of installation
Intellectual Property or Patent Counsel, that there are |
exigencies justifying a shorter period for the contractor to
respond. The contracting officer will also give the
contractor notice of any determination made based on any
response by the contractor. Any such determination to cancel
or ignore the markings shall be a final decision under the
Contract Disputes Act. Failure of the contractor to respond
to the contracting officer's inquiry within the time afforded
may, however, result in Government action to cancel or ignore
the markings. The above procedures may be modified in
accordance with regulations implementing the Freedom of
Information Act (5 U.S.C. 552) if necessary to respond to a
request for data thereunder.
    (i) <u>Omitted or incorrect notices.</u> (1) Data delivered under a |
contract containing the clause at 18-52.227-74, Rights in
Data--General, without a limited rights notice or restricted
rights notice, and without a copyright notice, shall be
presumed to have been delivered with unlimited rights, and the
Government assumes no liability for the disclosure, use, or
reproduction of such data. However, to the extent the data
has not been disclosed without restriction outside the
Government, the contractor may within 6 months (or a longer
period approved by the contracting officer for good cause
shown) request permission of the contracting officer to have
omitted limited rights or restricted rights notices, as
applicable, placed on qualifying data at the contractor's
expense, and the contracting officer may agree to so permit if
the contractor (i) identifies the data for which a notice is
to be added or corrected, (ii) demonstrates that the omission
of the proposed notice was inadvertent, (iii) establishes that
use of the proposed notice is authorized, and (iv)
acknowledges that the Government has no liability with respect
to any disclosure or use of any such data made prior to the
addition of the notice or resulting from the omission of the
notice.
    (2) The contracting officer may also (i) permit
correction, at the contractor's expense, of incorrect notices
if the contractor identifies the data on which correction of
the notice is to be made, and demonstrates that the correct
notice is authorized, or (ii) correct any incorrect notices.
    (j) <u>Release, publication, and use of data.</u> (1) In |
paragraph (d) of the clause at 18-52.227-74, Rights in Data-- |
General, subparagraph (d)(1) provides that contractors |
normally have the right to use, release to others, reproduce,
distribute, or publish data first produced in the performance |
of a contract except to the extent such data may be subject to |

300

PATENTS, DATA, AND COPYRIGHTS

the Federal export control laws and regulations or unless otherwise set forth in either paragraph (d) of the clause or as expressly set forth in the contract (see the procedures of subparagraphs (2) and (3) below). In addition, to the extent the contractor receives or is given access to data that is necessary for the performance of the contract from the Government or others acting on behalf of the Government, and the data contains restrictive markings, subparagraph (d)(2) provides an agreement with the contractor to treat the data in accordance with such markings unless otherwise specifically authorized in writing by the contracting officer.

(2) In accordance with NASA policy and procedures for the distribution of computer software developed by NASA and NASA contractors (NASA Management Instruction 2210.2A, April 24, 1978), a contractor is not to establish claim to copyright, publish, or release to others computer software first produced in the performance of contract without prior written permission of the contracting officer. This limitation is therefore included in subparagraph (d)(3) of the clause at 18-52.227-74, Rights in Data--General. Such permission may be granted only with concurrence of the cognizant official named in the NMI. The contracting officer may also, at the request of the contractor prior to contract award, delete said subparagraph (d)(3) from the clause or modify or override it with express contract provisions, if the contracting officer, with the concurrence of the cognizant official named in the NMI, determines either that the contract will not require a significant development effort for computer software as defined in NASA Management Instruction 2210.2A, or that such deletion, modification or overriding is otherwise consistent with the NMI.

(3) Any other provisions imposing limitations or restrictions on the contractor's right to use, release to others, reproduce, distribute, or publish data first produced in the performance of a contract must be expressly stated in the contract, and contain specific reference to paragraph (d) of the clause at 18-52.227-74, Rights in Data--General. Use of such provisions requires approval of the Procurement Officer and concurrence of installation Intellectual Property or Patent Counsel. Additional contractual limitations or restrictions (other than as may be required for national security reasons) are not to be imposed on data specifically used, but not first produced, in the performance of a contract without the approval of the Assistant Administrator for Procurement.

(k) Rights to technical data in successful proposals.

(1) NASA may, as consideration of contract award, desire to acquire unlimited rights in technical data (but not commercial or financial information) contained in a successful proposal upon which a contract award is based. However, the prospective contractor may (i) advise the contracting officer

301

DATA AND COPYRIGHTS

that the technical data, or portions thereof, (to be identified by the prospective contractor) are covered by the prescribed "Restriction on Use and Disclosure of Proposal and Quotation Information (Data)" notice (as set forth in 18-52.215-72 for solicited proposals and in 18-15.509-70 for unsolicited proposals) and request that such protection continue, or (ii) establish to the contracting officer's satisfaction that identified portions of the technical data do not relate directly to or will not be utilized in the work to be performed under the contract and request that such portions be excluded from the Government's rights.

(2) If unlimited rights to technical data in successful proposals, as set forth in subparagraph (1) above, are to be acquired, it shall be by use of the clause at 18-52.227-81, Rights to Proposal Data (Technical). Any excluded technical data will be identified by inserting appropriate proposal page numbers in the clause. Such exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in Part 18-15 relating to proposal information (i.e., will be used for evaluation purposes only). If the clause at 18-52.227-81 is included in a contract, the prospective contractor must be specifically afforded the opportunity to exclude technical data as set forth in subparagraph (1) above, and the contract file must reflect that fact. If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to its acquisition as limited-rights data, if it so qualifies, in accordance with paragraph (d) above.

18-27.473-3 Production of special works.

(a) The clause at 18-52.227-77, Rights in Data--Special Works, applies to contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for --

(1) The production of audiovisual works including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like;

(2) Histories of the respective agencies, departments, services, or units thereof;

(3) Works pertaining to recruiting, morale, training, or career guidance;

(4) Surveys of Government establishments;

302

PATENTS, DATA, AND COPYRIGHTS

(5) Works pertaining to the instruction or guidance of
Government officers and employees in the discharge of their
official duties;
(6) The compilation of reports, studies, surveys, or
similar documents that do not involve research, development,
or experimental work performed by the contractor;
(7) The collection of data containing personally
identifiable information such that the disclosure thereof
would violate the right of privacy or publicity of the
individual to whom the information relates;
(8) Investigation reports; or
(9) The development, accumulation, or compilation of data
(other than that resulting from research, development, or
exerimental work performed by the contractor), the early
release of which could prejudice follow-on acquisition
activities.
(b) The contract may specify the purposes and conditions
(including time limitations) under which the data may be used,
released, or reproduced other than for contract performance.
Contracts for the production of audiovisual works, sound
recordings, etc. may include limitations in connection with
talent releases, music licenses, and the like that are
consistent with the purposes for which the works are acquired.
(c) Paragraph (e) of the clause, which requires the
contractor to indemnify the Government against any liability
incurred as the result of any violation of trade secrets,
copyrights, right of privacy or publicity, or any libelous or
other unlawful matter arising out of or contained in any
production or compilation of data that is subject to the
clause, may be deleted or limited in scope where the
contracting officer determines, in consultation with
installation Intellectual Property or Patent Counsel, that
because of the nature of the particular data involved such
liability will not arise.
18-27.473-4 Rights relating to the acquisition of existing
data other than limited-rights data.
(a)   Existing audiovisual and similar works. The clause at
18-52.227-78, Rights in Data--Existing Works, is for use in
contracts exclusively for the acquisition (without
modification) of existing motion pictures, television
recordings, and other audiovisual works; sound recordings;
musical, dramatic, and literary works, pantomimes and
choreographic works; pictorial, graphic, and sculptural works;
and works of a similar nature. The contract may set forth
limitations consistent with the purposes for which the works
covered by the contract are being acquired. Examples of these
limitations are (1) means of exhibition or transmission, (2)
time, (3) type of audience, and (4) geographical locations. If
the contract requires that works of the type indicated above
are to be modified through editing, translation, or addition
of subject matter, etc. (rather than purchased in existing

303

DATA AND COPYRIGHTS

form) the clause at 18-52.227-77, Rights in Data--Special
Works, is to be used. (See 18-27.473-3.)

   (b) <u>Separate acquisition of existing computer software.</u> (1)
If the contract is for the separate acquisition of existing
computer software, no specific contract clause contained in
this subpart need be used. However, the contract must
specifically address the Government's rights to use, disclose,
and reproduce the software and must contain terms obtaining
sufficient rights for the Government to fulfill the need for
which the software is being acquired. The restricted rights
set forth in 18-27.473-2(e) should be used as a guide and are
usually the minimum the Government should accept. If the
computer software is to be used for networking purposes (i.e.,
loading a program into the memory of a host computer for use
in or with multiple processors, computers, workstations, and
terminals which may form a network or system located at a
single site or be connected by communications to other
networks or systems located at different sites), adequate
rights for such purposes must also be obtained. If the
computer software is "commercial" computer software (i.e.,
privately developed software normally vended commercially
under a license or lease agreement restricting its use,
disclosure, or reproduction) the clause at 18-52.227-79,
Commercial Computer Software--Restricted Rights, may be used
in the contract or purchase order (see also subparagraph (2)
below). When using such clause the contract or purchase order
may expressly state any additions to, or limitations on, the
restricted rights set forth in subparagraph (d)(2) of the
clause. If the computer software is to be acquired with
unlimited rights, the contract or purchase order must also so
state. In addition, the contract must adequately describe the
computer programs and/or data bases, the form (tapes, punch
cards, disc pack, and the like), and all the necessary
documentation pertaining thereto. If the acquisition is by
lease or license, the disposition of the computer software (by
returning to the vendor or destroying) at the end of the term
of the lease or license must be addressed.

      (2) If the contract incorporates, makes reference to, or
uses a vendor's standard commercial lease, license, or
purchase agreement, such agreement shall be reviewed to assure
that it is consistent with subparagraph (1) above. Caution
should be exercised in accepting a vendor's terms and
conditions since they may be directed to commercial sales and
may not be appropriate for Government contracts. Any
inconsistencies in a vendor's standard commercial agreement
shall be addressed in the contract and the contract terms
shall take precedence over the vendor's standard commercial
agreement. If the clause 18-52.227-79, Commercial Computer
Software--Restricted Rights, is used, inconsistencies in the
vendor's standard commercial agreement are reconciled by the
clause.

NASA/FAR SUPPLEMENT   18-27.473-4

PATENTS, DATA, AND COPYRIGHTS

(3) If a prime contractor under a contract containing the clause at 18-52.227-74, Rights in Data--General, with its Alternate III, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to the Government, the contracting officer may approve any additions to or limitations on the restricted rights in the Restricted Rights Notice of subparagraph (g)(3) in a collateral agreement incorporated in and made part of the prime contract. (See also 18-27.473-2(e).)

(c) Other existing works. Except for existing audiovisual and similar works as discussed in paragraph (a) above, and existing computer software as discussed in paragraph (b) above, no clause contained in this subpart need be included in (i) contracts where the only data to be acquired consists solely of books, publications, and similar items in the exact form in which such items exist prior to the request for purchase (i.e. the off-the-shelf purchase of such items) unless reproduction rights of such items are to be obtained or (ii) contracts resulting from sealed bidding that require only existing data (other than limited-rights data) to be delivered unless reproduction rights for such data are to be obtained. If reproduction rights are to be obtained, such rights must be specifically set forth in the contract.

18-27.473-5 Contracts awarded under Small Business Innovative Research (SBIR) Program.

The clause at 18-52.227-80, "Rights in Data--SBIR Program, is for use in all Phase I or Phase II contracts awarded under the Small Business Innovative Research (SBIR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982). The clause is limited to use solely in contracts awarded under the SBIR Program, and is the only data rights clause to be used in such contracts.

18-27.474 Procedures--acquisition of data.

(a) General. (1) The requirements for data to be delivered under a contract should strike a balance between NASA's policies of providing for the widest practical and appropriate dissemination of the results of NASA's research and development activities, protecting a contractor's legitimate proprietary interest, providing for full and open competition, and obtaining adequate documentation to operate and maintain items and components or use processes necessary for NASA to carry out its missions and objectives.

(2) It is NASA's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements are subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloguing, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum consistent with subparagraph (1) above.

305

DATA AND COPYRIGHTS

(3) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data, shall be specified in the contract.   In establishing the contract data requirements and in specifying data items to be delivered by a contractor, NASA installations may, in accordance with paragraph (b) below, develop their own contract schedule provisions (including data requirements lists and data description documents) for listing, specifying, describing, identifying source of, assuring delivery of, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(b)   Specifying data delivery requirements. (1) The requirements for technical and other data (including computer software and documentation thereof) to be delivered as an element of performance under any contract, as well as the delivery schedule therefor, should, to the maximum extent practicable, be either specified or referenced in a single section of the contract addressing data delivery requirements. Such requirements shall take into consideration the factors set forth in subparagraphs (2)-(5) below. Any specifications used to describe the data, in terms of type, purpose, and format, should also be referenced in that single section of the contract and made applicable to the data required to be delivered.

(2) The contractor normally should be required to furnish reports of work performed under all research and development contracts (fixed price and cost reimbursable), and also may be required to furnish such reports in cost-reimbursable supply contracts if considered desirable for monitoring contract performance. This may be achieved by including the clause substantially as provided at 18-52.227-82, Reports of Work, in contracts with other than nonprofit organizations or by including substantially the same requirements, modified as needed to meet the particular requirements of the contract, in the section of the contract specifying data delivery requirements. Normally in contracts with nonprofit organizations, the clause should be modified to eliminate the requirement for monthly process reports. Consideration should be given to the desirability of providing reports on the completion of significant units or phases of work, in addition to periodic reports and reports on the completion of the entire contract. If the clause at 18-52.227-82 is used, it should be referenced in the section of the contract specifying data delivery requirements. Use of such clause, however, does not preclude the listing of other data in such section to be delivered under the contract. The clause may also be modified to enable the contracting officer to provide specific instructions regarding delivery, report numbering, distribution lists, and other information to assure appropriate distribution of the required reports of work, or

PATENTS, DATA, AND COPYRIGHTS

such instructions may be included in the section of the
contract specifying data delivery requirements. In addition,
if in accordance with NASA Management Instruction (NMI)
2230.1, "NASA Scientific and Technical Document Availability
Authorization," an initial determination is made that any of
the foregoing reports of work required to be furnished under a
research and development contract may receive unrestricted
release (a publicly available document) pursuant to a blanket
release as authorized in the NMI, the contractor may be
requested to send a reproducible copy and a printed copy of
such reports to --

        NASA Scientific & Technical Information Facility
        Attn: Accessioning Department
        P.O. Box 8785
        Baltimore/Washington International Airport, MD 21240

This may be achieved by either using the clause·at 18-52.227-
82 with its Alternate I, or by stating such requirement in the
section of the contract specifying data delivery requirements.
    (3) Requirements for delivery of technical data relating
to standard commercial items, components, or processes should
be kept to the absolute minimum consistent with the purpose
for which such item, component, or process is being procured.
Normally a vendor's manuals for installation, operation or
routine maintenance and repair, and/or form, fit, and function
data, is adequate for most needs.
    (4) Any detailed design, development, or production
contract with an estimated cost (in current year dollars) of
$1,000,000 or more at the time of procurement plan approval
should have the delivery requirements for technical data set
forth in separate contract line items. Such data line items
should normally be broken down in terms of the subassembly,
assembly, or subsystem to which the data relates. If
practicable under the circumstances, such line items may be
further broken down to the part or component level if the
design or development of the part or component is required as
a work element under the contract and there are anticipated
reprocurement needs for such part or component. Separate data
line items may also be used in contracts not meeting the above
thresholds. Pursuant to Pub. L. 98-577, separate data line
items are required in contracts for a major system acquisition
(and to which the clause at 18-52.227-83 is applicable, see
paragraph (d) below).
    (5) In no event should any data delivery requirements be
construed to require that a contractor provide the Government,
as a condition of the procurement, unlimited rights in, or
reprocurement rights to, any data that qualifies as limited-
rights data or restricted computer software. Rather, form,
fit, and function data is to be furnished with unlimited
rights in lieu of the qualifying data, or the qualifying data

DATA AND COPYRIGHTS

is to be furnished with limited rights or restricted rights if needed (see 18-27.473-2(d) and (e)). The provision at 18-52.227-75, Representation of Limited-Rights Data and Restricted Computer Software, should be used as an aid in determining whether any limited-rights data or restricted computer software is likely to be used in meeting contract data requirements. The matter should also be addressed during contract negotiations.

(c) <u>Additional data requirements.</u> Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be possible or appropriate to ascertain all the data requirements at the time of contracting, the clause at 18-52.227-73, Additional Data Requirements, is provided to enable the subsequent ordering by the Government of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. Data may be ordered under this clause at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contractor may be relieved of retention requirements for specified data items by the contracting officer any time during the retention period required by the clause. Any data ordered under the clause will be subject to the Rights in Data--General clause in the contract, and data authorized to be withheld under that clause will not be required to be delivered under the Additional Data Requirements clause.

(d) <u>Major system acquisitions.</u> (1) In order to assure that technical data needed to support a major system acquisition is timely delivered and is complete, accurate, and satisfies the requirements of the contract concerning the data, the clause at 18-52.227-83, Technical Data Certification, Revision, and Withholding of Payment, is to be included in every detailed design, development, or production contract for a major system acquisition (as the term "major system" is defined in section 4 of the Office of Federal Procurement Policy Act, as amended by Pub. L. 98-577), and in contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property which may be replaced during the service life of the system, and including spare parts and replenishment spare parts unless it is determined prior to the time of contract execution, with approval of the Assistant Administrator for Procurement, that it is not needed for either a given contract or for identified work elements (including the data delivery requirements therefor) of a given contract. It is to be used in other contracts only with approval of the Assistant Administrator for Procurement.

PATENTS, DATA, AND COPYRIGHTS

(2) The clause at 18-52.227-83 requires the contractor, upon delivery of any technical data made subject to the clause in the contract, to certify that such data is complete, accurate, and complies with contract requirements. It also provides for corrections of any deficiencies in the data, as well as for the ability of the Government to request revisions of the data to reflect engineering design changes made during performance of the contract and affecting form, fit, and function of the items the data depicts. Further included is the authority to withhold payment under the contract to assure timely delivery of the technical data and/or assure correction if the technical data is not complete, accurate, and in compliance with contract requirements.

(3) When the clause at 18-52.227-83 is used, the section of the contract specifying data delivery requirements (see subparagraph (b)(4) above) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of such technical data, the technical officer, or such other designated official responsible for data management under the contract, shall review the technical data and the contractor's certification relating thereto to assure that the data is complete, accurate, and complies with contract requirements. If not, the contractor is to be requested to correct the deficiencies, and payment may be withheld until such is done. Final payment should not be made under the contract until the technical officer, or other designated official, provides a written statement to the contracting officer that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

18-27.475 Solicitation provisions and contract clauses.

18-27.475-1 Rights in data--general.

(a)(1) The contracting officer shall insert the clause at 18-52.227-74, Rights in Data--General, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is--

(i) For the production of special works of the type set forth in 18-27.473-3, but the clause at 18-52.227-74, Rights in Data-General, shall be included in the contract and made applicable to data other than special works, as appropriate;

(ii) For the separate acquisition of exisiting works, as described in 18-27.473-4;

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case the contracting officer may prescribe different clauses (see also 18-27.475-8(a) below);

(iv) For architect-engineer services or construction work, in which case the contracting officer may prescribe different clauses (see 18-27.475-8(b) below), but the clause at 18-52.227-74, Rights in Data--General, may be included in

DATA AND COPYRIGHTS

the contract and made applicable to data pertaining to other than architect-engineer services and construction work;

     (v) A Small Business Innovative Research (SBIR) contract (Phase I or Phase II) (see 18-27.475-7); or

     (vi) A contract involving co-sponsored research and development in which a License Rights in Data clause has been authorized pursuant to 18-27.473-2(f) (see also 18-27.475-8(c) below).

    (2) If the contracting officer determines, in accordance with 18-27.473-2(b), to adopt the alternate definition of limited-rights data for use in the clause, the clause shall be used with its Alternate I.

    (3) If the contracting officer determines it is necessary to obtain the delivery of limited-rights data, the clause shall be used with its Alternate II (see 18-27.473-2(d)). The contracting officer shall, when Alternate II is used, assure that the purposes, if any, for which limited-rights data is to be disclosed outside the Government are included in the "Limited Rights Notice" of subparagraph (g)(2) of the clause in accordance with 18-27.473-2(d)(2). The contract may exclude identified items of data from delivery under subparagraph (g)(2) of the clause. Alternate II may be used at the time of contracting or subsequently by amendment if the need to acquire limited-rights data arises during contract performance.

    (4) If the contracting officer determines it is necessary to obtain the delivery of restricted computer software, the clause shall be used with its Alternate III (see 18-27.473-2(e)). Any greater or lesser rights regarding the use, duplication, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause must be specified in the contract. The contract may exclude identified items of computer software from delivery under subparagraph (g)(3) of the clause. Alternate III may be used at the time of contracting or subsequently by amendment if the need to acquire restricted computer software arises during contract performance.

   (b) The contracting officer may modify paragraph (d) of the clause as authorized in 18-27.473-2(j)(2) or (3).

   <u>18-27.475-2 Representation of limited-rights data and restricted computer software.</u>

    If the contracting officer desires to have an offeror state in response to a solicitation, to the extent feasible, whether limited-rights data or restricted computer software is likely to be used in meeting the data requirements set forth in the solicitation, the contracting officer shall insert the provision at 18-52.227-75, Representation of Limited-Rights Data and Restricted Computer Software, in the Representations section of any solicitation containing the clause at 18-52.227-74, Rights in Data--General. The contractor's response

PATENTS, DATA, AND COPYRIGHTS

will provide an aid in determining whether the clause should be used with Alternative II and/or Alternate III. (See 18-27.473-2(d) and (e).)

18-27.475-3 Additional data requirements.

(a) The contracting officer shall insert the clause at 18-52.227-76, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work, except those awarded using small purchase procedures, unless all the requirements for data are believed to be known at the time of contracting and are specified in the contract. (See 18-27.474.) This clause may also be used in other contracts when considered appropriate, after consultation with installation Intellectual Property or Patent Counsel. If the clause at 18-52.227-74, Rights in Data--General, is used in the contract with its Alternates II or III, the contracting officer may permit the contractor to identify data the contractor does not wish to deliver, and may specifically exclude in the contract any requirement that such data be delivered under paragraphs (g)(2) or (g)(3) of that clause or ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data.

(b) The contracting officer may alter the Additional Data Requirements clause by deleting the term "or specifically used" in paragraph (a) thereof if delivery of such data is not necessary to meet the Government's requirements for data.

18-27.475-4 Rights in data--special works.

The contracting officer shall insert the clause at 18-52.227-77, Rights in Data--Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 18-27.473-3. The contract may specify the purpose and conditions (including time limitations) under which the data may be used, released, or reproduced by the contractor for other than contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired. The contracting officer, in consultation with installation Intellectual Property or Patent Counsel, may delete or limit the scope of paragraph (e) of the clause where there is no specific need to obtain indemnity for the liabilities specified therein (see 18-27.473-3(c)).

18-27.475-5 Rights in data--existing works.

(a) The contracting officer shall insert the clause at 18-52.227-78, Rights in Data--Existing Works, in solicitations

3//

DATA AND COPYRIGHTS

and contracts exclusively for the acquisition, without
modification, of existing audiovisual and similar works of the
type set forth in 18-27.473-4(a). The contract may set forth
limitations consistent with the purposes for which the work is
being acquired. The clause at 18-52.227-75, Rights in Data--
Special Works, shall be used if existing works are to be
modified, as by editing, translation, addition of subject
matter, etc.

(b) While no specific clause of this subpart need be
included in contracts for the separate acquisition of existing
computer software, the contracting officer shall assure that
the contract contains terms to obtain sufficient rights for
the Government to fulfill the need for which the software is
being acquired and is otherwise consistent with 18-27.473-
4(b). In addition, the clause at 18-52.227-79, Commercial
Computer Software--Restricted Rights, may be used as
prescribed in 18-27.475-6.

(c) While no specific clause of this subpart need be
included in contracts solely for the acquisition of books,
publications and similar items in the exact form in which such
items exist prior to the request for purchase (i.e., the off-
the-shelf purchase of such items, see 18-27.473-4(c)), if
reproduction rights are to be acquired the contract shall
include terms addressing such rights. (See 18-27.473-4(c).)

18-27.475-6 Commercial computer software--restricted rights.

The contracting officer may insert the clause at 18-52.227-
79, Commercial Computer Software--Restricted Rights, in
solicitations and contracts for the separate acquisition of
existing privately-developed computer software normally vended
commercially under a license or lease agreement restricting
its use, disclosure, or reproduction, if it is desired to
assure consistency with the restricted rights set forth in 18-
27.473-2(e). (See also 18-27.473-4(b)).

18-27.475-7 Rights in data--SBIR Program.

The contracting officer shall insert the clause at 18-
52.227-80, Rights in Data--SBIR Program, in solicitations and
contracts for Phase I and Phase II under the Small Business
Innovative Research (SBIR) Program.

18-27.475-8 Additional clauses.

(a) The contracting officer may develop and include as
appropriate and in consultation with installation Intellectual
Property or Patent Counsel, clauses consistent with the policy
of 18-27.472 in contracts to be performed outside the United
States, its possessions, and Puerto Rico.

(b) The contracting officer may develop and include as
appropriate and in consultation with installation Intellectual
Property or Patent Counsel, clauses consistent with the policy
in 18-27.472 in contracts for architect-engineer services and
construction work.

(c) The contracting officer may develop and include, with
approval of the Procurement Officer and in consultation with

NASA/FAR SUPPLEMENT   18-27.475-8

PATENTS, DATA, AND COPYRIGHTS

installation Intellectual Property or Patent Counsel, a
License Rights in Data clause in solicitations and contracts
under the circumstances discussed in 18-27.473-2(f). Such
clause may be used for all or for specifically identified
tasks or work elements under the contract. In the latter
instance its use may be in addition to the clause at 18-
52.227-74, Rights in Data--General, with the contract
specifically identifying which clause is to apply to which
tasks or work elements to be performed under the contract.

18-27.475-9 Rights to proposal data (technical).
The contracting officer shall insert the clause at 18-
52.227-81, Rights to Proposal Data (Technical), in
solicitations and contracts if it is desired to obtain (with
contractor agreement) unlimited rights to technical data
contained in the proposal upon which contract award is based.
When this clause is used, the prospective contractor must be
be afforded an opportunity to exclude technical data from the
clause (i.e., unlimited rights are not acquired for the
excluded data) and the contract file must reflect that fact.
This clause is not to be used to obtain rights to any
commercial or financial information in the proposal. If there
is a need to have access to any of the excluded technical data
during contract performance, consideration should be given to
its acquisition with limited rights in accordance with 18-
27.473-2(d).

18-27.475-10 Reports of work.
(a) The contracting officer shall prescribe the clause at
18-52.227-82, Reports of Work, in all research and development
contracts unless it is determined, consistent with the
procedures of 18-27.474(b)(2), that it is not needed because
the reporting requirements thereof are adequately addressed in
a section of the contract schedule relating to data delivery
requirements. The clause may also be used in cost-
reimbursement supply contracts if considered desirable for
monitoring contract performance. When the clause is used, it
should be cross-referenced in the section of the contract
schedule specifying data delivery requirements. The clause may
be modified, as appropriate, in accordance with 18-
27.474(b)(2).
(b) The clause may be used with its Alternate I if there is
a blanket authorization, in accordance with NMI 2230.1, to
have reports furnished under the clause disseminated by the
NASA Scientific and Technical Information Facility without
restriction.

18-27.475-11 Acquisitions of major systems or parts
therefor.
The contracting officer shall insert the clause at 18-
52.227-83, Technical Data Certification, Revision and
Withholding of Payment, in contracts in support of a major
system of the type, and to the extent, set forth in 18-
27.474(d). When used, this clause requires that the technical

313

DATA AND COPYRIGHTS

data to which it applies be specified in the contract (see 18-
27.474(d)(3)).

314

TABLE OF CONTENTS

PART 52--SOLICITATION PROVISIONS AND
CONTRACT CLAUSES

NASA/FAR SUPPLEMENT   CFR TITLE 48 CHAPTER 18

3/5

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

The Contractor shall include the clause in the NASA FAR Supplement at 18-52.227-70, New Technology, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, research, design, or engineering work to be performed by other than a small business firm or a nonprofit organization.

(End of clause)

18-52.227-74 Rights in Data - General.
As prescribed in 18-27.475-1(a)(1) and (b), insert the following clause:

RIGHTS IN DATA--GENERAL (APRIL 1985)

(a) Definitions.
"Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as contract cost analyses or financial, business, and management information required for contract administration purposes.

"Technical data," as used in this clause, means that data (other than computer software) which is of a scientific or technical nature.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that is sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it specifically excludes the algorithm, process, formulas, and flow charts of the software.

"Limited-rights data," as used in this clause, means data that embodies trade secrets or is commerical or financial and confidential or privileged, but only to the extent that the data pertains to items, components, or processes developed at private expense, including minor modifications thereof.

"Limited rights," as used in this clause, means the rights of the Government in limited-rights data as set forth in the Limited Rights Notice of subparagraph (g) (2) if included in this clause.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is published copyrighted computer software, including minor modifications of such computer software.

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in the Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract.

"Unlimited rights," as used in this clause, means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) <u>Allocation of rights.</u> (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in--

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitutes manuals or instructional and training material for installation, operation, or routine maintenance and repair; and

(iv) All other data delivered under this contract unless provided otherwise for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) The Contractor shall have the right to--

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract unless provided otherwise in paragraph (d) below;

(ii) Protect from unauthorized disclosure and use that data which is limited-rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add, or correct limited-rights or restricted-rights notices and to take other appropriate action, in accordance with paragraphs (e) and (f) below; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) <u>Copyright.</u> (1) <u>Data first produced in the performance of this contract.</u> Unless provided otherwise in subparagraph (d) below, the Contractor may establish claim to copyright subsisting in scientific and technical articles based on or derived from data first produced in the performance of this contract and published or presented in academic, technical and professional journals or conference papers. The prior, express written permission of the Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract in accordance with 18-27.473-2(f) of the NASA FAR Supplement. If

3/7

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 to the data when such data is delivered to the Government, and include that notice as well as acknowledgment of Government sponsorship on the data when deposited in the U.S. Copyright Office or published. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that is not first produced in the performance of this contract and that contains the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above; provided, however, that if such data is computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) below if included in this contract or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.

(3) Removal of notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, publication, and use of data. (1) The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract except to the extent such data may be subject to the Federal export control laws and regulations, or unless either provided otherwise below in this paragraph or expressly set forth in this contract.

(2) The Contractor agrees that to the extent it receives or is given access to data that is necessary for the performance of this contract and that contains restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(3) The Contractor agrees not to establish claim to copyright, publish, or release to others computer software first produced in the performance of this contract without prior written permission of the Contracting Officer.

(e) Unauthorized marking of data. (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract is marked with the notices specified in subparagraphs (g) (2) or

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(g) (3) below and use of such is not authorized by this
clause, or if such data bears any other restrictive or
limiting markings not authorized by this contract, the
Contracting Officer may at any time either return the data to
the Contractor, or cancel or ignore the markings. However,
markings will not be cancelled or ignored unless--
       (i) The Contracting Officer makes written inquiry to the
Contractor concerning the propriety of the markings, providing
the Contractor 30 days (or a shorter period of not less than 5
days from the date of receipt of such inquiry by the
Contractor   if   the   Contracting   Officer determines, in
accordance with 18-27.473-2(g) of the NASA-FAR Supplement,

                   /Next page is 18-52.227:13/

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

that there are exigencies justifying such shorter period) to respond; and
     (ii) The Contractor fails to respond within the set period (or a longer time approved by the Contracting Officer for good cause shown), or the Contractor's response fails to substantiate the propriety of the markings.
     (2) The Contracting Officer shall consider the Contractor's response, if any, and determine whether the markings shall be cancelled or ignored. The Contracting Officer shall furnish written notice to the Contractor of the determination, which shall be a final decision under the Contract Disputes Act.
     (3) The above procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C 552) if necessary to respond to a request for data thereunder.
     (f) Omitted or incorrect markings.
     (1) Data delivered to the Government without any notice authorized by paragraph (g) below, and without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor--
     (i) Identifies the data to which the omitted notice is to be applied;
     (ii) Demonstrates that the omission of the notice was inadvertent;
     (iii) Establishes that the use of the proposed notice is authorized; and
     (iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.
     (2) The Contracting Officer may also (i) permit correction, at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.
     (g) Protection of limited-rights data and restricted computer software. (1) When data other than that listed in subdivisions (b)(1)(i), (ii), and (iii) above is specified to be delivered under this contract and qualifies as either limited-rights data or restricted computer software the Contractor, if it desires to continue protection of such data, shall withhold such data and not furnish it to the Government

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

under this contract. As a condition to this withholding the
Contractor shall identify the data being withheld and furnish
form, fit, and function data in lieu thereof.
    (2) (Reserved).
    (3) (Reserved).
    (h) Subcontracting.   The Contractor has the responsibility
to obtain from its subcontractors all data and rights therein
necessary to fulfill the Contractor's obligations to the
Government under this contract. If a subcontractor refuses to
accept   terms affording the Government such rights, the
Contractor shall promptly bring such refusal to the attention
of the Contracting Officer and not proceed with subcontract
award without further authorization.
    (i) Relationship 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.

(End of clause)

Alternate I (APRIL 1984). If a determination is made
pursuant to 18-27.475-1(a)(2), substitute the following
definition for the. definition of "Limited-rights data" in
paragraph (a) of the clause:

"Limited-rights data," as used in this clause, means data
produced at private expense that embodies trade secrets or is
commercial or financial and confidential or privileged.

| Alternate II (APRIL 1985). As prescribed in 18-27.475-
1(a)(3), insert the following subparagraph (2) in paragraph
(g) of the clause:

    (2) Notwithstanding subparagraph (g)(1) above, the contract
may identify and specify the delivery of limited-rights data,
or the Contracting Officer may require by written request the
delivery of limited-rights data that has been withheld or
would otherwise be withholdable. Limited-rights data formatted
as a computer data base is to be treated as limited-rights
data under this subparagraph. If delivery of such data is so
required, the Contractor may affix the following "Limited
Rights Notice" to the data and the Government will thereafter
treat the data, subject to the provisions of paragraphs (e)
and (f) above, in accordance with such Notice:

| LIMITED RIGHTS NOTICE (APRIL 1985)

| (a) This data is submitted with limited
rights   under   Government   contract   No.......   (and
subcontract......., if appropriate). It may be reproduced and
used by the Government with the express limitation that it

321

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

will not, without permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose this data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use by support service contractors.

(2) (The Contracting Officer may list additional purposes in accordance with 18-27.473-2(d) or shall insert "Reserved").

(b) This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of notice)

Alternate III (APRIL 1984). As prescribed in 18-27.475-1(a)(4), insert the following subparagraph (3) in paragraph (g) of the clause:

(3) (i) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. Computer data bases comprising limited-rights data are to be treated as limited-rights data. If delivery of such computer software is so required, the Contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) above, in accordance with the Notice:

RESTRICTED RIGHTS NOTICE (APRIL 1984)

(a) This computer software is submitted with restricted rights under Government contract No........ (and subcontract ...., if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided below or as otherwise expressly stated in the contract.

(b) This computer software may be--

(1) Used or copied for use in or with the computer for which it was acquired, including use at any Government installation to which such computer may be transferred;

(2) Used with a backup computer if the computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software shall be subject to the same restricted rights; and

322

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(5) Disclosed and reproduced for use by support
contractors or their subcontractors in accordance with
subparagraphs (1) through (4) above, provided the Government
makes such disclosure subject to these restricted rights.
(c) Notwithstanding the foregoing, if this computer software
is published copyrighted computer software, it is licensed to
the Government, without disclosure prohibitions, with the
minimum rights set forth in paragraph (b) above.
(d) Any other rights or limitations regarding the use,
duplication, or disclosure of this computer software are to be
expressly stated in the contract.
(e) This Notice shall be marked on any reproduction of this
computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the above Notice on
restricted computer software, the following short-form Notice
may be used in lieu thereof:

RESTRICTED RIGHTS NOTICE (SHORT FORM) (APRIL 1984)

Use, reproduction, or disclosure is subject to restrictions
set forth in contract No....... (and subcontract......, if
appropriate).

(End of notice)

18-52.227-75 Representation of Limited-Rights Data and
Restricted Computer Software.
As prescribed in 18-27.475-2, insert the following provision
in solicitations that include the clause at 18-52.227-74,
Rights in Data--General:

REPRESENTATION OF LIMITED-RIGHTS DATA AND
RESTRICTED COMPUTER SOFTWARE (APRIL 1985)

(a) This solicitation sets forth the work to be performed if
a contract award results, and the Government's known
requirements for data (as defined in 18-27.471 of the NASA FAR
Supplement (NFS)). Any resulting contract may also provide the
Government the option to order additional data under the
Additional Data Requirements clause at 18-52.227-76 of the
NFS, if included in the contract. Any data delivered under
the resulting contract will be subject to the Rights in Data--
General clause at 18-52.227-74 of the NFS that is to be
included in this contract. Under the latter clause a
contractor may withhold from delivery data that qualifies as
limited-rights data or restricted computer software, and
deliver form, fit, and function data in lieu thereof. The
latter clause also may be used with its Alternates II and/or

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

III to obtain delivery of limited-rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate.

(b) As an aid in determining the Government's need to include any of the aforementioned Alternates in the clause at 18-52.227-74, Rights in Data--General, of the NFS, the offeror's response to this solicitation shall, to the extent feasible, complete the representation below to either state that none of the data qualifies as limited-rights data or restricted computer software, or identify which of the data qualifies as limited-rights data or restricted computer software. Any identification of limited-rights data or restricted computer software in the offeror's response is not determinative of the status of such data should a contract be awarded to the offeror.

REPRESENTATION CONCERNING DATA RIGHTS

Offeror has reviewed the requirements for the delivery of data or software and states (offeror check appropriate block)--

☐   None of the data or software proposed |
         for fulfilling such requirements
         qualifies as limited-rights data or
         restricted computer software.

☐   Data or software proposed for fulfilling |
         such requirements qualifies as limited-
         rights data or restricted computer
         software and is identified as follows:

         _____
         _____
         _____
         _____
         _____

NOTE: "Limited-rights data" and "Restricted computer software" are defined in the contract clause entitled "Rights In Data--General."

(End of provision)

18-52.227-76 Additional Data Requirements.
As prescribed in 18-27.475-3, insert the following clause:

ADDITIONAL DATA REQUIREMENTS (APRIL 1984)

(a) In addition to the data (as defined in the Rights in Data--General clause included in this contract) specified elsewhere in this contract to be delivered, the Contracting

32⁴

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Officer may at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The Rights in Data--General clause included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the contractor to deliver any data the withholding of which is authorized by the Rights in Data--General clause of this contract, or data that is specifically identified in this contract as not subject to this clause.

(c) When data is to be delivered under this clause, the Contractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(d) The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph (a) above.

(End of clause)

18-52.227-77 Rights in Data--Special Works.
As prescribed in 18-27.475-4, insert the following clause:

RIGHTS IN DATA--SPECIAL WORKS (APRIL 1984)

(a) Definitions.
"Data," as used in this clause, means recorded information regardless of form or the media on which it may be recorded. The term includes computer software. The term does not include information incidental to contract administration, such as contract cost analyses or financial, business, and management information required for contract administration purposes.

"Unlimited rights," as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) Allocation of Rights (1) The Government shall have--
(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) below regarding copyright;

(ii) The right to limit exercise of claim to copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in such data, in accordance with subparagraph (c)(1) below; and

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) below.

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(2) The Contractor shall have, to the extent permission is granted in accordance with subparagraph (c)(1) below, the right to establish claim to copyright subsisting in data first produced in the performance of this contract.

(c) <u>Copyright</u>.   (1) <u>Data first produced in the performance of this contract.</u> (i) The Contractor agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any data first produced in the performance of this contract without the prior written permission of the Contracting Officer. If claim to copyright is made, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 to such data when delivered to the Government, and include that notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in subdivision (i) above, the Contracting Officer may direct the Contractor to establish, or authorize the estabishment of, claim to copyright in such data and to assign, or obtain the assignment of, such copyright to the Government or its designated assignee.

(2) <u>Data not first produced in the performance of this contract</u>. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that is not first produced in the performance of this contract and that contains the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above.

(d) <u>Release and use restrictions</u>. Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) <u>Indemnity.</u> The Contractor shall indemnify the Government and its officers, agents and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

unlawful matter contained in such data. The provisions of
this paragraph do not apply unless the Government provides
notice to the Contractor as soon as practicable of any claim
or suit, affords the Contractor an opportunity under
applicable laws, rules, or regulations to participate in the
defense thereof, and obtains the Contractor's consent to the
settlement of any suit or claim other than as required by
final decree of a court of competent jurisdiction; and do not
apply to material furnished to the Contractor by the
Government and incorporated in data to which this clause
applies.

(End of clause)

18-52.227-78 Rights in Data--Existing Works.
As prescribed in 18-27.475-5(a), insert the following
clause:

RIGHTS IN DATA--EXISTING WORKS (APRIL 1984)

(a) Except as otherwise provided in this contract, the
Contractor grants to the Government, and others acting on its
behalf, a paid-up, nonexclusive, irrevocable, worldwide
license to use, perform, and display, by or on behalf of the
Government, for all the material or subject matter called for
under this contract or for which this clause is specifically
made applicable.
(b) The Contractor shall indemnify the Government and its
officers, agents, and employees acting for the Government
against any liability, including costs and expenses, incurred
as the result of (1) the violation of trade secrets,
copyrights, or right of privacy or publicity, arising out of
the creation, delivery, publication, or use of any data
furnished under this contract; or (2) any libelous or other
unlawful matter contained in such data. The provisions of
this paragraph do not apply unless the Government provides
notice to the Contractor as soon as practicable of any claim
or suit, affords the Contractor an opportunity under
applicable laws, rules, or regulations to participate in the
defense thereof, and obtains the Contractor's consent to the
settlement of any suit or claim other than as required by
final decree of a court of competent jurisdiction; and do not
apply to material furnished to the Contractor by the
Government and incorporated in data to which this clause
applies.

(End of clause)

18-52.227-79 Commercial Computer Software-Restricted Rights.
As prescribed in 18-27.475-6, insert the following clause:

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

COMMERCIAL COMPUTER SOFTWARE--RESTRICTED RIGHTS
(APRIL 1985)

(a)   Any   restricted   computer   software   (including
documentation   thereof)   delivered   under   this   purchase
order/contract   shall   be   subject   to the "Restricted Rights"
required by the NASA FAR Supplement (NFS 18-27.473-2(e) and
18-27.473-4(b)),   as set forth in paragraph (d), below. Where
the vendor proposes its standard commercial software license,
or . lease   agreement,   those   applicable   portions thereof
consistent with Federal laws, standard industry practices, the
Federal   Acquisition   Regulations (FAR) and   the   NASA   FAR
Supplement, including the "Restricted Rights" set   forth   in
paragraph (d) below, shall be incorporated into and made a
part of this purchase order/contract.
    (b) If the vendor proposes its standard commercial software
license or lease agreement after this purchase order/contract
has been issued, or at or after the time the computer software
is delivered, such license or lease agreement shall be deemed
incorporated into and made a part of the resulting contract
under the same terms and conditions as in paragraph (a) above.
For   purposes   of   receiving   updates,   correction   notices,
consultation, etc. on the computer software,   the   NASA
Contracting   Officer   or   the   NASA Contractor Technical
Representative/User may sign any license or lease registration
form or card and return it directly to the vendor; however,
such signing shall not alter any of the terms and conditions
set forth in this clause.
    (c) Vendor's acceptance is expressly limited to the terms
and conditions of this purchase order/contract. If   the
specified computer software is shipped or delivered to NASA,
it shall be understood that the vendor has unconditionally
accepted the terms and conditions set forth in paragraphs (a)
and (b) above, and that such terms and conditions constitute
the entire agreement between the parties concerning rights in
the computer software.
    (d)   The following "Restricted Rights" of NFS 18-27.473-2(e)
shall apply:
       (1)   The restricted computer software delivered under this
purchase order/contract may not be used, reproduced   or
disclosed by the Government except as provided below or
otherwise expressly stated in the purchase order/contract.
       (2) The restricted computer software may be--
          (i) Used or copied for use in or with the computer for
which it was acquired, including use at any Government
installation to which such computer may be transferred;
          (ii) Used with a backup computer if the computer for
which it was acquired is inoperative;
          (iii) Reproduced for safekeeping (archives) or backup
purposes;

32.

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(iv) Modified, adapted, or combined with other computer
software, provided that the modified, combined, or adapted
portions of the derivative software incorporating restricted
computer software shall be subject to the same restricted
rights; and
(v) Disclosed and reproduced for use by support
contractors or their subcontractors, subject to the same
restrictions under which the Government acquired the software.
(3) If the restricted computer software is published,
copyrighted computer software it is licensed to the
Government, without disclosure prohibitions, with the rights
set forth in subparagraph (2) above.

(End of clause)

18-52.227-80 Rights in Data--SBIR Program.
As prescribed in 18-27.475-7, insert the following clause:

RIGHTS IN DATA--SBIR PROGRAM (APRIL 1985)

(a) Definitions.
"Data," as used in this clause, means recorded information,
regardless of form or the media on which it may be recorded.
The term includes technical data and computer software. The
term does not include information incidental to contract
administration, such as contract cost analyses or financial,
business, and management information required for contract
administration purposes.
"Technical data," as used in this clause, means that data
which is of a scientific or technical nature.
"Computer software," as used in this clause, means computer
programs, computer data bases, and documentation thereof.
"Form, fit, and function data," as used in this clause,
means data describing, and sufficient to enable, physical and
functional interchangeability; as well as data identifying
source, size, configuration, mating and attachment
characteristics, functional characteristics, and performance
requirements.
"Limited-rights data," as used in this clause, means data
developed at private expense that embodies trade secrets or is
commercial or financial and confidential or privileged.
"Restricted computer software," as used in this clause,
means computer software developed at private expense and that
is a trade secret, is commercial or financial and confidential
or priviledged, or is published copyrighted computer software,
including minor modifications of such computer software.
"SBIR data," as used in this clause, means data first
produced by a contractor that is a small business firm in the
performance of a small business innovation research contract
issued under the authority of 15 U.S.C. 638 (Pub. L. 97-219,
"Small Business Innovation Development Act of 1982"), and

329

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

which, without obligation as to its confidentiality, has not been made available to others by the Contractor, or is not already available to the Government.

"SBIR rights," as used in this clause, mean the rights in SBIR data as set forth in the SBIR Rights Notice of paragraph (d) of this clause.

"Unlimited rights," as used in this clause, means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) <u>Allocation of rights.</u> (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in--

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitutes manuals or instructional and training material for installation, operation, or routine maintenance and repair; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d) below or for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) •The Contractor shall have the right to--

(i) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) below;

(ii) Withhold from delivery that data which is limited-rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add, or correct limited-rights or restricted-rights notices and to take other appropriate action, in accordance with paragraphs (e) and (f) below; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) <u>Copyright.</u> (1) <u>Data first produced in the performance of this contract.</u> Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. If claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 and 402 to the data when such data is delivered to the Government, and include that notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up,

33^

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that is not first produced in the performance of this contract and that contains the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above.

(3) Removal of notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Rights to SBIR data. The Contractor is authorized to affix the following "SBIR Rights Notice" to SBIR data delivered under this contract and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) below, in accordance with such Notice:

SBIR RIGHTS NOTICE (APRIL 1985)

This SBIR data is furnished with SBIR rights under NASA Contract No. ----- (and subcontract -------- if appropriate). For a period of 2 years after acceptance of all items to be delivered under this contract the Government agrees to use this data for Government purposes only, and it shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, such data may be disclosed for use by support contractors. After the aforesaid 2-year period the Government has a royalty-free license to use, and to authorize others to use on its behalf, this data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of this data by third parties. This Notice shall be affixed to any reproductions of this data, in whole or in part.

(End of notice)

(e) Unauthorized marking of data. (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract is marked with the notices specified in paragraph (d) above and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by the contract, the Contracting Officer may at any

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

time either return the data to the Contractor, or cancel or ignore the markings. However, markings will not be cancelled or ignored unless --
    (i) The Contracting Officer makes written inquiry to the Contractor concerning the propriety of the markings, providing the Contractor 30 days (or a shorter period of not less than 5 days from the date of receipt of such inquiry by the Contractor if the Contracting Officer determines, with approval of the Head of the Contracting Activity, that there are exigencies justifying such shorter period) to respond; and
    (ii) The Contractor fails to respond within the set period (or a longer time approved by the Contracting Officer for good cause shown), or the Contractor's response fails to substantiate the propriety of the markings.
    (2) The Contracting Officer shall consider the Contractor's response, if any, and determine whether the markings shall be cancelled or ignored. The Contracting Officer shall furnish written notice to the Contractor of the determination, which shall be a final decision under the Contract Disputes Act.
    (3) The above procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request for data thereunder.
  (f) _Omitted or incorrect markings._ (1) Data delivered to the Government without any notice authorized by paragraph (d) above, and without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor --
    (i) Identifies the data to which the omitted notice is to be applied;
    (ii) Demonstrates that the omission of the notice was inadvertent;
    (iii) Establishes that the use of the proposed notice is authorized; and
    (iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.
    (2) The Contracting Officer may also (i) permit correction, at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(g) Protection of limited-rights data and restricted computer software. (1) When data other than that listed in subdivisions (b)(1)(i) and (iii) above is specified to be delivered under this contract and such data qualifies as either limited-rights data or restricted computer software the Contractor, if it desires to continue protection of such data, shall withhold such data and not furnish it to the Government under this contract. As a condition to this withholding the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof.

(h) Subcontracting. The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(i) Relationship 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.

(End of clause)

18-52.227-81 Rights to Proposal Data (Technical).

As prescribed in 18-27.475-9, insert the following clause:

RIGHTS TO PROPOSAL DATA (TECHNICAL) (APRIL 1985)

Except for data contained on pages _____, it is agreed that as a condition of award of this contract, and notwithstanding the conditions of any notice appearing thereon, the Government shall have unlimited rights (as defined in the "Rights in Data" clause contained in this contract) in and to the technical data contained in the proposal upon which this contract is based.

(End of clause)

18-52.227-82 Reports of Work.
As prescribed at 18-27.475-10, insert the following clause:

REPORTS OF WORK (APRIL 1985)

(a) Monthly progress reports. The Contractor shall submit separate monthly progress reports of all work accomplished during each month of contract performance. Reports shall be in narrative form and brief and informal in content. Monthly

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

reports shall be submitted in ..... copies. Monthly reports shall include--
     (1) A quantitative description of overall progress.
     (2) An indication of any current problems which may impede performance and proposed corrective action.
     (3) A discussion of the work to be performed during the next monthly reporting period.
   (b) Quarterly progress reports. The Contractor shall submit separate quarterly reports of all work accomplished during each three-month period of contract performance. In addition to factual data, these reports shall include a separate analysis section which interprets the results obtained, recommends further action, and relates occurrences to the ultimate objectives of the contract work. Sufficient diagrams, sketches, curves, photographs, and drawings shall be included to convey the intended meaning. Quarterly reports shall be submitted in ..... copies.
   (c) Final report. The Contractor shall submit a final report which documents and summarizes the results of the entire contract work, including recommendations and conclusions based on the experience and results obtained. The final report shall include tables, graphs, diagrams, curves, sketches, photographs, and drawings in sufficient detail to comprehensively explain the results achieved under the contract. The final report shall be submitted in ..... copies.
   (d) Submission. The quantities of reports specified in paragraphs (a) through (c) shall be submitted to the technical monitor of the contract.

(End of clause)

Alternate I (APRIL 1985). If authorized under 18-27.475-10(b), the following may be added to paragraph (d) of the clause:

  In addition, a reproducible copy and a printed or reproduced copy shall be sent to--

        NASA Scientific and Technical Information Facility
        Attn: Accessioning Department
        P.O. Box 8757
        Baltimore/Washington International Airport, MD 21240

   18-52.227-83 Technical Data Certification, Revision, and Withholding of Payment.
   As prescribed in 18-27.475-11, insert the following clause:

TECHNICAL
DATA CERTIFICATION, REVISION, AND WITHHOLDING
OF PAYMENT (APRIL 1985)

334

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(a) <u>Scope of clause.</u> This clause shall apply to all technical data (as defined in the Rights in Data--General clause included in this contract) that has been specified in this contract as being subject to this clause. It shall apply to all such data delivered, or required to be delivered, at any time during contract performance or within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth herein. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) <u>Technical data certification.</u> (1) All technical data that is subject to this clause shall be accompanied by the following certification upon delivery:

TECHNICAL DATA CERTIFICATION (APRIL 1985)

The Contractor, _____, hereby certifies that the technical data delivered herewith under Government contract No. _____ (and subcontract _____, if appropriate) is complete, accurate, and complies with the requirements of the contract concerning such technical data.

(End of certification)

(2) The Government shall rely on the above certification in accepting delivery of the technical data, and in consideration thereof may, at any time during the period covered by this clause, request correction of any deficiencies which, in its opinion, are not in compliance with contract requirements. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data--General clause included in this contract.

(c) <u>Technical data revision.</u> The Contractor also agrees, at the request of the Contracting Officer, to revise technical data that is subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor will be compensated for any such revisions to the technical data made pursuant to this paragraph.

(d) <u>Withholding of payment.</u> (1) At any time before final payment under this contract the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5% of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion respecting any technical data that is subject to this clause, the Contractor fails to --

SOLICITATION PROVISIONS AND CONTRACT CLAUSES

    (i) Make timely delivery of such technical data as required by this contract;

    (ii) Provide the certification required by subparagraph (b)(1) above;

    (iii) Make the corrections required by subparagraph (b)(2) above; or

    (iv) Make revisions requested under paragraph (c) above.

    (2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has delivered the data and/or has made the required corrections or revisions. Withholding shall not be made if the failure to make timely delivery, and/or the deficiencies relating to delivered data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

    (3) The Contracting Officer may decrease or increase the sums withheld up to the sums authorized above. The amount withheld under this paragraph shall be in addition to any withholding under any other terms of this contract. The withholding of any amount under this paragraph, or the subsequent payment thereof, shall not be construed as a waiver of any Government rights.

(End of clause)

12

PART 927—PATENTS, DATA, AND COPYRIGHTS

Subpart 927.4—Technical Data and Copyrights

927.400   Scope of subpart.

   This subpart sets forth DOE's policy, procedures, and instructions for contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into, with or for the benefit of the Government.

927.401   Definitions.

   "Technical data" means for the purpose of this subpart, recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data, as used in this subpart, do not include financial reports, cost analyses, and other information incidental to contract administration.
   "Proprietary data" means for the purpose of this subpart, technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:
   (1) Are not generally known or available from other sources without obligation concerning their confidentiality;
   (2) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(3) Are not already available to the Government without obligation concerning their confidentiality.

"Contract data" means for the purpose of this subpart, technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, technical data that may be called for under the Additional Technical Data Requirements clause of the contract, if any, or technical data actually delivered in connection with the contract.

"Unlimited rights" means for the purpose of this subpart, rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

927.402 Acquisition and use of technical data.

927.402-1 General.

(a) The provisions herein pertain to research, development, demonstration and supply contracts. Special considerations for contracts for the operation, design, or construction of Government-owned facilities are covered by Subpart 970.27. Under DOE's broad charter to perform research, development, and demonstration work, in both nuclear and nonnuclear fields, and to meet the objectives stated in 927.402-2, DOE has extensive needs for technical data. The satisfaction of these needs and the achievement of DOE's objectives through a sound data policy are found in the balancing of the needs and equities of the Government, its contractors, and the general public.

(b) It is important to keep a clear distinction between contract requirements for the delivery of technical data on the one hand, and rights in technical data on the other. The legal rights which the Government acquires in technical data in DOE contracts (other than "facilities" contracts) are set forth in the Rights in Technical Data (long form) clause of 952.227-75. However, this clause does not obtain for the Government the delivery of any data whatsoever. Rather, known requirements for the technical data to be delivered by the contractor shall be set forth as part of the contract (e.g. in the statement of work). The Additional Technical Data Requirements clause at 952.227-73 may be used along with the clause at 952.227-75 to enable the contracting officer to require the contractor to furnish additional technical data, the requirement for which was not known at the time of contracting. There is, however, a built-in limitation on the

kind of technical data which a contractor may be required to deliver under either the contract statement of work or the Additional Technical Data Requirements clause. This limitation is found in the withholding provision of paragraph (e) of the Rights in Technical Data (long form) clause of 952.227-75 which provides that the contractor need not furnish "proprietary data." It is specifically intended that the contractor may withhold "proprietary data" even though a requirement for technical data specified in the statement of work or called for pursuant to the Additional Technical Data Requirements clause would seemingly require the furnishing of proprietary data. This withholding of proprietary data is the primary means by which the contractor may protect its proprietary position.

(c) There are, however, two situations where the Government, or its representative, may need to have limited access to a contractor's proprietary data.

(1) First, paragraph (f) of the Rights in Technical Data (long form) clause gives the contracting officer's representatives the limited right to inspect at the contractor's facility the contractor's proprietary data which were withheld from delivery under paragraph (e) of the clause for the purpose of verifying that such data were properly withheld or to evaluate work performance. In carrying out the inspection, normally the contracting officer's representative is a DOE employee although he may be an employee of a DOE contractor acting under an agreement to treat in confidence the proprietary data to be inspected. However, where the contractor whose data are to be inspected demonstrates that there would be a possible conflict of interest if the inspection were made by such a contractor employee, the contracting officer's representative may be limited to a DOE employee. Paragraph (f) has a built-in exclusion from these inspection rights for "specific items of proprietary data" when they are so specified in the contract schedule. Such exclusions limit even DOE's minimum rights of evaluating contract work performance and verifying that technical data withheld by the contractor is proprietary in fact. Such exclusions should be sparingly used, and only in situations where program personnel stipulate to the fact that DOE has no need for access to the specified items to be excluded from paragraph (f), i.e., that the nondisclosure and nonaccessibility will not adversely affect the DOE program involved. It should also be noted that paragraph (f) permits exclusion of "specific items" of proprietary data and,

accordingly, should not be used to exclude classes of technical data or all technical data pertaining to specific items or processes or classes of items or processes.

(2) The second situation, where the Government may have limited access to a contractor's proprietary data, is provided in optional paragraph (g) of the Rights in Technical Data (long form) clause at 952.227-75 Alternate I. When used, optional paragraph (g) provides the Government the right to require the contractor to furnish with limited rights the proprietary data previously withheld under paragraph (e). In this situation, the limited rights in proprietary data and the Government's obligation for limited use and disclosure of such data as set forth in the Rights in Technical Data (long form) clause provides the means by which the contractor protects its proprietary position. Paragraph (g) will be used only where it is determined by DOE that for programmatic reasons there is a need for the delivery of proprietary data to the Government. Where proprietary data is to be delivered under paragraph (g) and subparagraph (a) or (b) of the limited rights legend is to be applied to the data, the contractor may, if he can show the possibility of a conflict of interest regarding disclosure of such data to other contractors, limit or modify subparagraphs (a) or (b) as set forth in 927.402-3(e)(2), to exclude or include certain contractors.

(d) The contractor licensing provisions of optional paragraph (h) at 952.227-75 Alternate II of the Rights in Technical Data (long form) clause enable DOE to require limited licenses in proprietary contract data to be granted to the Government and responsible parties in certain circumstances. Such a license may parallel or supplement the license obtained in background patents under the provisions of paragraph (k) of the Patent Rights clause of 41 CFR 9-9.107-5(a). Paragraph (h) is normally to be included in contracts for research, development or demonstration where it is deemed by DOE that the limited license afforded therein is necessary to ensure widespread commercial use or practical utilization of a subject of the contract. As explained in 927.402-3(e)(3), paragraph (h) provides that upon request by DOE, the contractor will grant to the Government and responsible third parties a license in proprietary data only where such data in the form of results obtained by its use, i.e., essential equipment, articles, products, and the like which were the subject of the contract, are not otherwise available, or cannot be made

338

available in a reasonable time as set forth in paragraph (h).

(e)(1) It is the responsibility of prime contractors and higher tier subcontractors, in meeting their obligations with respect to contract data, to obtain from their subcontractors the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in these regulations, and subject to the approval of the contracting officer where required, selection of appropriate technical data provisions for subcontracts is the responsibility of the prime contractor or higher-tier subcontractor. In many but not all instances, inclusion in a subcontract of the Rights in Technical Data (long form) clause of 952.227–75 will suffice to obtain for the benefit of the Government the rights in and, if appropriate, access to technical data. Access by DOE to technical data, i.e., the inspection rights afforded in paragraph (f) of the Rights in Technical Data (long form) clause at 952.227–75 normally should be obtained only in first-tier subcontracts having as a purpose the conduct of research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract. If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the contractor shall so inform the Contracting Officer in writing and not proceed with the subcontract without written authorization of the Contracting Officer. In prime contracts (or higher-tier subcontracts) which contain the Additional Technical Data Requirements clause, it is the further responsibility of the contractor (or higher-tier subcontractor) to determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract (or higher-tier subcontract).

(2) As is the case for DOE in its determination of technical data requirements, the Additional Technical Data at 952.227–73 Requirements clause should not be used at any subcontracting tier where the technical data requirements are fully known, and normally the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to inequitably acquire rights in the subcontractor's proprietary data for their private use, and they shall not acquire rights on

behalf of the Government to proprietary data for standard commercial items unless required by the prime contract.

(f) Related to the acquisition and use of technical data are the contractor's rights in contract data as well as technical data furnished to the contractor by DOE or its contractors. These rights are set forth in paragraph (b)(2) of each Rights in Technical Data clause and provide that the contractor may, subject to patent, security and other provisions of the contract, use for its private purposes contract data it first produces in the performance of the contract, provided that the contractor has met its data requirements (e.g., delivery of data in form of progress or status reports specified to be delivered) as of the date of the private use of such data. It is not necessary that a final report be submitted in order to privately use data if all required progress and interim reports and other technical data then due have been delivered. Paragraph (b)(2) further provides that technical or other data received by the contractor in the performance of the contract must be held in confidence by the contractor in accordance with restrictions accompanying the data.

(g) An additional clause described further at 927.402–3(f), the text of which is found at 952.227–76 entitled Rights in Data—Special Works, is to be used in place of or in addition to the Rights in Technical Data (long form) clause in contracts where a purpose of the contract is the production of copyrightable material, a substantial portion of which is to be first produced in the performance of the contract, such as motion pictures, television recordings, books, histories, etc. Where, during contract negotiations, it may be determined to purchase, i.e., "specifically acquire," unlimited rights in technical data, or to lease or obtain a license therein, or to obtain rights in existing data, an appropriate clause therefor should be obtained from patent counsel. In situations where technical data including computer software are to be leased or licensed, the terms of any agreement restricting the Government's rights will be included in the contract as either a special clause or an agreement annexed thereto. Another clause, the Rights in Technical Data (short form) clause further described at 927.402–3(g), the text of which is found at 952.227–77, is provided for use in research contracts with educational institutions and consultants. Such contracts may, for example, include those for conducting symposia, training, or education, or other contracts not involving possible use of proprietary data.

(h) In contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR Part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, the following parenthetical phrase shall be inserted after "contract data" in paragraph (b)(2)(ii) of the clause at 952.227–75, after "technical data" in paragraph (b)(2) of the clause at 952.227–77, or after "technical data" in paragraph (b)(2)(ii) of the clause at 952.227–78 as appropriate: "(except Restricted Data in category C–24, 10 CFR Part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology)." In addition, there are other types of contract situations (e.g., no cost contracts for studies or evaluation) wherein the contractor is given access to restricted data. In such contract situations, limitations on the use of such data may be appropriate.

927.402–2 Policy.

The technical data policy is directed toward achieving the following objectives:

(a) Making the benefits of the energy research, development and demonstration programs of DOE widely available to the public in the shortest practicable time;

(b) Promoting the commercial utilization of the technology developed under DOE programs;

(c) Encouraging participation by private persons in DOE energy research, development, and demonstration programs; and

(d) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

927.402–3 Procedures (supply, research, development, or demonstration contracts).

(a) *Known requirements for technical data.* Technical data requirements are determined in relation to the intended use of the data which in turn depends upon the intended use of the contract end item. In many contracts for research, the end item may often be a technical report or series of such reports, while in contracts beyond research, the subject of the contract may be a feasibility model, an engineering or advance development model, or a

prototype. The extent to which required technical data may be needed often depends on the level of maturity of design and perfection of the end item, and for a demonstration plant or prototype, may include data pertaining to performance, operational and environmental testing, repair, maintenance, operation, quality assurance, detailed design, logistics, training, etc. Known technical data requirements shall be programmatically ascertained prior to contracting and shall be included in requests for proposals or disclosed during contract negotiations for incorporation as data requirements in the contract statement of work.

(b) *Additional requirements for technical data.* In contracts for research, development, or demonstration, it is not normally possible or appropriate for the Government to ascertain all actual needs for technical data in advance of contracting. Accordingly, the Additional Technical Data Requirements clause at 952.227–73, shall normally be used in such contracts (and, if appropriate, in subcontracts) to enable the ordering of technical data as the actual need and requirement therefor becomes known during the course of the contract. If all technical data requirements are known in advance of contracting and are set forth in the contract statement of work, this clause need not be used. The Additional Technical Data Requirements clause should not normally be used in supply contracts because the required technical data therefor are ordinarily known in advance and thus are specified in the contract statement of work or specification. When the Additional Technical Data Requirements clause is used, the Rights in Technical Data-Long Form clause at 952.227–75 shall also be used.

(c) *Clause text.* The text of the Additional Technical Data Requirements clause is found at 952.227–73.

(d) *Proposals.* (1) The policy and procedures for treatment of proposal information are set forth in FAR 15.413 for solicited proposals, in FAR 15.509 for unsolicited proposals, and 927.70.

(2) Solicited proposals are to be handled in accordance with the procedures of FAR 15.413–2. Evaluation of such proposals outside the Government is authorized in accordance with the procedures of FAR 15.413–2(f) and paragraph (d)(4) below. In order to assure that solicited proposals are properly handled, the handling notice of FAR 15.413–2(e) shall be affixed to a cover sheet attached to each proposal upon receipt by DOE. Use of the notice

neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose the information.

(3) Unsolicited proposals are to be handled in accordance with FAR 15.509. Outside evaluations of such proposals are authorized in accordance with the procedures of 925.7000.

(4) It is DOE policy to have proposals evaluated by the most competent persons available in Government. In addition, DOE may meet its evaluation needs by having proposals reviewed by evaluators and contractor organizations operating or managing government-owned facilities. Where it is determined to evaluate a proposal outside the Government, such as by consultants, grantees and contractors including those who operate or manage Government-owned facilities, the agreement of 927.7000 or an equivalent arrangement for the treatment of the proposal shall be obtained from the outside evaluator before DOE furnishes a copy of the proposal to such person. In addition, care should be taken that the required handling notice is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator.

(5) Should a contract be awarded based on a proposal, it is DOE policy, in consideration of the award, to obtain unlimited rights for the Government in the technical data contained in the proposal unless the prospective contractor marks those portions of the technical information which it asserts as "proprietary data", or specifies those portions of such technical data which are not directly related to or will not be utilized in the work to be funded under the contract. "Proprietary data" is defined in 927.401(b). A proposer who receives a contract award shall mark the data identified as proprietary by specifying the appropriate page numbers to be inserted in the Rights to Proposal Data clause of 952.227–82, which clause shall be inserted in the contract. Subject to the concurrence of the contracting officer, information unrelated to the contract may be deleted from the proposal by the contractor. The responsibility, however, of identifying technical data as proprietary or deleting it as unrelated, rests with the prospective contractor.

(e) *Rights in technical data.* (1) The Rights in Technical Data (long form) clause set forth at 952.227–75 shall be used in all contracts having as a purpose the conduct of research, development, or demonstration, or in contracts for supplies, or in any other contract where technical data are expected to be first produced under the contract, where technical data are specified to be

delivered in the contract, or where the contract contains the Additional Technical Data Requirements clause. Accordingly, all such contracts shall contain the Rights in Technical Data (long form) clause at 927.227–75, except as noted in 970.2702 and 927.402–3 (f) and (g) and except contracts for standard commercial off-the-shelf supplies where technical data such as operating or repair manuals are routinely furnished with the supplies.

(2) *Optional paragraph-Limited Rights in Proprietary Data.* In research, development, or demonstration contracts, and supply contracts where it is determined that delivery of proprietary data is necessary with limited rights in the Government, the Rights in Technical Data (long form) clause at 952.227–75 shall be supplemented by the additional paragraph (g) set forth at Alternate I to the clause. It should be noted that this paragraph does not entitle the contractor to place a limited rights legend on any technical data furnished to the Government under paragraph (g) unless the contracting officer requests in writing delivery of identified technical data previously withheld under paragraph (e) of the Rights in Technical Data clause. Paragraph (g) provides that proprietary data may be specified in the contract as being excluded from the delivery requirements of paragraph (e). Alternatively, the limited rights legend specified in Alternate I may be made applicable to only those classes of proprietary data determined as being necessary for delivery with limited rights. In addition, when furnishing proprietary data with the limited rights legend, subparagraphs (a), (b) and (c) thereunder may be modified as follows. When proprietary data is to be furnished only for evaluation, subparagraph (a) of the limited rights legend shall be used, and subparagraphs (b) and (c), if otherwise inapplicable, may be deleted. When there is a programmatic requirements that proprietary data be disclosed to other DOE contractors only for information or use in connection with work performed under their contracts, subparagraph (b) of the limited rights legend shall be used, and subparagraphs (a) and (c) may be deleted if otherwise inapplicable. In either of the foregoing examples, the contractor may, if it can show the possibility of a conflict of interest because of disclosure of such data to certain contractors or evaluators, exclude such contractors or evaluators from subparagraphs (a) or (b). If the data is required solely for emergency repair or overhaul, subparagraph (c) of

the limited rights legend shall be retained, and subparagraphs (a) and (b) may be deleted, unless otherwise applicable. In the event it is determined that all of the subparagraphs (a), (b) and (c) of the limited rights legend are to be deleted, the word "none" shall be inserted in the legend after the colon(:).

(3) *Optional paragraph-Contractor Licensing.* In many contracting situations the achievement of DOE's objectives would be frustrated if the Government, at the time of contracting, did not obtain on behalf of responsible third parties and itself limited license rights in and to proprietary contract data. Where, for example, the contractor is required to license background patents, consideration should be given to securing co-extensive license rights to the Government and responsible third parties at reasonable royalties, and under appropriate restrictions, for contract data which are proprietary data in order to practice the technology which is a subject of the contract. When such a license right is deemed necessary, the Rights in Technical Data (long form) clause at 952.227-75 should be supplemented by the addition of paragraph (h) at 952.227-75 Alternate II. Paragraph (h) will normally be sufficient to cover proprietary contract data for items and processes that were used in the contract and are necessary in order to insure widespread commercial use of a subject of the contract. The expression "subject of the contract" is intended to limit the licensing required in paragraph (h) below to the fields of technology specifically contemplated in the contract effort and may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in 41 CFR 9-9.107-5(b)(9) pertaining to "Background Patents." Where, however, proprietary contract data cover the main purpose or basic technology of the research, development, or demonstration effort of the contract, rather than subcomponents, products or processes which are ancillary to the contract effort, the limitations set forth in subparagraphs (h) (1)-(4) should be modified or deleted. Paragraph (h) further provides that technical data may be specified in the contract as being excluded from or not subject to the licensing requirements thereof. This exclusion can be implemented by limiting the applicability of the provisions of paragraph (h) to only those classes or categories of proprietary data determined as being essential for licensing. Although contractor licensing may be required under paragraph (h), the final resolution of questions

regarding the scope of such licenses, the terms thereof, including provions for confidentiality and reasonable royalties, is then left to the negotiation of the parties with resolution of the issues being made, if necessary, by a court of competent jurisdiction.

(f) *Rights in Data—Special Works.* (1) The clause set forth in 952.227-76 shall be used in all contracts where the principal purpose or a task of the contract is the production of copyrightable works, even through such works may incorporate uncopyrighted material or material previously copyrighted by the contractor or others. Such contracts include those:

(i) Primarily for production of motion picture or television recordings or scripts, musical compositions or arrangements, sound tracks or recordings, translations, adaptations, and the like;

(ii) For books, compilations, surveys, histories, or technology information pamphlets;

(iii) For works pertaining to management studies, support services, training, career guidance, or similar functions of DOE; and

(iv) For works pertaining to guidance or instruction of DOE officials or employees in the discharge of official duties.

(2) The Rights in Data—Special Works clause at 952.227-76 should be modified with the assistance of Patent Counsel where the contract calls for the editing, translation, addition, or other modification of the subject matter of an existing work.

(g) *Rights in Technical Data (short form).* The clause set forth in 952.227-77 may be used in contracts for basic research including grants, special research contracts with educational institutions, contracts with consultants, contracts for symposia, or for the conduct of training and educational programs, and in other contracts of a similar nature. This clause shall not be used in any contract where proprietary information of the contractor may be utilized in the performance of work under the contract; in such instances the Additional Technical Date Requirements clause of 952.227-73 and the Rights in Technical Data (long form) clause of 952.227-75 shall be used. The short form clause of this section shall not be used in situations involving long-term consultancy arrangements for work in DOE programs providing opportunities for specialized work experience at DOE-owned facilities for scientific, engineering, and other employees of private firms and

institutions engaged in civilian applications of atomic energy.

927.403 Negotiations and deviations.

Contracting officers shall contact the Patent Counsel assisting their contracting activity, or the Assistant General Counsel for Patents, for assistance to the contracting officer in selecting, negotiating, or approving appropriate data and copyright clauses in accordance with the procedures as set forth in 927.402 and 970.27. In particular, advice of Patent Counsel should be obtained regarding the appropriateness or modification of optional paragraphs (g) and (h) of the Rights in Technical Data (long form) clause, the exclusion of specific items of proprietary data from paragraph (f) in said clause, and the exclusion of the Additional Technical Data Requirements clause of 952.227-73.

Subpart 927.70—Disclosure of Proposal Information

927.7000 Disclosure outside Government.

(a) It is DOE policy to have proposals evaluated by the most competent persons available in the Goverment. In addition, DOE may meet its evaluation needs by having proposals reviewed by evaluators and contractor organizations operating or managing government-owned facilities. Outside evaluations may be made provided the requirements in (b) and (c) below are met. A decision to employ outside evaluators shall take into consideration requirements for avoidance of organizational conflicts of interest set forth in 909.5 and the competitive relationship, if any, between the proposer and the outside evaluator.

(b) Decisions to evaluate proposals outside the government shall be made only by the Source Selection Official with the concurrence of the Procurement Executive, Headquarters, for all source evaluation board acquisitions, or by the Senior Program Offical or designee with the concurrence of the HCA or his designee for other acquisitions. If the proposal under consideration expressly indicates that only Government evaluation is authorized and evaluation outside the Government is neverthless desired, the proposer shall be advised that DOE may be unable to give full consideration to the proposal unless the proposer consents in writing to having the proposal evaluated outside the Government.

(c) Where it is determined to evaluate a proposal outside the Government, such as by consultants, grantees or contractors including those who grant or manage Government-owned facilities

the following agreement or an equivalent arrangement for the treatment of the proposal shall be obtained from the outside evaluator before DOE furnishes a copy of the proposal to such person. In addition, care should be taken that the handling notice required by 927.7003 is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator.

Agreement

Conditions for Evaluating Proposal

Whenever DOE furnishes a proposal for evaluation, I the recipient agree to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, it is agreed all copies of the proposal and abstracts, if any, shall be returned to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the conracting officer, it is agreed the recipient shall not contact the originator of the proposal concerning any aspect of its contents.
Recipient: ————————————
Date: ————————————

927.7001   Proposal information.

Information contained in proposals will be used only for evaluation purposes except to the extent such information is generally available to the public, is already the property of the Government, or the Government already has unrestricted use rights, or is or has been made available to the Government from any source, including the proposer or offeror, without restriction. The term "proposal," as used in this section, includes responses to program opportunity notices (PONs), program research and development announcements (PRDAs) and solicitations of a similar nature, in addition to requests for proposals (RFPs) and unsolicited proposals. As a practical matter, DOE cannot assume any responsibility for disclosure or use of any such information unless it is identified by the proposer or offeror in accordance with this section. Unless a solicitation specifies otherwise, DOE will not refuse to consider a solicited proposal or an unsolicited proposal merely because the proposal is restrictively marked.

927.7002   Treatment of proposal information.

(a) A proposal may include technical data and other data, including trade secrets and/or privileged or confidential

commercial or financial information which the offeror does not want disclosed to the public or used by the Government for any purpose other than proposal evaluation. To protect such data the offeror should specifically identify each page including each line or paragraph thereof containing the data to be protected and mark the cover sheet of the proposal with the notice set forth at FAR 52.215–12, as prescribed at FAR 15.407(c)(8) for solicited proposals or FAR 15.509 for unsolicited proposals. Solicitation documents shall include instructions to proposers to mark their proposals in the prescribed manner.

(b) A reference to that notice on a proposal cover sheet shall be placed on each page to which the notice applies. Data, or abstracts of data, marked with that notice will be retained in confidence and used by the DOE or its designated representative(s) including Government contractors and consultants, as set forth in paragraph (c) below solely for the purpose of evaluating the proposal. The data so marked will not otherwise be disclosed or used without the proposer's prior written permission except to the extent provided in any resulting contract, or to the extent required by law. Offerors should be made aware of the provisions of paragraph (c) below if they desire to modify the notice at FAR 52.215–12 or otherwise seek to limit the evaluation to the Government only. The restriction contained in the notice does not limit the Government's right to use or disclose any data contained in the proposal if it is obtainable from any source, including the offeror, without restriction. Although it is the policy of the DOE to treat all proposals as confidential, the Government assumes no liability for disclosure or use of unmarked data and may use or disclose such data for any purpose. See FAR 15.1001(b) regarding disclosure to other offerors.

(c) Should a contract be awarded based on a proposal, it is DOE policy, in consideration of the award, to obtain unlimited rights for the Government in the technical data contained in the proposal unless the prospective contractor marks those portions of the technical information which he asserts "proprietary data," or specifies those portions of such technical data which are not directly related to or will not be utilized in the work to be funded under the contract. "Proprietary data" is defined in 927.401. An offeror who receives a contract award shall mark the data identified as proprietary by specifying the appropriate page numbers to be inserted in the Rights to Proposal Data clause of 952.227–82, which clause

shall be inserted in the contract. Subject to the concurrence of the contracting officer, information unrelated to the contract may be deleted from the proposal by the contractor. The responsibility, however, of identifying technical data as proprietary or deleting it as unrelated, rests with the prospective contractor.

(d) The clause at 952.227–82 shall be included in any contract which resulted from a proposal that was the basis of negotiation and award of the contract. This clause is intended to apply only to technical data and not to other data such as privileged or confidential commercial or financial information.

927.7003   Handling notice.

In order that proposals may be handled in confidence consistent with the policies set forth in this section and pursuant to 927.402–3(d)(2), the notice at FAR 15.413–2(e) for solicited proposals and FAR 15.509(d) for unsolicited proposals shall be affixed to a cover sheet attached to each proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

927.7004   Identification of proprietary data in propsals.

927.7004–1   Solicited proposals.

Even though the statement of work contained in a solicitation sets forth the known requirements for technical data. i.e., technical data which will be specified to be delivered, there is no assurance that the contractor will deliver all of this data because paragraph (e) of the Rights in Technical Data (long form) clause at 952.227–75 permits the contractor to withhold proprietary data from delivery. In order to ascertain the technical data the proposer intends to withhold as proprietary data, and as an aid in determining whether to include the provision for limited rights in proprietary data set forth in optional paragraph (g) of the Rights in Technical Data (long form) clause. the provision set forth in 952.227–83 shall be included in the solicitation. This provision explains that solicitations will include DOE's known requirements for technical data, and that the proposer must submit a list identifying to the best of its knowledge which of this data will be withheld as proprietary data, or state that no technical data will be withheld. The submission of such a list does not constitute a stipulation or determination by the Government that the data identified therein are in fact proprietary.

In addition, the provision to be included in the solicitation refers to the Additional Technical Data Requirements clause at 952.227–73, as being included in the proposed contract where, due to programmatic considerations, it is contemplated that all of the requirements for technical data will not be known at the time of contracting. When a proposer specifically identifies the proprietary data to be withheld, the contracting officer shall determine as advised by the appropriate program manager, whether:

(a) the Government needs limited rights in the proprietary data, in which case the optional paragraph (g) will be included in the Rights in Technical Data (long form) clause;

(b) the Government needs to require the contractor to license proprietary data to the Government and responsible third parties, in which case optional paragraph (h) will be included in the Rights in Technical Data (long form) clause; and

(c) the Government needs unlimited rights in the proprietary data, in which case negotiations may be held to purchase or obtain a suitable license to the proprietary data.

927.7004–2 Solicitations.

The provision at 952.227–83 shall normally be included in solicitations which may result in contracts calling for research, development, or demonstration work or solicitations for supplies in which delivery of required technical data is contemplated.

927.7004–3 Unsolicited proposals.

The contracting officer, during contract negotiations, shall identify technical data which will be required to be furnished under the contract. The proposer shall be required to submit a list identifying, to the best of his knowledge, which of this data will be withheld as proprietary under paragraph (e) of the Rights in Technical Data (long form) clause, or to state that no technical data will be withheld. The contracting officer shall then make the determinations, in the same manner as set forth in 927.7004–1 for solicited proposals, pertaining to the proprietary data identified to be withheld.

(2) If fulfillment of the contract will necessitate reproduction in excess of the limits set forth above, the contractor shall notify the contracting officer in writing and obtain the contracting officer's approval prior to acquiring on DOE's behalf production, acquisition, and dissemination of printed matter. Such printing must be obtained from the Government Printing Office (GPO), a contract source designated by GPO or a Joint Committee on Printing authorized federal printing plant.

(3) Printing services not obtained in compliance with this guidance will result in the cost of such printing being disallowed.

(4) The Contractor will include in each of his subcontracts hereunder a provision substantially the same as this clause including this paragraph (4).

952.209   Clauses related to contractor's qualifications.

952.209-70   Organizational conflicts of interest—disclosure or representation.

Use the following solicitation provision under the circumstances described at 909.570.

Organizational Conflicts of Interest Disclosure or Representation (Apr 1984)

It is Department of Energy policy to avoid situations which place an offeror in a position where its judgment may be biased because of any past, present, or currently planned interest, financial or otherwise, the offeror may have which relates to the work to be performed pursuant to this solicitation or where the offeror's performance of such work may provide it with an unfair competitive advantage. (As used herein, "offeror" means the proposer or any of its affiliates or proposed consultants or subcontractors of any tier.) Therefore:

(a) The offeror shall provide a statement which describes in a concise manner all relevant facts concerning any past, present or currently planned interest (financial, contractural, organizational, or otherwise) relating to the work to be performed hereunder and bearing on whether the offeror has a possible organizational conflict of interest with respect to (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage. The offeror may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of possible organizational conflicts of interest relating to other divisions or sections of the organization and how that structure or system would avoid or mitigate such organizational conflict.

(b) In the absence of any relevant interests referred to above, the offeror shall submit a statement certifying that to its best knowledge and belief no such facts exist relevant to possible organizational conflicts of interest. Proposed consultants and subcontractors are responsible for submitting information and may submit it directly to the contracting officer.

952.208-70   Printing.

Title 44, United States Code, "Public Printing and Documents," establishes policies regarding public printing and documents within the Federal Government. It provides that public printing will be accomplished by the Government Printing Office, its regional offices or authorized departmental printing plants. It provides a limited exemption for contractors. Requirements exceeding that limitation are to be accomplished utilizing Government resources. To facilitate this, contracting officers shall furnish the necessary forms and instructions to contractors, as called for by DOE Order 1340.1, and include the following clause in all contracts:

Printing (Apr 1984)

The contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single unit, or no more than 25,000 units in the aggregate of multiple units, will not be deemed to be printing. A unit is defined as one sheet, size 8½ by 11 inches one side only, one color. A requirement is defined as a single publication ducument.

(1) The term "printing" includes the following processes: composition, plate making, presswork, binding, microform publishing, or the end items produced by such processes.

(c) The Department will review the statement submitted and may require additional relevant information from the offeror. All such information, and any other relevant information known to the Department, will be used to determine whether an award to the offeror may create an organizational conflict of interest is found to exist, the Department may (1) impose appropriate conditions which avoid such conflict, (2) disqualify the offeror, or (3) determine that it is otherwise in the best interest of the United States to contract with the offeror by including appropriate conditions mitigating such conflict in the contract awarded.

(d) The refusal to provide the disclosure or representation and any additional information as required shall result in disqualification of the offeror for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award, or if such nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated for default. The offeror may also be disqualified from subsequent related Department contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract. The attention of the offeror in complying with this provision is directed to 18 U.S.C. 1001.

(e) Depending on the nature of the contract activities, the offeror may, because of possible organizational conflicts of interest, propose to exclude specific kinds of work from the statement, unless the solicitation specifically prohibits such exclusion. Any such proposed exclusion by an offeror shall be considered by the Department in the evaluation of proposals, and if the Department considers the proposed excluded work to be an essential or integral part of the required work, the proposal may be rejected as unacceptable.

(f) No award shall be made until the disclosure or representation has been evaluated by the Government. Failure to provide the disclosure or representation will be deemed to be a minor informality (FAR 14.405) and the offeror or contractor shall be required to promptly correct the omission.

952.209-71 Organizational conflicts of interest—general.

Insert the following contract clause under the circumstances described at 909.570.

Organizational Conflicts of Interest—General (Apr 1984)

(a) The contractor warrants that, to the best of his knowledge and belief, and except as otherwise disclosed, there are no relevant facts which could give rise to organizational conflicts of interest, as defined in 909.570 or that the contractor has disclosed all relevant information.

(b) The contractor agrees that, if after award, an organizational conflict of interest with respect to this contract is discovered, an immediate and full disclosure in writing shall be made to the Contracting Officer which shall include a description of the action which the contractor has taken or proposes to

take to avoid or mitigate such conflicts. The Department may, however, terminate the contract for its convenience if it deems such termination to be in the best interest of the Government.

(c) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the contracting officer, the Government may terminate the contract for default.

(d) The provisions of this clause shall be included in all subcontracts for work to be performed similar to the service provided by the prime contractor, and the terms "contract," "contractor," and "contracting officer" modified appropriately to preserve the Government's rights.

(e) Prior to a contract modification when the statement of work is modified to add new work, the period of performance is significantly increased, or the parties to the contract are changed, the Department will request and the contractor is required to submit either an organizational conflict of interest disclosure or representation or an update of the previously submitted disclosure or representation.

952.209-72 Organizational conflicts of interest—special clause.

Insert the following contract clause under the circumstance described at 909.570.

Organizational Conflicts of Interest—Special Clause (Apr 1984)

(a) *Purpose.* The primary purpose of this clause is to aid in ensuring that the contractor (1) is not biased because of its past, present, or currently planned interests (financial, contractual, organizational, or otherwise) which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "contractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity.

(1) *Technical consulting and management support services.*

(i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited or unsolicited) which stem directly from the contractor's performance of work under this contract. Furthermore, unless so directed in writing by the contracting officer, the Contractor shall not perform any technical consulting or management support services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for technical consulting and management support services.

(ii) If the contractor under this contract prepares a complete or essentially complete

statement of work or specifications to be used in competitive acquisitions, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard commercial items to the Government.

(2) *Access to and use of information.*

(i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (Pub. L. 93–579), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the contracting officer it shall not: (a) use such information for any private purpose unless the information has been released or otherwise made available to the public; (b) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first; (c) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and (d) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (Pub. L. 93–579), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor shall have, subject to patent, data, and security provisions of this contract, the right to use technical data it first produces under this requirements of this contract have been met.

(c) *Disclosure after award.* (1) The contractor agrees that if after award it discovers an organizational conflict of interest with respect to this contract, an immediate and full disclosure shall be made in writing to the contracting officer which shall include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts.

The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the contracting officer,

the Department may terminate the contract for default.

(d) *Subcontracts.* (1) The contractor shall include this clause, including this paragraph, in subcontracts of any tier which involve performance or work of the type specified in (b)(1) above or access to information of the type covered in (b)(2) above. The terms "contract", "contractor" and "contracting officer" shall be appropriately modified to preserve the Government's rights.

(2) If a subcontract is to be issued for evaluation services or activities, technical consulting or management support services work as defined at 909.570, the contractor shall obtain for the Department a disclosure statement or representation, in accordance with DOE regulations in effect at the time, from each intended subcontractor or consultant. The contractor shall not enter into any subcontract nor engage any consultant unless the contracting officer shall have first notified the contractor that there is little or no likelihood that an organizational conflict of interest exists or that despite the existence of a conflict of interest the award is in the best interest of the Government.

(e) *Remedies.* For breach of any of the above restrictions or for nondisclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract, the Government may terminate the contract for default, disqualify the contractor for subsequent related contractual efforts and pursue such other remedies as may be permitted by law or this contract.

(f) *Waiver.* Requests for waiver under this clause shall be directed in writing to the contracting officer and shall include a full description of the requested waive and the reasons in support thereof. If it is determined to be in the best interests of the Government, the contracting officer shall grant such a waiver in writing.

(g) *Modifications.* Prior to a contract modification when the statement of work is modified to add new work, the period of performance is significantly increased, or the parties to the contract are changed, the Department will request and the contractor is required to submit either an organizational conflict of interest disclosure or representation or an update of the previously submitted disclosure or representation.

952.227-72 [Reserved]

952.227-73 Additional technical data requirements.

The following clause shall be used in contracts for research, development, or demonstration work and in other contracts as directed in 927.402-3(b).

Additional Technical Data Requirements (Apr. 1984)

(a) In addition to the technical data specified elsewhere in this contract to be delivered, the contracting officer may at any time during the contract performance or within one year after final payment call for the contractor to deliver any technical data first produced or specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design.

(b) The provisions of the Rights in Technical Data clause included in this contract are applicable to all technical data called for under this Additional Technical Data Requirements clause. Accordingly, nothing contained in this clause shall require the contractor to actually deliver any technical data, the delivery of which is excused by paragraph (e) of the Rights in Technical Data clause.

(c) When technical data are to be delivered under this clause, the contractor will be compensated for appropriate costs for converting such data into the prescribed form for reproduction, and for delivery.

952.227-74 [Reserved]

952.227-75 Rights in technical data—long form.

As directed by 927.402-3(e), the following clause shall be used in all contracts having as a purpose the conduct of research, development, or demonstration, or in contracts for supplies, or in any other contract where technical data are specified to be delivered in the contract, or where the contract contains the Additional Technical Data Requirements clause at 952.227-73.

Rights in Technical Data—Long Form (Apr. 1984)

(a) *Definitions.*
(1) "Technical data" means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists.

347

specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(iii) Are not already available to the Government without obligation concerning the confidentiality.

(3) "Contract data" means technical data first produced in the performance of the contract in technical data which are specified to be delivered under the contract; technical data that may be called for under the Additional Technical Data Requirements clause of the contract, if any, or technical data actually delivered in connection with the contract.

(4) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) *Allocation of rights.*

(1) The Government shall have:

(i) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data;

(ii) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case, DOE will notify the contractor of the action taken;

(iii) No rights under this contract in any technical data which are not contract data.

(2) The contractor shall have:

(i) The right to withhold proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract data it first produces in the performance of this contract, provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contracting Officer.

(3) Nothing contained in this Rights of Technical Data clause shall imply a license to

the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(c) *Copyrighted material.*

(1) The contractor shall not, without prior written authorization of the Patent Counsel, establish a claim to statutory copyright in any contract data first produced in the performance of the contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf a royalty-free, nonexclusive, irrevocable, worldwide license for Governmental purposes to publish, distribute, translate, duplicate exhibit and perform any such data copyrighted by the contractor.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others, without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If such royalty-free license is unavailable and the contractor nevertheless determines that such copyrighted material must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the Contracting Officer to include such copyrighted material in the technical data prior to its delivery.

(d) *Subcontracting.* It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(1) Promptly submit written notice to the Contracting Officer setting forth reasons for the subcontractor refusal and other pertinent information which may expedite disposition of the matter; and

(2) Not proceed with the subcontract without the written authorization of the Contracting Officer.

(e) *Withholding of proprietary data.* Notwithstanding the inclusion of the Additional Technical Data Requirements clause in this contract or any provision of this contract specifying the delivery of technical data, the contractor may withhold proprietary data from delivery, provided that the contractor furnishes in lieu of any such proprietary data so withheld technical data disclosing the source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("Form, Fit and Function" data, e.g., specification control drawing, catalog sheets, envelope drawings, etc.), or a general description of such proprietary data where "Form, Fit and Function" data are not applicable. The Government shall acquire no rights to any proprietary data so withheld except that such data shall be subject to the "inspection rights" provisions of paragraph (f), and, if included, the "Limited rights in proprietary data" provisions of paragraph (g)

and the "Contractor licensing" provisions of paragraph (h).

(f) *Inspection rights.* Except as may be otherwise specified in this contract for specific items of proprietary data which are not subject to this paragraph, the Contracting Officer's representatives, at all reasonable times up to three years after final payment under this contract, may inspect at the contractor's facility any proprietary data withheld under paragraph (e) and not furnish under paragraph (g), if this contract includes such paragraph, for the purposes of verifying that such data properly fell within the withholding provision of paragraph (e), or for evaluating work performance.

Alternate I: Additional paragraph (g), limited rights. The following paragraph (d) shall be added to the basic clause at 952.227-75 above when it is determined in accordance with 927.402-3(e)(2) that delivery of proprietary data is necessary with limited rights in the Government.

(g) *Limited rights in proprietary data.* Except as may be otherwise specified in this contract as technical data which are not subject to this paragraph, the contractor shall, upon written request from the Contracting Officer at any time prior to three years after final payment under this contract, promptly deliver to the Government any "proprietary data" withheld pursuant to paragraph (e) of the Rights in Technical Data clause of this contract. The following legend and no other is authorized to be affixed on any "proprietary data" delivered pursuant to this provision, provided the "proprietary data" meets the conditions for initial withholding under paragraph (e) of the Rights in Technical Data clause. The Government will thereafter treat the "proprietary data" in accordance with such legend.

Limited Rights Legend (Apr 1984)

This technical data contains "proprietary data," furnished under "Contract No. ———" with the U.S. Department of Energy (and Purchase Order No. ——— if applicable) which may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the contractor, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not further disclosed;

(b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this contract is part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be

3 48

retained in confidence and not be further disclosed.

This legend shall be marked on any reproduction of this data in whole or in part.

Alternate II: Additional paragraph (h), contractor licensing. The following paragraph (b) shall be added to the basic clause at 952.227–75 above when it is determined in accordance with 927.402–3(e)(3) that the Government should obtain on behalf of third parties and itself limited license rights in and to proprietary contract data.

(h) *Contract licensing.* Except as may be otherwise specified in this contract as technical data not subject to this paragraph, the contractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purpose of practicing a subject of this contract, a nonexclusive license in any contract data which are proprietary data, on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obligated to license any such data if the contractor demonstrates to the statisfaction of the Head of the Agency or designee that:

(1) Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;

(2) Such data, in the form of results obtained by their use, have a commercially competitive alternative available or readily introducible from one or more other sources;

(3) Such data, in the form of results obtained by their use, are being supplied by the contractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or its licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or

(4) Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

952.227-76 Rights in data—special works.

The following clause shall be included in contracts having as a principal purpose or task the production of copyrightable works as discussed in 927.402–3(f).

Rights in Data—Special Works (Apr. 1984)

(a) The term "Data" as used herein means recorded information regardless of form or characteristic, such as writings, sound recordings, pictorial reproductions, drawings, or other graphic representations, and works of similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term includes data such as management studies and data produced under support services contracts but does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All data first produced or composed in the course of or under this contract shall be the sole property of the Government. Except with the prior written permission of the contracting officer, the contractor agrees not to assert any rights at common law or in equity or establish any claim to statutory copyright in such data. The contractor shall not publish or reproduce such data in whole or in part or in any manner of form, or authorize others so to do, without the written consent of the Contracting Officer or until such time as the Government may have released such data to the public.

(c) The contractor hereby grants to or will obtain for the Government a royalty-free, nonexclusive and irrevocable license throughout the world (1) to publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, any and all data which are not first produced or composed in the performance of this contract but which are incorporated in the work furnished under this contract; and (2) to authorize others so to do.

(d) The contractor shall indemnify and save and hold harmless the Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy, arising out of the publication, translation, reproduction, delivery, performance, use, or disposition of any data furnished under this contract; or (2) based upon any libelous, defamatory, or other unlawful matter contained in such data.

(e) Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

952.227-77 Rights in technical data clause—short form.

As discussed in 927.402–3(g), the following clause may be used in contracts for basic research with educational institutions and in contracts with consultants and in other contracts of a similar nature. The clause shall not be used in any contract where proprietary information of the contractor may be utilized in performance of work under the contract.

Rights in Technical Data—Short Form (Apr. 1984)

(a) *Definitions.* The definitions of terms set forth in DEAR 927.401 apply to the extent these terms are used herein.

(b) *Allocation of rights.*

(1) The Government shall have:

(i) Unlimited rights in technical data first produced or specifically used in the performance of this contract;

(ii) The right of the contracting officer or his representative to inspect at all reasonable times up to three years after final payment under this contract all technical data first produced or specifically used in the contract (for which inspection the contractor or its subcontractor shall afford proper facilities to DOE); and

(iii) The right to have any technical data first produced or specifically used in the

performance of this contract delivered to the Government as the contracting officer may from time to time direct during the progress of the work, or in any event as the contracting officer shall direct upon completion or termination of this contract.

(2) The contractor shall have:

The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the contracting officer.

(c) *Copyrighted material.*

(1) The contractor agrees to, and does hereby grant to the Government, and to its officers, agents, servants and employees acting within the scope of their duties:

(i) A royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use, and dispose of and to authorize others to do so, all copyrightable material first produced or composed in the performance of this contract by the contractor, its employees or any individual or concern specifically employed or assigned to originate and prepare such material; and

(ii) A license as aforesaid under any and all copyrighted or copyrightable works not first produced or composed by the contractor in the performance of this contract but which are incorporated in the material furnished under the contract, provided that such license shall be only to the extent the contractor now has, or prior to completion or final settlement of the contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(2) The contractor agrees that it will not knowingly include any material copyrighted by others in any written or copyrightable material furnished or delivered under this contract without a license as provided for in paragraph (c)(1)(ii) hereof, or without the consent of the copyright owner, unless it obtains specific written approval of the contracting officer for the inclusion of such copyrighted material.

952.227-78 Rights in technical data—facility

As discussed in 970.2702 the following clause is to be used in contracts for the operation of Government-owned facilities (GOCO's).

Rights in Technical Data—Facility (Apr 1984)

(a) *Defi itions:*

(1) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or

demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(iii) Are not already available to the Government without obligation concerning their confidentiality.

(3) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) *Allocation of rights.*

(1) The Government shall have:

(i) Ownership in all technical data first produced in the performance of the contract;

(ii) The right to inspect technical data first produced or specifically used in the performance of the contract at all reasonable times (for which inspection the proper facilities shall be afforded DOE by the contractor and its subcontractors);

(iii) The right to have all technical data first produced or specifically used in the performance of the contract delivered to the Government or otherwise disposed of by the contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this contract, provided that nothing contained in this paragraph shall require the contractor to actually deliver any technical data, the delivery of which is excused by this Rights in Technical Data clause;

(iv) Unlimited rights in technical data specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design; the contractor agrees to leave a copy of such technical data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer; provided, that if such data are proprietary, the rights of the Government in such data

shall be governed solely by the provisions of optional paragraph (e) hereof—"Limited Rights in Proprietary Data;"

(v) The right to remove, cancel, correct, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the contractor of the action taken.

(2) The contractor shall have:

(i) The right to withhold its proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract, provided the data requirement of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the contracting officer.

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

(c) *Copyrighted material.*

(1) The contractor shall not, without prior written authorization of the Patent Council establish a claim to statutory copyright in any technical data first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a royalty-free, nonexclusive, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the contractor.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowlingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If the contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the contracting officer to include such material in the technical data prior to its delivery.

(d) *Subcontracting.*

(1) Unless otherwise directed by the contracting officer, the contractor agrees to use in subcontracts having as a purpose the conduct of research, development, and demonstration work or in subcontracts for

supplies, the contract clause provisions in 48 CFR 952.227-75 in accordance with the policy and procedures of 48 CFR 927.402-1, 927.402-2 and 927.402-3.

(2) It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons for the subcontractor's refusal and other pertinent information which may expedite disposition of the matter; and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

952.227-79 Limited rights in proprietary data.

As discussed in 970.2702(c) the following paragraph may be used as a supplement to the clause at 952.227-78 where it is determined that delivery of proprietarty data is necessary with limited rights in the Government.

(e) Except as may be otherwise specified in this contract as technical data which are not subject to this paragraph, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid-up license and right to use by or for the Government, any proprietary data of the contractor specifically used in the performance of this contract; provided, however, that to the extent that any proprietary data when furnished or delivered is specifically indentified by the contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government, except as provided in the "Limited Rights Legend" set forth below. All such proprietary data shall be marked with the following "Limited Rights Legend":

Limits Rights Legend (Apr 1984)

This Technical data contains "proprietary data," furnished under contract No. —— with the U.S. Department of Energy (and purchase order No. —— if applicable) which may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside of the Government or be used for purposes of manufacture without prior permission of the following purposes:

(a) This " proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this contract is a part for information for use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

350

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed.

This legend shall be marked on any reproduction of this data in whole or in part.

952.227–80   Technical data certification.

In solicitations which may involve the acquisition of technical data, obtain the following certification and include the legend at FAR 52.215–12 and, where appropriate, the provision at 952.227–83.

Technical Data Certification (Apr 1984)

(a) The offeror certifies that it has not delivered or is not obligated to deliver to the Government under any contract or subcontract the same or substantially the same technical data included in its offer, except as set forth below:

( ) none
( ) Contract No. (and Subcontract No., if applicable)

Agency name and place of delivery ——

(b) The work to be performed and the known requirements for technical data as set forth in the solicitation have been reviewed. To the best of my knowledge:
/ / There will be no technical data withheld from delivery as being proprietary data.
/ / The technical data listed on page —— of the proposal will likely be used in conjunction with the performance of work under the contract and is represented as being proprietary data to
, be protected from unauthorized use and disclosure and therefore to be withheld from delivery in a report not having a restrictive legend.

952.227–81   Royalty Payments Certification

If the nature of the acquisition suggests that royalty payments may be involved, include the following certification in the solicitation.

Royalty Payments (Apr 1984)

In order that DOE may be informed regarding royalty payments to be made by a contractor in connection with any acquisition, construction, or operation where the amount of the royalty payment is reflected in the contract price, or is to be reimbursed by the Government, check one of the following:
( ) The Contract price includes no amount representing the payment of royalty by the offeror directly to others in connection with the performance of the contract.
( ) The contract price includes an amount for royalty payment expected to be made in connection with the proposed award. The Offeror shall set forth below: (1) the amount of each payment, (2) the names of the

licensor, (3) either the patent numbers involved or such other information as will permit identification of the patents and patent applications and the basis on which royalties will be paid.

952.227–82   Rights to proposal data.

Pursuant to 927.7002(d), include this clause in any contract which the decision to make the award included consideration of a technical proposal.

Rights to Proposal Data (Apr 1984)

Except for technical data contained on pages —— of the contractor's proposal dated —— which are asserted by the contractor as being proprietary data, it is agreed that, as a condition of the award of this contract, and notwithstanding the provisions of any notice appearing on the proposal, the Government shall have the right to use, duplicate, disclose and have others do so for any purpose whatsover, the technical data contained in the proposal upon which this contract is based.

952.227–83   Rights in technical data solicitation representation.

Pursuant to 927.7004–1 and 927.7004–2, include this provision, the legend at FAR 52.215–12 and the certification at 952.227–80 in solicitations which may result in contracts for research, development, or demonstration work or contracts for supplies in which delivery of required technical data is contemplated.

Rights in Technical Data Solicitation Instruction (Apr 1984)

The section of this solicitation which describes the work to be performed also sets forth DOE's know requirements for technical data. The Additional Technical Data Requirements clause, if included in this solicitation, provides the Government with the option to order additional technical data, the requirements for which are not known at the time of contracting. There is, however, a built-in limitation on the kind of technical data which may be required. This limitation provides that the contractor may withhold delivery of proprietary data. Accordingly, it is necessary that your proposal state that the work to be performed and the known requirements for technical data as set forth in the solicitation have been reviewed, and either state that, to the best of your knowledge, not data will be withheld, or submit a list identifying the proprietary data which, to the best of your knowledge, will likely be used in the contract performance and will be withheld.

3 51

Subpart 970.27—Patents, Data, and Copyrights

970.2701 General.

(a) The provisions of 41 CFR 9–9.1 remain in effect for the management and operation of Government-owned research or production facilities.

(b) A management and operating contractor's obligations for protection of information and data received from DOE and other contractors or subcontractors, and for the contractor's private use of contract data first produced in the performance of the contract, are set forth in subparagraph (b)(2) of each Rights in Technical Data clause in 952.227. This subparagraph provides that the contractor may, subject to patent, security, or other provisions of.the contract, use for its private purposes, contract data it first produces in the performance of the contract, provided that the contractor has met its data requirements (e.g., delivery of data in the form of progress

or status reports specified to be delivered) as of the date of private use of such data. It is not necessary that a "Final Report" be submitted in order to privately use data if all required progress and interim reports and other technical data than due have been delivered. Paragraph (b)(2) further provides that technical or other data received by the contractor in the performance of the contract must be held in confidence by the contractor in accordance with restrictions accompanying the data.

(c) Contractors should be aware that technical information which is reported to DOE by DOE contractors may be disseminated by DOE to others, subject to the restrictions included in the "Rights to Technical Data" clause.

(d) Employees of contractors operating DOE facilities may not be used to assist in the preparation of a proposal or bid for the performance of private commercial services similar or related to those being performed under the DOE contract unless such employee has been separated, with DOE approval, from performance of work under the DOE contract for such period as the Head of the Contracting Activity or designee shall direct consistent with the purpose of this section.

(e) Contractors operating DOE facilities and performing services as a part of their contract work for other Government agencies or private organizations should not be permitted to utilize information which is furnished by such customers for their own private activities unless it is generally available to others, or unless the customer authorizes such use.

970.2702 Procedures.

(a) *General.* It is essential that DOE maintain continuity in its programs which are implemented by contracts for the operation of Government-owned facilities. Contract data first produced or specifically used in the performance of such contracts must be considered as integral to and remaining with the facility or plant after termination of such contracts and thus available to DOE and its future contractors for the continued use of the facility or plant. However, it is recognized that these contracts by their nature cannot always be subject to one set of prescribed contract provisions which will always apply. Accordingly, the Rights in Technical Data-Facility clause set forth in 952.227–78 is to be used as a basic or minimal clause which may be modified or expanded with the concurrence of patent counsel to meet particular contract situations.

Whenever a contract has as a purpose the operation of a Government-owned research or production facility, the clause set forth at 952.227–78 shall normally be included in the contract. Inasmuch as this clause secures to the Government ownership, access to, and, if requested, delivery of all technical data first produced in the performance of the contract and access to and delivery of technical data which are specifically used in the performance of the contract, there is no need to include the Additional Technical Data Requirements Clause of 952.227–73.
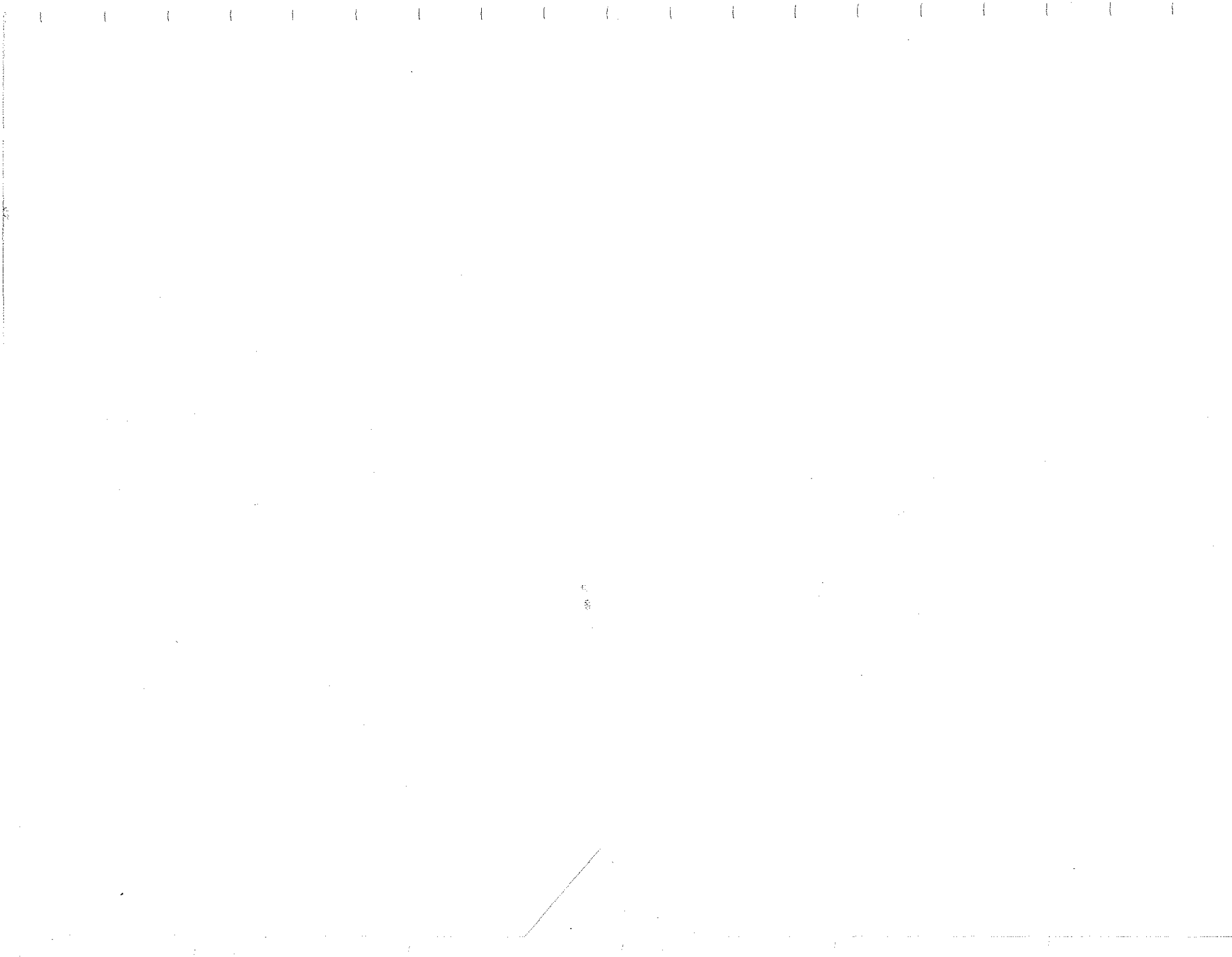
(b) *Subcontracting.* Unless otherwise directed by the contracting officer, the contractor shall be required to follow the policy and procedures of 927.402–1, 927.402–2, and 927.402–3 and shall employ the provisions of the Additional Technical Data Requirements Clause of 952.227–73 and the Rights in Technical Data (Long Form) clause of 952.227–75, where appropriate, except in subcontracts for the design of special production plants or facilities or specially designed equipment for facilities or plants, in which instances contractors shall include the provisions of the Rights in Technical Data—Facility Clause of 952.227–78.

(c) *Optional clause—Limited rights in proprietary data.* In contracts where i: determined that delivery of proprietar data is necessary with limited rights in ' the Government, the Rights in Technical Data clause of this section shall be supplemented by the additional paragraph (e), set forth in 952.227–79. Paragraph (e) provides that technical data may be specified in the contract a‹ being excluded from the delivery requirements thereof. Alternatively, paragraph (e) may be limited or made applicable to only those classes of proprietary data determined as being necessary for delivery with limited rights. In addition, when furnishing proprietary data with the limited rights legend, paragraphs (a), (b) and (c) thereunder may be modified as follows When proprietary data is to be furnished only for evaluation, paragraph (a) of the limited rights legend shall be used, and paragraphs (b) and (c), if otherwise inapplicable, may be deleted When there is a programmatic requirement that proprietary data be disclosed to other DOE contractors only for information or use in connection with work performed under their contracts, paragraph (b) of the limited rights legend shall be used, and paragraphs (a) and (c) may be deleted i: otherwise inapplicable. In either of the foregoing examples, the contractor may, if it can show the possibility of a conflict of interest because of disclosure of such data to certain contractors or evaluators, exclude contractors or evaluators from paragraphs (a) or (b). If the data is required solely for emergency repair or overhaul, paragraph (c) of the limited rights legend shall be retained, and paragraphs (a) and (b) may, unless otherwise applicable, be deleted. In the event that it is determined that all of the paragraphs (a), (b) and (c) of the limited rights legend are to be deleted, the word "none" shall be inserted in the legend after the colon (:).

(d) For contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR Part 725, see 927.402–1(h).

Part III

Department of Transportation

Office of the Secretary

48 CFR Ch. 12
Acquisition Regulations; Final Rule

Subpart 1227.4—Rights in Data and Copyrights

1227.401-70   Definitions.

(a) "Data." as used in this subpart, means recorded information, regardless of form or the media on which it may be recorded. The term includes computer software. The term does not include information incidental to contract administration, such as contract cost analysis or any financial, business and management information required for contract administration purposes.

(b) "Computer software." as used in this subpart, means computer programs, computer data bases, and documentation thereof.

(c) "Form. fit. and function data." as used in this subpart, means data relating to, and sufficient to enable, physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements.

(d) "Limited-rights data." as used in this subpart, means data that embodies trade secrets or is commercial or financial and confidential or privileged. to the extent that such data pertains to items, components or processes developed at private expense, including minor modifications thereof. (Agencies may, however, adopt the following alternate definition: "Limited-rights data." as used in this subpart, means data developed at private expense that embodies trade secrets or is commercial or financial and confidential or privileged.)

(e) "Restricted computer software." as used in this subpart, means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is published copyrighted computer software.

(f) "Unlimited rights." as used in this subpart, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(g) "Limited rights." as used in this subpart, means the rights of the Government in limited-rights data, as set forth in a Limited Rights Notice if

included in the data rights clause of the contract.

(h) "Restricted rights." as used in this subpart. means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice if included in a data rights clause of the contract or as otherwise may be included or incorporated in the contract.

1227.401-71 Procedures.

(a) *General.* All contracts that require data be produced. furnished. or acquired must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use. duplication, and disclosure of such data. except certain contracts resulting from formal. advertising that require only existing data (other than limited-rights data and restricted computer software) to be delivered and reproduction rights are not needed for such data. As a general rule. the data rights clause at 1252.227-71. Rights in Data—General. including Alternates I-V where determined appropriate by the administration (agency) as discussed in paragraph (b) below. is to be used for this purpose. However, certain types of contracts. the particular subject matter of a contract. or the intended use of the data, may require the use of other clauses or no clause at all. as discussed in paragraphs (c) and (d) below.

(b) *Basic Rights in Data.* (1) *Summary.* The clause at 1252.227-71. Rights in Data—General. is structured to strike a balance between DOT's needs in carrying out its missions and programs and the contractor's needs to protect property rights and valid economic interests in certain data arising out of private investment. This clause enables the contractor to protect from unauthorized use and disclosure data that qualified as limited-rights data or restricted computer software (see paragraph (b)(2) below for an alternate definition of limited-rights data). This clause also specifically delineates the categories or types of data that DOT is to acquire with unlimited rights (see paragraph (b)(3) below). The contractor may protect qualifying limited-rights data and restricted computer software under this clause by either withholding such data from delivery to DOT. or when DOT has a need to obtain delivery of limited-rights data or restricted computer software. by delivering such data with limited rights or restricted rights with authorized notices on the data. (See paragraphs (b) (4) and (5) below.) In addition. this clause enables contractors to establish and/or maintain copyright protection for data first

produced and/or delivered under the contract. subject to certain license rights in the Government. (See paragraph (b) (6) below.) This clause also includes procedures that apply when the Government questions whether notices on data are authorized (see paragraph (b)(7) below) or when a contractor wishes to add or correct omitted or incorrect notices on data (see paragraph (b)(8) below); addresses the contractor's right to release. publish or use certain data involved in contract performance (see paragraph (b)(9) below); and provides for the possibility for the Government to inspect certain data at the contractor's facility (see paragraph (b)(10) below).

(2) *Alternate definition of limited-rights data.* In the clause at 1252.227-71. Rights in Data—General. in order for data to qualify as limited-rights data. in addition to being data that either embodies a trade secret or is data that is commercial or financial and confidential or privileged. such data must also pertain to items. components. or processes developed at private expense. including minor modifications thereof. However. where appropriate. the contracting officer may determine to adopt in the clause the alternate definition for limited-rights data that does not require that such data pertain to items. components. or processes developed at private expense: but rather that the data that either embodies a trade secret or is commercial or financial and confidential or privileged be produced at private expense in order to qualify as limited-rights data. As an example. this alternate definition may be used where the principal purpose of a contract does not involve the development. use or delivery of items. components. or processes that are intended to be acquired for use by or for the Government (either under the contract in question or any anticipated follow-on contracts relating to the same subject matter). Other examples include contracts for market research and surveys. economic forecasts. socio-economic reports. educational material. health and safety information. management analysis. and related matters. This alternate definition of limited-rights data may be adopted. where appropriate. by using the clause with its Alternate L

(3) *Unlimited-rights data.* Under the clause at 1252.227-71. Rights in Data—General. the Government acquires unlimited rights in the following data except as provided in paragraph (b)(6) below for copyrighted data: (i) Data first produced in the performance of a contract: (ii) form. fit. and function data

delivered under contract: (iii) data (except as may be included with restricted computer software) that constitutes manuals or instructional and training material for installation. operation. or routine maintenance and repair delivered under a contract; and (iv) all other data delivered under the contract unless such data qualifies as limited-rights data or restricted computer software. If any of the foregoing data is published copyrighted data. the Government acquires it under a copyright license as set forth in paragraph (b)(6) below rather than with limited rights or restricted rights.

(4) *Protection of limited-rights data.* (i) The contractor may protect data (other than unlimited rights data or published copyrighted data) that qualifies as limited-rights data under the clause at 1252.227-71. Rights in Data—General. by withholding such data from delivery and providing form. fit. and function data in lieu thereof; or. if the clause is used with its Alternate II and DOT specifies the delivery of the data. by delivering such data with limitations on its use and disclosure. These two modes of protection afforded the contractor (i.e.. withhold. or deliver with limited rights) are provided for in paragraph (g) of the clause at 1252.227-71. Rights in Data—General. Subparagraph (g)(1) of this clause allows the contractor to withhold limited-rights data and provide form. fit. and function data in lieu thereof. Alternate II adds subparagraph (g)(2) to this clause to enable DOT selectively to obtain the delivery of withheld or withholdable data with limited rights. The limitations on the Government's right to use and disclose limited-rights data when the clause is used with its Alternate II are set forth in a "Limited Rights Notice" that the contractor is required to affix to such data. The specific limitations in the Notice are described below.

(ii) Limited-rights data delivered to the Government with the Limited Rights Notice contained in subparagraph (g)(2) (Alternate III) will not. without permission of the contractor. be used by the Government for purposes of manufacture. and will not be disclosed outside the Government except for certain limited purposes as may be set forth in the Notice. and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes which may be selected by an agency and added to the Limited Rights Notice of subparagraph (g)(2) of the clause (Alternate II):

(A) Use by support service contractors.

(B) Evaluation by nongovernment evaluators.

(C) Use by other contractors participating in the DOT program of which this contract is a part, for information and use in connection with the work performed under their contracts.

(D) Emergency repair or overhaul work.

(E) Release to a foreign government. as the interests of the United States may require. for information or evaluation. or for emergency repair or overhaul work by such Government.

(iii) As an aid in determining whether the clause should be used with its Alternate II. the provision at 1252.227–72. Notification of Limited Rights Data and Restricted Computer Software. may be included in any solicitation containing the clause at 1252.227–71. Rights in Data—General. In addition. the need for Alternate II should be considered during the negotiations of a contract. particularly if negotiations are based on an unsolicited proposal. However. use of the clause at 1252.227–71. Rights in Data—General. without Alternate II does not preclude this Alternate from being used subsequently by amendment during contract performance should the need arise for delivery of limited-rights data that has been withheld or identified as withholdable.

(5) *Protection of restricted computer software.* (i) If computer software qualifies as restricted computer software. the clause at 1252.227–71. Rights in Data—General. permits the contractor to protect such software by either withholding it from delivery and providing form. fit. and function data in lieu thereof; or if the clause is used with its Alternate III and DOT specifies delivery of the software. by delivering the software with restricted rights regarding its use. disclosure. and reproduction. The two modes of protection afforded the contractor (i.e. withhold or deliver with restricted rights) are provided for in paragraph (g) of the clause at 1252.227–71. Rights in Data—General. Subparagraph (g)(1) of this clause allows the contractor to withhold restricted computer software and provide form. fit. and function data in lieu thereof. Alternate III adds subparagraph (g)(3) to this clause to enable DOT selectively to obtain delivery of the withheld or withholdable computer software with restricted rights. The restrictions on the Government's right to use. disclose. and reproduce restricted computer software when the clause is used with its Alternate III are

set forth in "Restricted Rights Notice" that the contractor is required to affix to such computer software. When restricted computer software delivered with such Notice is published copyrighted computer software. it is acquired with a restricted copyright license. without disclosure prohibitions. as also set forth in the Notice. The specific restrictions in the Notice are set forth below.

(ii) Restricted computer software delivered with the Restricted Rights Notice of subparagraph (g)(3) (Alternate III) will not be used or reproduced by the Government. or disclosed outside the Government. except that the computer software may be:

(A) Used. or copied for use in or with the computer for which it was acquired. including use at any Government installation to which such computer or computers may be transferred:

(B) Used. or copied for use in or with a backup computer if the computer or computers for which it is acquired is inoperative:

(C) Reproduced for safekeeping (archives) or backup purposes:

(D) Modified. adapted. or combined with other computer software. provided that the modified. combined. or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights: and

(E) Disclosed and reproduced by support contractors or their subcontractors. subject to the same restrictions under which DOT acquired the software.

(iii) The restricted rights set forth in 1227.401–71(b)(5)(ii) above are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of subparagraph (g)(3) (Alternate III) of the clause. However. either greater or lesser rights. consistent with the purposes and needs for which the software is to be acquired. may be specified in the contract. Any additions to. or limitations on. the restricted rights set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause are to be expressly stated in the contract: or. with approval of the contracting officer. in a collateral agreement incorporated in and made part of the contract. (See paragraph (d)(2) below.)

(iv) As an aid in determining whether the clause should be used with its Alternate III. the provision at 1252.227–72. Notification of Limited-Rights Data and Restricted Computer Software. may be included in any solicitation containing the clause at T252.227–71.

Rights in Data—General. In addition. the need for Alternate III should be considered during negotiations of a contract. particularly if negotiations are based on an unsolicited proposal. However. use of the clause at 1252.227–71. Rights in Data—General. without Alternate III does not preclude this Alternate from being used subsequently by amendment during contract performance. should the need arise for the delivery of restricted computer software that has been withheld or identified as withholdable.

(6) *Copyrighted data.*—(i) *Data first produced in the performance of a contract.* (A) In order to enhance the transfer or dissemination of information produced at Government expense. contractors may be permitted to establish claim to copyright subsisting in data first produced in the performance of work under a contract containing the clause at 1252.227–71. Rights in Data—General. This right is granted in subparagraph (c)(1) of the clause for any data first produced under the contract. DOT may. however. specifically exclude items or categories of data from the right of the contractor to establish claim to copyright when appropriate: for example. where the data is to be disseminated in useful form by the Government. Also. agencies having programs for the transfer or dissemination of information resulting from its programs may. by use of the clause with its Alternate IV. include a substitute subparagraph (c)(1) in the clause to limit the right of the contractor granted in subparagraph (c)(1) to establish claim of copyright to scientific and technical articles based on or derived from work performed under the contract and published in academic. professional. or technical journals. However. when Alternate IV is used. permission may be granted to establish claim to copyright in all other data in accordance with the procedures set forth below.

(B) Usually permission for a contractor to establish claim to copyright for data first produced under the contract will be granted when copyright protection will enhance the appropriate transfer or dissemination of such data. The request for permission must be in writing. and may be made either at the time of contracting or subsequently during contract performance. It should identify the data involved or furnish a copy of the data for which permission is requested. as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be

granted unless: (1) The data consists of a report that represents the official views of DOT or that DOT is required by statute to prepare: (2) the data is intended primarily for internal use by the Government: (3) the data is of the type that DOT itself distributes to the public under an established program: or (4) DOT determines that limitation on distribution of the data is in the national interest.

(C) Whenever a contractor establishes claim to copyright subsisting in data first produced in the performance of a contract, the Government normally is granted a paid-up. nonexclusive. irrevocable. worldwide license to reproduce. prepare derivative works. distribute to the public. perform publicly and display publicly by or on behalf of the Government. for all such data, as set forth in subparagraph (c)(1) of the clause at 1252.227-71. Rights in Data—General. However. DOT may on a case-by-case basis or on a class basis obtain on equitable terms a license of lesser scope than set forth in subparagraph (c)(1) of the clause if DOT determines that such lesser license will substantially enhance the transfer or dissemination of any data first produced under the contract.

(ii) *Data not first produced in the performance of a contract.* (A) Contractors are not to incorporate in data delivered under contract any data not first produced under the contract with the copyright notice of 17 U.S.C. 401 or 402 without either: Acquiring for, or granting to the Government and others acting on its behalf. a paid-up. nonexclusive. irrevocable. worldwide license to reproduce. prepare derivative works. distribute copies to the public. and perform publicly and display publicly. by or on behalf of the Government. for all such data: or obtaining permission from the contracting officer to do otherwise. However. if computer software not first produced under contract is delivered with the copyright notice of 17 U.S.C. 401 or 402. the Government's license will be as set forth in subparagraph (g)(3) (Alternate III) if included in the clause at 1252.227-71. Rights in Data—General. or as otherwise may be provided in a collateral agreement incorporated in or made part of the contract.

(B) Contractors delivering data with an authorized limited rights or restricted rights notice and a copyright notice of 17 U.S.C. 401 or 402 should modify the copyright notice to include the following (or similar) statement: "Unpublished— all rights reserved under the copyright laws." If this statement is omitted. the contractor may be afforded opportunity to correct it in accordance with 1227.401-71(b)(8). Otherwise. data

delivered with a copyright notice of 17 U.S.C. 401 or 402 may be presumed to be published copyrighted data subject to the applicable license rights set forth in paragraph (b)(6)(ii)(A) above. without disclosure limitations or restrictions.

(C) If contractor action causes limited rights or restricted rights data to be published with copyright notice after its delivery to the Government, the Government is relieved of disclosure and use limitations and restrictions regarding such data, and the contractor should advise the Government and request that a copyright notice be placed on the data. and acknowledge that the applicable copyright license set forth in paragraph 1227.401-71(b)(6)(ii) above applies.

(7) *Unauthorized marking of data.* The Government has. in accordance with paragraph (e) of the clause at 1252.227-71. Rights in Data—General, the right either to return to the contractor data containing markings not authorized by that clause or to cancel or ignore such markings. However. markings will not be cancelled or ignored without making written inquiry of the contractor and affording the contractor at least 30 days to substantiate the propriety of the markings. The contracting officer will also give the contractor notice of any determination made based on any response by the contractor. Any such determination to cancel or ignore the markings shall be a final decision under the Contract Disputes Act. Failure of the contractor to respond to the contracting officer's inquiry within the time afforded may. however. result in Government action to cancel or ignore the markings. The above procedures may be modified in accordance with DOT regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request for data thereunder.

(8) *Omitted or incorrect notices.* (i) Data delivered under a contract containing the clause at 1252.227-71. Rights in Data—General. without a limited-rights notice or restricted rights notice. or without a copyright notice. shall be presumed to have been delivered with unlimited rights. and the Government assumes no liability for the disclosure. use or reproduction of such data. However. to the extent the data has not been disclosed without restriction outside the Government. the contractor may within six months (or a longer period approved by the contracting officer for good cause shown) request permission of the contracting officer to have omitted limited rights or restricted rights notices. as applicable. placed on qualifying data at the contractor's expense. and the

contracting officer may agree to so permit if the contractor—

(A) Identifies the data for which a notice is to be added or corrected:

(B) Demonstrates that the omission of the proposed notice was inadvertent:

(C) Establishes that use of the proposed notice is authorized: and

(D) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(ii) The contracting officer may also (A) permit correction at the contractor's expense of incorrect notices if the contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized. or (B) correct any incorrect notices.

(9) *Release, publication and use of data.* (i) In the clause at 1252.227-71. Rights in Data—General. paragraph (d) provides that contractors normally have the right to use. release to others. reproduce. distribute. or publish data first produced or specifically used by the contractor in the performance of a contract; however. to the extent the contractor receives or is given access to data that is necessary for the performance of the contract and the data contains restrictive markings. the contractor agrees to treat the data in accordance with such markings unless otherwise specifically authorized in writing by the contracting officer.

(ii) DOT may. on a case-by-case basis. or on a class basis. place further limitations or restrictions on the contractor's right to use. release to others. reproduce. distribute or publish any data first produced (but not data specifically used) in the performance of the contract. Such restrictions are not to be imposed on a class basis unless they are pursuant to statutory requirements. determined to be necessary in the furtherance of DOT mission objectives. or determined to be necessary in support of specific DOT programs.

(10) *Inspection of data at the contractor's facility.* DOT may obtain the right to inspect data at the contractor's facility by use of Alternate V. which adds paragraph (j) to provide that right in the clause at 1252.227-71. Rights in Data—General. The data subject to inspection may be data withheld or withholdable under subparagraph (g)(1) of the clause. or any data specifically used in the performance of the contract. Such inspection may be made by the contracting officer or representative for the purpose of verifying a contractor's

assertion regarding the limited rights or restricted rights status of the data. or for evaluating work performance under the contract. This right may be exercised at all reasonable times up to three years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) (Alternate V). If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative. the contracting officer shall designate an alternate representative.

(c) *Production of special works.* (1) The clause at 1252.227–74. Rights in Data—Special Works, applies to contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use. or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance. or disclosure of the data. Examples are contracts for—

(i) The production of audiovisual works including motion pictures or television recordings with or without accompanying sound. or for the preparation of motion picture scripts. musical compositions. sound tracks. translations. adaptations, and the like:

(ii) Histories of the respective agencies. departments. services. or units thereof:

(iii) Works pertaining to recruiting. morale. training. or career guidance:

(iv) Surveys of Government establishments:

(v) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties:

(vi) The compilation of reports. studies. surveys. or similar documents that do not involve research. development. or experimental work performed by the contractor:

(vii) The collection of data containing identifiable personal information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates:

(viii) Investigatory reports: or

(ix) The development. accumulation. or compilation of data (other than that resulting from research, development. or experimental work performed by the contractor). the early release of which could prejudice follow-on acquisition activities.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used. released. or reproduced other than for contract performance. Contracts for the production of audiovisual works. sound recordings. etc.. may include limitations in connection with talent releases. music licenses. and the like that are consistent with the purposes for which the works are acquired.

(d) *Acquisition of existing data other than limited-rights data.* (1) *Existing audiovisual and similar works.* The clause at 1252.227–75. Rights in Data—Existing Works, is for the use in contracts exclusively for the acquisition (without modification) of existing motion pictures. television recordings. and other audiovisual works: sound recordings: musical. dramatic. and literary works: pantomimes and choreographic works: pictorial. graphic. and sculptural works: and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are: (i) Means of exhibition or transmission. (ii) time. (iii) type of audience. and (iv) geographical location. If the contract requires that works of the type indicated above are to be modified through editing. translation. or addition of subject matter. etc. (rather than purchased in existing form). the clause at 1252.227–74. Rights in Data—Special Works. is to be used. (See 1227.401–71(c))

(2) *Separate acquisition of existing computer software.* (i) If the contract is for the separate acquisition of existing computer software. no specific contract clause prescribed in this subpart need be used. However. the contract must specifically address the Government's rights to use. disclose. and reproduce the software. and must contain terms obtaining sufficient rights for the Government to fulfill the need for which the software is being acquired. The restricted rights set forth in 1227.401–71(b)(5) should be used as a guide and are usually the minimum the Government should accept. If the computer software is to be acquired with unlimited rights. the contract must also so state. In addition. the contract must adequately describe the computer programs and/or data bases. the form (tapes. punch cards. disc pack. and the like). and all the necessary documentation pertaining thereto. If the acquisition is by lease or license. the disposition of the computer software (by returning to the vendor or destroying) at

the end of the term of the lease or license must be addressed.

(ii) If the contract incorporates. makes reference to. or uses a vendor's standard commercial lease. license. or purchase agreement. such agreement shall be reviewed to assure that it is consistent with paragraph (d)(2)(i) above. Caution should be exercised in accepting a vendor's terms and conditions since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract. and the contract terms shall take precedence over the vendor's standard commercial agreement.

(iii) If a prime contractor under a contract containing the clause at 1252.227–71. Rights in Data—General. with subparagraph (g)(3) (Alternate III) in the clause. acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to the Government. the contracting officer may approve any additions to. or limitations on the restricted rights in the Restricted Rights Notice of subparagraph (g)(3) in a collateral agreement incorporated in and made part of the contract. (See also 1227.401–71(b)(5).)

(3) *Other existing works.* Except for existing audiovisual and similar works pursuant to paragraph (d)(1) above. and existing computer software pursuant to paragraph (d)(2) above. no clause contained in this subpart need be included in: (i) Contracts solely for the acquisition of books. publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e. the off-the-shelf purchase of such items) unless reproduction rights of such items are to be obtained: or (ii) contracts resulting from formal advertising that require only existing data to be delivered unless reproduction rights for such data (other than limited-rights data) are to be obtained. If reproduction rights are to be obtained. such rights must be specifically set forth in the contract.

1227.401–72 Acquisition of data.

(a) *General.* (1) It is important to recognize and maintain the conceptual distinction between contract terms whose purpose is to identify the data required for delivery to. or made available to. the Government (i.e. data requirements): and those contract terms whose purpose is to define the respective rights of the Government and the contractor in such data (i.e. data rights). This section relates to data

requirements; 1227.401-71 relates to the data rights.

(2) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements are subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum.

(3) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data, shall be specified in the contract.

(b) *Additional data requirements.* Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be possible or appropriate to ascertain all the data requirements at the time of contracting, the clause at 1252.227-73, Additional Data Requirements, is provided to enable the subsequent ordering by the Government of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. Data may be ordered under the clause at any time during contract performance or within a period of three years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contractor may be relieved of retention requirements for specified data items by the contracting officer at any time during the retention period required by the clause. Any data ordered under the clause will be subject to the Rights in Data—General clause in the contract and data authorized to be withheld under that clause will not be required to be delivered under this Additional Data Requirements clause.

1227.401-73 Solicitation provisions and contract clauses.

(a) *Rights in Data—General.* (1) The contracting officer shall insert the clause at 1252.227-71, Rights in Data—General, (see 1227.401-71(b)) in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 1227.401-71(c). In

this circumstance, the contracting officer shall include the clause at 1252.227-71, Rights in Data—General, and make it applicable to data other than special works, as appropriate:

(ii) For the separate acquisition of existing works, as described in 1227.401-71(d);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case the contracting officer may prescribe different clauses (see paragraph (h) below);

(iv) For architect-engineer services or construction work, in which case the contracting officer may prescribe different clauses (see paragraph (i) below), but the clause at 1252.227-71, Rights in Data—General, may be included in the contract and made applicable to data pertaining to other than architect-engineer services and construction work:

(v) A Small Business Innovative Research (SBIR) contract, in which case the contracting officer shall prescribe clauses consistent with the requirements of Pub. L. 97-219 (the Small Business Innovation Development Act of 1982) and the Small Business Administration Policy Directive No. 85-01 (see paragraph (j) below):

(vi) For the operation of a Government-owned facility to perform research, development or production work, in which case the contracting officer may prescribe different clauses (see paragraph (k) below).

(2) If the contracting officer determines, in accordance with 1227.401-71(b)(2), to adopt the alternate definition of "Limited Rights Data" in paragraph (a) of the clause, the clause at 1252.227-71 shall be used with its Alternate I.

(3) If DOT needs to obtain the delivery of limited-rights data (see 1227.401-71(b)(4)), the clause shall be used with its Alternate II. The contracting officer shall, when Alternate II is used, assure that the purposes, if any, for which limited-rights data is to be disclosed outside the Government are included in the "Limited Right Notice" of subparagraph (g)(2) of the clause in accordance with 1227.401-71(b)(4). The contract may exclude identified items of data from delivery under subparagraph (g)(2) of the clause. Alternate II may be used at the time of contracting or subsequently by amendment if the need to acquire limited-rights data arises during contract performance.

(4) If an administration needs to obtain the delivery of restricted computer software (see 1227.401-71(b)(5)), the clause shall be used with

its Alternate III. Any greater or lesser rights regarding the use, duplication, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause must be specified in the contract. Alternate III may be used at the time of contracting or subsequently by amendment if the need to acquire restricted computer software arises during contract performance.

(5) If DOT wishes to limit the automatic right of the contractor to establish claim to copyright subsisting in data first produced in the performance of the contract, to scientific and technical articles based on or derived from the work performed under the contract and published in academic, technical, or professional journals, the clause shall be used with its Alternate IV. (See 1227.401-71(b)(6).) Alternate IV provides a substitute subparagraph (c)(1) in the clause with such limitation. This subparagraph (c)(1) does, however, allow the contracting officer to give permission to the contractor to establish claim to copyright subsisting in other data first produced in the performance of the contract, either at the time of contracting or subsequently during contract performance, in accordance with 1227.401-71(b)(6).

(6) If DOT needs to have the right to inspect certain data at a contractor's facility, (see 1227.401-71(b)(10)), the clause shall be used with its Alternate V. Alternate V adds a paragraph (j) to the clause to provide for such right, including the limitations thereon. Inspection may be by the contracting officer or representative and may be made at all reasonable times up to three years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not to be subject to inspection under paragraph (j) of the clause. If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

(b) If DOT desires to have an offeror state in response to a solicitation, to the extent feasible, whether limited-rights data or restricted computer software is likely to be used in meeting the data requirements set forth in the solicitation, the contracting officer shall insert the provision at 1252.227-72, Notification of Limited-Rights Data and Restricted Computer Software, in any solicitation containing the clause at 1252.227-71, Rights in Data—General. The

contractor's response will aid in determining whether the clause should be used with Alternate II and/or Alternate III. (See 1227.401-71(b) (4) and (5).)

(c) The contracting officer shall insert the clause at 1252.227-73. Additional Data Requirements, in solicitations and contracts involving experimental. developmental, research. or demonstration work unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. (See 1227.401-72.) This clause may also be used in other contracts when considered appropriate. If the clause at 1252.227-71. Rights in Data—General. is used in the contract with its Alternates II or III. the contracting officer may permit the contractor to identify data the contractor does not wish to deliver, and may specifically exclude in the contract any requirement that such data be delivered under paragraphs (g)(2) or (g)(3) of that clause or ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the Additional Data Requirements clause by deleting the term "or specifically used" in subparagraph (a) thereof if delivery of such data is not necessary to meet the Government's requirements for data.

(d) The contracting officer shall insert the clause at 1252.227-74. Rights in Data—Special Works. in solicitations and contracts primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use. or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance. or disclosure of the data. Examples of such contracts are set forth in 1227.401-71(c). The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released or reproduced by the contractor for other than contract performance. Contracts for the production of audiovisual works. sound recordings. etc. may include limitations in connection with talent releases. music licenses, and the like that are consistent with the purposes for which the data is acquired.

(e) The contracting officer shall insert the clause at 1252.227-75. Rights in Data—Existing Works. in solicitations and contracts exclusively for the acquisition. without modification. of existing audiovisual and similar works

of the type set forth in 1227.401-71(d)(1). The contract may set forth limitations consistent with the purposes for which the work is being acquired. The clause at 1252.227-74. Rights in Data—Special Works. shall be used if existing works are to be modified. as by editing. translation. addition of subject matter. etc.

(f) While no specific clause of this subpart need be included in contracts for the separate acquisition of existing computer software. the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 1227.401-71(d)(2).

(g) While no specific clause of this subpart need be included in contracts solely for the acquisition of books. publications and similar items in the exact form in which such items exists prior to the request for purchase (i.e.. the off-the-shelf purchase of such items). if reproduction rights are to be acquired the contract shall include terms addressing such rights. (See 1227.401-71(d)(3).)

(h) The contracting officer may prescribe. as appropriate. clauses consistent with the policy of FAR 27.401 in contracts to be performed outside the United States. its possessions. and Puerto Rico.

(i) The contracting officer may prescribe. as appropriate, clauses consistent with the policy in FAR 27.401 in contracts for architect-engineer services and construction work.

(j) The contracting officer shall prescribe clauses consistent with the requirements of Pub. L. 97-219 (the Small Business Administration Development Act of 1982) and the Small Business Innovative Policy Directive No. 65-01 in Small Business Innovative Research (SBIR) contracts.

(k) The contracting officer may prescribe. as appropriate, clauses consistent with the policy of FAR 27.401 in contracts for the operation of Government-owned research. development. or production facilities.

"Form, fit, and function data," as used in this clause, means data describing, and sufficient to enable, physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements.

"Limited-rights data," as used in this clause, means data that embodies trade secrets or is commercial or financial and confidential or privileged, but only to the extent that the data pertains to items, components, or processess developed at private expense, including minor modifications thereof.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret, is commercial or financial data which is confidential or privileged, or is published copyrighted computer software.

"Unlimited rights," as used in this clause, means the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

"Limited rights," as used in this clause, means the rights of the Government in limited-rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitutes manuals or instructional and training material for installation, operation, or routine maintenance and repair; and

(iv) All other data delivered under this contract unless otherwise provided for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) The contractor shall have the right to—

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract unless provided otherwise in paragraph (d) below;

(ii) Protect from unauthorized disclosure and use that data which is limited-rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add, or correct limited rights or restricted rights notices, and to take other appropriate action, in accordance with paragraphs (e) and (f) below; and

1252.227-71   Rights in Data—General.

(a) As prescribed in 1227.401-73(a)(1) insert the following clause:

Rights in Data—General (Apr. 1984)

(a) *Definitions.*

"Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term shall be construed broadly; it includes all writings within the scope of Article 1, Section 8, Clause 8 of the United States Constitution, as well as all works subject to copyright under Title 17, United States Code. The term does not include information incidental to contract administration, such as contract cost analysis or financial, business, and management information required for contract administration purposes.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) *Copyright*—(1) *Data first produced in the performance of this contract.* Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. When claim to copyright is made, the contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 to the data when such data is delivered to the Government, and include that notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) *Data not first produced in the performance of this contract.* The contractor shall not, without prior written permission of the contracting officer, incorporate into data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 or 402 unless the contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above; *provided,* however, that if such data is computer software, the Government shall acquire a copyright license as set forth in subparagraph (g)(3) below if included in this contract, or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.

(3) The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Release, publication and use of data.* (1) The contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the contractor in the performance of this contract, except as may be provided otherwise below in this paragraph.

(2) The contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contains restrictive markings, the contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the contracting officer.

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract is marked with the notices specified in subparagraphs (g)(2) or (g)(3) below and use of such is not authorized by this clause, the contracting officer may either return the data to the contractor, or cancel or ignore the markings. However, markings will not be cancelled or ignored unless—

(i) The contracting officer makes written inquiry to the contractor concerning the propriety of the markings, providing the contractor 30 days to respond; and

(ii) The contractor fails to respond within the 30 day period (or such longer time approved by the contracting officer for good cause shown), or the contractor's response fails to substantiate the propriety of the markings.

(2) The contracting officer shall consider the contractor's response, if any, and determine whether the markings shall be cancelled or ignored. The contracting officer shall furnish written notice to the contractor of the determination, which shall be a final decision under the Contract Disputes Act.

(3) The above procedures may be modified in accordance with DOT administrations' regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request for data thereunder.

(f) *Omitted or incorrect markings.* (1) Data delivered to the Government without any notice authorized by paragraph (g) below, or without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may request, within six months (or such longer time approved by the contracting officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the contractor's expense, and the contracting officer may agree to do so if the contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also (i) permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized; or (ii) correct any incorrect notices.

(g) *Protection of limited-rights data and restricted computer software.* (1) When data other than that listed in subdivisions (b)(1) (i), (ii), and (iii) above, is specified to be delivered under this contract and qualifies as either limited-rights data or restricted computer software, the contractor, if it desires to continue protection of such data, shall withhold such data and not furnish it to the Government under this contract. As a condition to this withholding, the contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited-rights data that is formatted as a computer data base for delivery to the Government is to be treated as limited-rights data and not restricted computer software.

(2)–(3) [Reserved]

(h) *Subcontracting.* The contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the contractor shall promptly bring such refusal to the attention of the contracting officer and not proceed with subcontract award without further authorization.

(i) *Relationship 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.

(b) *Alternate I* (APR 1984). As prescribed in 1227.401–73(a)(2), substitute the following definition for "Limited-Rights Data" in paragraph (a) of the clause:

"Limited-rights data," as used in this clause, means data produced at private expense that embodies trade secrets or is commercial or financial and confidential or privileged.

(c) *Alternate II* (APR 1984). As prescribed in 1227.401–73(a)(3), insert the following subparagraph (g)(2) in the clause:

(g)(2) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of limited-rights data, or the contracting officer may require by written request the delivery of limited-rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the contractor may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) above, in accordance with such Notice:

Limited Rights Notice (Apr. 1984)

(a) This data is submitted with limited rights under Government contract No——— (subcontract———, if appropriate). It may be reproduced and used by the Government with the express limitation that it will not, without permission of the contractor, be used for purposes of manufacture or disclosed outside the Government; except that the Government may disclose this data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

———(The contracting officer may list additional purposes as set forth in 1227.401–71(b)(4).)

(b) This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of Notice)

(d) *Alternate III* (APR 1984). As prescribed in 1227.401–73(a)(4), insert the following subparagraph (g)(3) in the clause:

(g)(3)(i) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of restricted computer software, or the contracting officer may require by written request the delivery of

restricted computer software that has been withheld. If delivery of such computer software is so required, the contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) above, in accordance with the Notice:

Restricted Rights Notice (Apr. 1984)

(a) This computer software is submitted with restricted rights under Government contract No. ———— (and subcontract ————, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided below or as otherwise expressly stated in the contract.

(b) This computer software may be—

(1) Used or copied for use in or with the computer for which it was acquired, including use at any Government installation to which such computer may be transferred;

(2) Used with a backup computer if the computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating restricted computer software shall be subject to the same restricted rights; and

(5) Disclosed and reproduced for use by support contractors or their subcontractors in accordance with subparagraphs (1) through (4) above, provided the Government makes such disclosure subject to these restricted rights.

(d) Any other rights or limitations regarding the use, duplication or disclosure of this computer software are to be expressly stated in the contract.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the above Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice (Short Form) (Apr. 1984)

Use, reproduction, or disclosure is subject to restrictions set forth in contract No ———— (and subcontract ———— if appropriate) with ———— (name of contractor and subcontractor).

(End of Notice)

(e) *Alternate IV* (APR 1984). As prescribed in 1227.401–73(a)(5), substitute the following subparagraph (c)(1) in the clause:

(c)(1) *Data first produced in the performance of this contract.* Unless provided otherwise in subparagraph (d) below, the contractor may establish claim to copyright subsisting in scientific and technical articles based on or derived from data first produced in the performance of this contract and published in academic, technical, or professional journals. The prior, express written permission of the contracting

officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract in accordance with Transportation Acquisition Regulation 1227.401–71(b)(8). When claim to copyright is made, the contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 to the data when such data is delivered to the Government, and include that notice as well as acknowledgement of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(f) *Alternate V* (APR 1984). As prescribed in 1227.401–73(a)(6), add the following paragraph (j) to the clause:

(j) The contractor agrees, except as may be otherwise specified in this contract for specific data items listed as not subject to this paragraph, that the contracting officer or an authorized representative may, at all reasonable times up to three years after acceptance of all items to be delivered under this contract, inspect at the contractor's facility, any data withheld under subparagraph (g)(1) of this clause, or any data specifically used in the performance or verifying the contractor's assertion pertaining to the limited rights or restricted rights status of the data. Where the contractor whose data is to be inspected demonstrates to the contracting officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the contracting officer shall designate an alternative inspector.

(End of clause)

1252.227–72 Notification of Limited-Rights Data and Restricted Computer Software.

As prescribed in 1227.401–73(b) insert the following provision in solicitations that include the clause at 1252.227–71, Rights in Data—General:

Notification of Limited-Rights Data and Restricted Computer Software (Apr. 1984)

(a) This solicitation sets forth the work to be performed and the Government's known requirements for data (as defined in Transportation Acquisition Regulation, 1227.401). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause (Transportation Acquisition Regulation 1252.227–73) if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data—General clause (Transportation Acquisition Regulation 1252.227–71) that is to be included in this contract. Under this clause, a contractor may withhold from delivery data that qualifies as limited-rights data or restricted computer software, and deliver form, fit, and function data in lieu thereof. This clause also may be used with Alternates II and/or III to obtain

delivery of limited-rights data or restricted computer software with limited rights or restricted rights. In addition, use of Alternate V with this clause provides the Government with the right to inspect such data at the contractor's facility.

(b) As an aid in determining the Government's need to include any of the above Alternates in the clause at 1252.227–71, Rights in Data—General, the offeror's response to this solicitation shall, to the extent feasible, either state that none of the data qualifies as limited-rights data or restricted computer software, or identify which of the data qualifies as limited-rights data or restricted computer software. Any identification of limited-rights data or restricted computer software in the offeror's response is not determinative of the status of such data should a contract be awarded to the offeror.

(End of provision)

1252.227–73 Additional Data Requirements.

As prescribed in 1227.401–73(c), insert the following clause in solicitations and contracts involving experimental, developmental or research work, except those awards using small purchase procedures. This clause may be used in solicitations and contracts for other types of work after consultation with legal counsel:

Additional Data Requirements (Apr. 1984)

(a) In addition to the data (as defined in the Rights in Data—General clause included in this contract) specified elsewhere in this contract to be delivered, the contracting officer may at any time during contract performance or within a period of three years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The Rights in Data—General clause included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the contractor to deliver any data: (1) The withholding of which is authorized by the Rights in Data—General clause of this contract; or (2) which is specifically identified in this contract as not subject to this clause.

(c) When data is to be delivered under this clause, the contractor will be compensated for: (1) Converting the data into the prescribed form, (2) reproduction; and (3) delivery.

(d) The contracting officer may release the contractor from the requirements of this clause for specifically identified data items at any time during the three-year period set forth in (a) above.

(End of clause)

1252.227–74 Rights in Data—Special Works.

As prescribed in 1227.401–73(d), insert the following clause:

product was developed under a Department of Transportation contract containing a Recoupment of Development Costs clause and that the purchase or lease price of such product is less than the price of such product when sold or leased to other than the Government by an amount no less than the Government's share under the Recoupment of Development Costs clause. A copy of each such notice shall be sent to the Contracting Officer. In the event the product is sold or leased to the Government, the amount by which the sales or lease price was reduced by virtue of this clause shall be credited to the amount recoverable under this clause.

(c) As may be determined by the Contracting Officer to be fair, reasonable and equitable, the Contractor shall also pay to the Government up to 33 percent of all sums hereafter received by, or credited to, the Contractor or its privies (including subcontractors) as payments under technical agreements permitting others (1) to sell, lease, or manufacture the product identified in paragraph (a) above, and (2) to use any process which is substantially the same as, or which is directly derived from, that developed by the Contractor or any of its subcontractors in the performance of this contract.

(d) Recoupment by the Government under this clause shall be limited to amounts paid and credited to the Contractor under this contract. Payments to the Government under this clause shall not be so high as to destroy the Contractor's competitive position for the product involved. provided that the product is otherwise reasonably priced and efficiently and economically produced.

(3) The Contractor shall report to the Government all sales, leases, licensing agreements, royalties and receipts which might reasonably be considered to be subject to this clause; and the Contractor shall promptly render accurate, certified accounts thereon to the Government at reasonable intervals.

(End of clause)

1252.235-70   [Reserved].

1252.235-71   Recoupment of Development Costs.

As prescribed in 1235.070 insert the following clause in solicitations and contracts:

Recoupment of Development Costs (Apr. 1984)

(a) As may be determined by the contracting officer to be fair, reasonable and equitable, the contractor shall pay to the Government up to five percent (5%) of sums hereafter received by or credited to the Contractor or its privies (including subcontractors) on sales or leases (exclusive of sales or leases to the U.S. Government. either directly or indirectly through Government prime contractors or subcontractors) of any product which is substantially the same in design as, or which is directly derived from, that developed by the Contractor or any of its subcontractors in the performance of this contract.

(b) In selling or leasing the product identified in paragraph (a) above to the Government. either directly or indirectly through Government prime Contractors or subcontractors, the Contractor or its privies (including subcontractors) shall notify the purchaser or lessee in writing that the

1252.242-70   Dissemination of Information—Educational Institutions.

As prescribed in 1242.203-70(c), the following clause may be used in research contracts with educational institutions in lieu of the clause 1252.242-72.

Dissemination of Information—Educational Institutions (Jan. 1985)

The Department desires widespread dissemination of the results of funded transportation research. The contractor, therefore, may publish (subject to the provisions of the "Data Rights" and "Patent Rights" clauses of the contract) research results in professional journals, books. trade publications, or other appropriate media (a thesis or collection of theses should not be used to distribute results as dissemination will not be sufficiently widespread.) All costs of publication pursuant to this clause shall be borne by the contractor and shall not be charged to the Government under this or any other Federal contract. Any copy of material published under this clause must contain acknowledgment of the Department of Transportation's sponsorship of the research effort and a disclaimer stating that the published material represents the position of the author(s) and not necessarily that of the Department of Transportation. Articles for publication or papers to be presented to professional societies do not require the authorization of the contracting officer prior to release.

However. two copies of each article shall be transmitted to the contracting officer at least two weeks prior to release or publication. Press releases concerning the results or conclusions from the research under this contract. shall not be made or otherwise distributed to the public without prior written approval of the contracting officer. Publication under the terms of this clause does not release the contractor from the obligation of preparing and submitting to the contracting officer a final report containing all findings and results of research, as set forth in the schedule of this contract.

(End of clause)

1252.242-72   Dissemination of contract information.

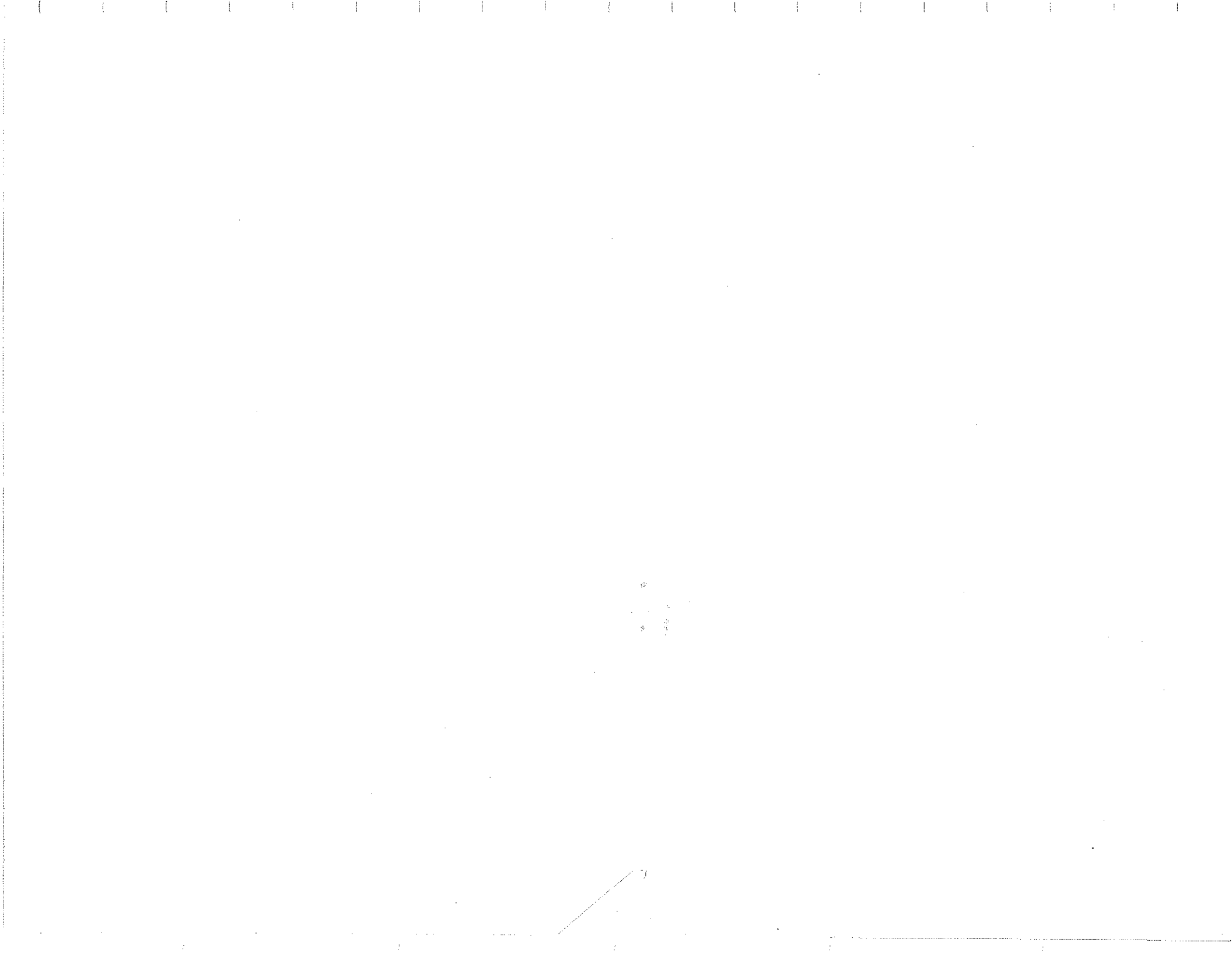As prescribed in 1242.203-70(b) insert the following clause in solicitations and contracts:

Dissemination of Contract Information (Apr. 1984)

The Contractor shall not publish. permit to be published, or distribute for public consumption. any information, oral or written. concerning the results or conclusions made pursuant to the performance of this contract. without the prior written consent of the Contracting Officer. (Two copies of any material proposed to be published or distributed shall be submitted to the Contracting Officer.)

(End of clause)

14

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1527 and 1552

[EPAAR Temp. Reg. 1; OA-FRL-2632-8]

Rights in Data and Copyrights Under EPA Contracts

AGENCY: Environmental Protection Agency.

ACTION: Temporary regulation.

SUMMARY: This EPA Acquisition Regulation (EPAAR) Temporary Regulation establishes policies and procedures under EPA contracts for rights in data and copyrights, and requirements for data. This action is necessary since the Federal Acquisition Regulation, which was effective on April 1, 1984, did not include regulatory coverage of rights in data and

copyrights. Regulatory coverage of these subjects in the FAR is not expected until after July 15, 1984. The intended effect of this action is to establish contractual rights and obligations between EPA and its contractors with respect to data and copyrights.

DATES: Effective date: July 15, 1984. Expiration date: July 14, 1986. Comments due: September 15, 1984.

ADDRESSES: Comments may be mailed to Edward Murphy, Procurement and Contracts Management Division (PM-214), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Edward Murphy, Policy Section, Tel: (202) 382-5034.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

In accordance with the memorandum from David Stockman, Director, Office of Management and Budget, to Donald Sowle, Administrator, Office of Federal Procurement Policy, and Christopher DeMuth, Administrator, Information and Regulatory Affairs, dated October 4, 1982, this rule is exempt from the provisions of Executive Order 12291.

Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96-354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have a significant economic impact on a substantial number of small entities. The EPA certifies that this rule will not have a significant impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis has been prepared.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2030-0012.

List of Subjects in 48 CFR Parts 1527 and 1552

Government procurement, Patents, data and copyrights.

(Sec. 205(c), 63 Stat. 390, as amended. 40 U.S.C. 486(c))

Dated: July 11, 1984.

Kenneth Dawsey,

Acting Director. Office of Administration.

1. 48 CFR Part 1527 is revised to read as follows:

PART 1527—PATENTS, DATA, AND COPYRIGHTS

Subpart 1527.70—Rights in Data and Copyrights

Sec.
1527.7000 Scope of subpart.
1527.7001 Definitions.
1527.7002 Policy.
1527.7003 Procedures.
1527.7004 Acquisition of data.
1527.7005 Solicitation provisions and contract clauses.

Authority: Sec. 205(c), 63 Stat. 390, as amended. 40 U.S.C. 486(c).

Subpart 1527.70—Rights in Data and Copyrights

1527.7000 Scope of subpart.

This subpart sets forth policies, procedures, and instructions with respect to—

(a) Rights in data and copyrights, and
(b) requirements for data.

1527.7001 Definitions.

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

"Data," as used in this subpart, means recorded information, regardless of form or the media on which it may be recorded. The term includes computer software. The term does not include information incidental to contract administration, such as contract cost analysis or any financial, business and management information required for contract administration purposes.

"Form, fit, and function data," as used in this subpart, means data relating to, and sufficient to enable, physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements.

"Limited rights," as used in this subpart, means the rights of the Government in limited-rights data, as set forth in a Limited Rights Notice if included in the data rights clause of the contract.

"Limited-rights data," as used in this subpart, means data that embodies trade secrets or is commercial or financial and confidential or privileged, to the extent that such data pertains to items, components or processes developed at private expense, including minor modifications thereof. (Contracting Officers may, with the concurrence of the Project Officer, use the following alternate definition: "Limited-rights data," as used in this subpart, means data developed at private expense that embodies trade secrets or is commercial or financial and confidential or privileged.)

"Restricted computer software," as used in this subpart, means computer software developed at private expense and that is a trade secret, or is commercial or financial and confidential or privileged, or is published copyrighted computer software.

"Restricted rights," as used in this subpart, means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice if included in a data rights clause of the contract or as otherwise may be included or incorporated in the contract.

"Unlimited rights," as used in this subpart, means the right of the Government, without additional cost to the Government, to use, disclose reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

1527.7002 Policy.

It is necessary for EPA, in order to carry out its missions and programs, to acquire or obtain access to many kinds of data produced during or used in the performance of its contracts. Such data may be required to: obtain competition among suppliers; fulfill certain responsibilities for disseminating and publishing the results of its activities; ensure appropriate utilization of the results of research, development, and demonstration activities; and meet other programmatic and statutory requirements, including regulatory activities. At the same time, EPA recognizes that its Contractors may have a property right or other valid economic interest in certain data resulting from private investment, and that protection from unauthorized use and disclosure of this data is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the Contractor's commercial position, and maintain EPA's ability to obtain access to or use of such data. The protection of this data by EPA is necessary to encourage qualified Contractors to participate in EPA programs and apply innovative concepts to such programs. The specific procedures and prescriptions for use of solicitation provisions and contract clauses set forth below are framed in light of the above considerations to strike a balance between EPA's needs and the Contractor's property rights and economic interests.

366

1527.7003 Procedures.

(a) *General.* All contracts that require data be produced, furnished, or acquired must contain terms that delineate the respective rights and obligations of the Government and the Contractor regarding the use, duplication, and disclosure of such data, except certain contracts resulting from formal advertising that require only existing data (other than limited-rights data and restricted computer software) to be delivered and reproduction rights are not needed for such data. As a general rule, the data rights clause at 1552.227–71, Rights in Data—General, is to be used for this purpose. However, certain types of contracts, the particular subject matter of a contract, or the intended use of the data, may require the use of other clauses or no clause at all, as discussed in paragraphs (c) and (d) of this section.

(b) *Basic Rights in Data Clause.* (1) *Summary.* The clause at 1552.227–71, Rights in Data—General, is structured to strike a balance between EPA's needs in carrying out its mission and programs and the Contractor's needs to protect property rights and valid economic interests in certain data arising out of private investment. This clause enables the Contractor to protect from unauthorized use and disclosure data that qualifies as limited-rights data or restricted computer software (see paragraph (b)(2) of this section for an alternate definition of limited-rights data). This clause also specifically delineates the categories or types of data that the Government is to acquire with limited rights (see paragraph (b)(3) of this section). The Contractor may protect qualifying limited-rights data and restricted computer software under this clause by either withholding such data from delivery to the Government; or when EPA has a need to obtain delivery of limited-rights data or restricted computer software, by delivering such data with limited rights or restricted rights with authorized notices on the data. (See paragraphs (b)(4) and (b)(5) of this section.) In addition, this clause enables Contractors to establish and/or maintain copyright protection for data first produced and/or delivered under the contract, subject to certain license rights in the Government. (See paragraph (b)(6) of this section.) This clause also includes procedures that apply when EPA questions whether notices on data are authorized (see paragraph (b)(7) of this section) or when a Contractor wishes to add or correct omitted or incorrect notices on data (see paragraph (b)(8) of this section); addresses the Contractor's right to

release, publish or use certain data involved in contract performance (see paragraph (b)(9) of this section); and provides for the possibility for the Government to inspect certain data at the Contractor's facility (see paragraph (b)(10) of this section).

(2) *Alternate definition of limited-rights data.* In the clause at 1552.227–71, Rights in Data—General, in order for data to qualify as limited-rights data, in addition to being data that either embodies a trade secret or is data that is commercial or financial and confidential or privileged, such data must also pertain to items, components, or processes developed at private expense, including minor modifications thereof. However, where appropriate and with the concurrence of the Project Officer, a Contracting Officer may determine to use in the clause the alternate definition for limited-rights data that does not require that such data pertain to items, components, or processes developed at private expense; but rather that the data that either embodies a trade secret or is commercial or financial and confidential or privileged be produced at private expense in order to qualify as limited-rights data. As an example, this alternate definition may be used where the principal purpose of a contract does not involve the development, use, or delivery of items, components, or processes that are intended to be acquired for use by or for the Government (either under the contract in question or any anticipated follow-on contracts relating to the same subject matter). Other examples include contracts for market research and surveys, economic forecasts, socio-economic reports, educational material, health and safety information, management analysis, and related matters. This alternate definition of limited-rights data may be used, where appropriate, by using the clause with its Alternate I.

(3) *Unlimited-rights data.* Under the clause at 1552.227–71, Rights in Data—General, the Government acquires unlimited rights in the following data except as provided in paragraph (b)(6) of this section for copyrighted data.

(i) Data first produced in the performance of a contract;

(ii) Form, fit, and function data delivered under a contract;

(iii) Data (except as may be included with restricted computer software) that constitutes manuals or instructional and/or training material delivered under a contract; and

(iv) All other data delivered under the contract unless such data qualifies as

limited-rights data or restricted computer software.

If any of the foregoing data is published copyrighted data, the Government acquires it under a copyright license as set forth in paragraph (b)(6) of this section rather than with limited rights or restricted rights.

(4) *Protection of limited-rights data.* (i) The Contractor may protect data (other than unlimited rights data or published copyrighted data) that qualifies as limited-rights data under the clause at 1552.227–71, Rights in Data—General, by withholding such data from delivery and providing form, fit, and function data in lieu thereof; or, if the Government specifies the delivery of the data, by delivering such data with limitations on its use and disclosure. These two modes of protection afforded the Contractor (i.e., withhold or deliver with limited rights) are provided for in paragraph (g) of the clause at 1552.227–71, Rights in Data—General. Paragraph (g)(1) of this clause allows the Contractor to withhold limited-rights data and provide form, fit, and function data in lieu thereof. Paragraph (g)(2) to this clause enables the Government selectively to obtain the delivery of withheld or withholdable data with limited rights. The limitations on the Government's right to use and disclose limited-rights data are set forth in a "Limited Rights Notice" that the Contractor is required to affix to such data. The specific limitations in the Notice are described in this section.

(ii) Limited-rights data delivered to the Government with the Limited Rights Notice contained in paragraph (g)(2) of the clause will not, without permission of the Contractor, be used by the Government for purposes of manufacture, and will not be disclosed outside the Government except for certain limited purposes as set forth in the Notice, and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. The specific purposes for which the Government may disclose limited-rights data are specified below and appear in the Limited Rights Notice of paragraph (g)(2) of the clause. The Contracting Officer may revise the purposes for disclosing limited-rights data appearing in the clause and as set forth in this section when such revisions are consistent with the Government's needs.

(A) Use by support service Contractors.

(B) Evaluation by nongovernment evaluators.

(C) Use by other contractors participating in the Government's

367

program of which this contract is a part, for information and use in connection with the work performed under their contracts.

(D) Emergency repair or overhaul work.

(E) Release to a foreign government, as the interests of the United States may require, for information or evaluation, or for emergency repair or overhaul work by such Government.

(iii) As an aid in identifying which, if any, of the data under the contract will qualify as limited-rights data, the provision at 1552.227–70, Notification of Limited-Rights Data and Restricted Computer Software, shall be included in any solicitation containing the clause at 1552.227–71, Rights in Data—General.

(5) *Protection of restricted computer software*. (i) If computer software qualifies as restricted computer software, the clause at 1552.227–71, Rights in Data—General, permits the Contractor to protect such software by either withholding it from delivery and providing form, fit, and function data in lieu thereof; or if the Government specifies delivery of the software, by delivering the software with restricted rights regarding its use, disclosure, and reproduction. The two modes of protection afforded the Contractor (i.e., withhold or deliver with restricted rights) are provided for in paragraph (g) of the clause at 1552.227–71, Rights in Data—General. If restricted computer software is needed for use in or with more than one computer, the Contracting Officer shall specify in the contract schedule the number of · computers on which the software will be used. The restrictions on the Government's right to use, disclose, and reproduce restricted computer software are set forth in a "Restricted Rights Notice" that the Contractor is required to affix to such computer software. When restricted computer software delivered with such Notice is published copyrighted computer software, it is acquired with a restricted copyright license, and without disclosure prohibitions, as also set forth in the Notice. The specific restrictions in the Notice are set forth in paragraph (b)(5)(ii) of this section.

(ii) Restricted computer software delivered with the Restricted Rights Notice of paragraph (g)(3) of the clause at 1552.227–71, Rights in Data—General, will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be:

(A) Used, or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(B) Used, or copied for use in or with a backup computer if the computer or computers for which it is acquired is inoperative;

(C) Reproduced for safekeeping (archives) or backup purposes;

(D) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights; and

(E) Disclosed and reproduced by support Contractors or their subcontractors, subject to the same restrictions under which the Government acquired the software.

(iii) The restricted rights set forth in paragraph (b)(5)(ii) of this section are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of paragraph (g)(3) of the clause. However, the Contracting Officer may revise the Restricted Rights Notice of paragraph (g)(3) of the clause to specify either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of paragraph (g)(3) of the clause are to be expressly stated in the contract; or, with approval of the Contracting Officer, in a collateral agreement incorporated in and made part of the contract. (See paragraph (d)(2) of this section.)

(iv) As an aid in identifying which, if any, of the computer software under the contract will qualify as restricted computer software, the provision at 1552.227–70, Notification of Limited-Rights Data and Restricted Computer Software, shall be included in any solicitation containing the clause at 1552.227–71, Rights in Data—General.

(6) *Copyright data*. (i) *Data first produced in the performance of a contract*. (A) In order to enhance the transfer or dissemination of information produced at Government expense, Contractors are permitted, by paragraph (c)(1) of the clause at 1552.227–71, Rights in Data—General, to establish claim of copyright to scientific and technical articles based on or derived from work performed under the contract and published in academic, professional, or technical journals. However, permission may be granted to establish claim to copyright in all other data in accordance with the procedures set forth below.

(B) Usually permission for a Contractor to establish claim to . copyright for data first produced under the contract will be granted when copyright protection will enhance the appropriate transfer or dissemination of such data. The request for permission must be in writing, and may be made either at the time of contracting or subsequently during contract performance. It should identify the data involved or furnish a copy of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. Examples of cases when it may not be in the Government's best interests to grant the request are:

(*1*) The data consists of a report that represents the official views of the Agency or that the Agency is required by statute to prepare;

(*2*) The data is intended primarily for internal use by the Government;

(*3*) The data is of the type that the Agency itself distributes to the public under an established program; or

(*4*) If it is deemed inappropriate to provide the Contractor with an essentially exclusive commercial publishing right.

(C) Whenever a Contractor establishes claim to copyright subsisting in data first produced in the . performance of a contract, the Government normally is granted a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all such data, as set forth in paragraph (c)(1) of the clause at 1552.227–71, Rights in Data—General.

(ii) *Data not first produced in the performance of a contract*. (A) Contractors are not to incorporate in data delivered under contract any data not first produced under the contract with the copyright notice of 17 U.S.C. 401 or 402 without either:

(*1*) Acquiring for, or granting to the Government and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data; or

(*2*) Obtaining permission from the Contracting Officer to do otherwise.

However, if computer software not first produced under contract is delivered with the copyright notice of 17 U.S.C. 401 or 402, the Government's license will be as set forth in paragraph (g)(3) of the

clause at 1552.227-71, Rights in Data—General, or as otherwise may be provided in a collateral agreement incorporated in or made part of the contract.

(B) Contractors delivering data with an authorized limited rights or restricted rights notice and a copyright notice of 17 U.S.C. 401 or 402 should modify the copyright notice to include the following (or similar) statement: "Unpublished—all rights reserved under the copyright laws." If this statement is omitted, the Contractor may be afforded an opportunity to add it in accordance with paragraph (b)(8) of this section. Otherwise, data delivered with a copyright notice of 17 U.S.C. 401 or 402 may be presumed to be published copyrighted data subject to the applicable license rights set forth in paragraph (b)(6)(ii) of this section, without disclosure limitations or restrictions.

(C) If Contractor action causes limited-rights or restricted rights data to be published with copyright notice after its delivery to the Government, the Government is relieved of disclosure and use limitations and restrictions regarding such data, and the Contractor should advise the Government and request that a copyright notice be placed on the data, and acknowledge that the applicable copyright license set forth in paragraph (b)(6)(ii) of this section applies.

(7) *Unauthorized marking of data.* The Government has, in accordance with paragraph (e) of the clause at 1552.227-71, Rights in Data—General, the right to either return to the Contractor data containing markings not authorized by that clause, or to cancel or ignore such markings. However, markings will not be cancelled or ignored without making written inquiry of the Contractor and affording the Contractor at least 30 days to substantiate the propriety of the markings. The Contracting Officer will also give the Contractor notice of any determination made based on any response by the Contractor. Any such determination to cancel or ignore the markings shall be a final decision under the Contract Disputes Act. Failure of the Contractor to respond to the Contracting Officer's inquiry within the time afforded may, however, result in Government action to cancel or ignore the markings. The Agency reserves the right to modify the above procedures when implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request for data thereunder.

(8) *Omitted or incorrect notices.* (i) Data delivered under a contract containing the clause at 1552.227-71,

Rights in Data—General, without a limited rights notice or restricted rights notice, or without a copyright notice, shall be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure or use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may within 6 months (or a longer period approved by the Contracting Officer for good cause shown) request permission of the Contracting Officer to have omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to so permit if the Contractor—
(A) Identifies the data for which a notice is to be added or corrected;
(B) Demonstrates that the omission of the proposed notice was inadvertent;
(C) Establishes that use of the proposed notice is authorized; and
(D) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.
(ii) The Contracting Officer may also (A) permit correction at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (B) correct any incorrect notices.

(9) *Release, publication and use of data.* (i) In the clause at 1552.227-71, Rights in Data—General, paragraph (d) provides that Contractors normally have the right to use, release to others, reproduce, distribute, or publish data first produced or specifically used in the performance of a contract; however, to the extent the Contractor receives or is given access to data that is necessary for the performance of the contract and the data contains restrictive markings, the Contractor agrees to treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(ii) Contracting Officers may, on a case-by-case basis, place further limitations or restrictions on the Contractor's right to use, release to others, reproduce, distribute or publish any data first produced in the performance of the contract.

(iii) The provisions of paragraph (b)(9) (i) and (ii) of this section are subject to the EPA Order entitled "Publication Review Procedure" and to the clause at 1552.237-70, Contract Publication Review Procedure.

(10) *Inspection of data at the Contractor's facility.* The Government obtains the right to inspect data at the Contractor's facility as provided in paragraph (j) of the clause at 1552.227-71, Rights in Data—General. The data subject to inspection may be data withheld or withholdable under paragraph (g)(1) of the clause, or any data specifically used in the performance of the contract. Such inspection may be made by the Contracting Officer or other Federal Government employee for the purpose of verifying a Contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised at all reasonable times up to 3 years after acceptance of all items to be delivered under the contract. The Contracting Officer may specify in the contract schedule, data items that are not subject to inspection under paragraph (j).

(c) *Production of special works.* (1) The clause at 1552.227-72, Rights in Data—Special Works, applies to contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. This clause shall be used in contracts for:

(i) The production of audiovisual works including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like;

(ii) Histories of the Agency, or units thereof;

(iii) Works pertaining to recruiting, morale, training, or career guidance;

(iv) Surveys of Government establishments;

(v) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(vi) The compilation of reports, studies, surveys, or similar documents which are intended for use in connection with Agency regulatory and/or enforcement activities and that do not involve research, development, or experimental work performed by the Contractor;

(vii) The collection of data containing personally identifiable information such

369

that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(viii) Investigatory reports; or

(ix) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the Contractor), the early release of which could prejudice follow-on acquisition activities or Agency regulatory and/or enforcement activities.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(d) *Acquisition of existing data other than limited-rights data.* (1) *Existing audiovisual and similar works.* The clause at 1552.227-73, Rights in Data— Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are:

(i) means of exhibition or transmission,

(ii) time,

(iii) type of audience, and

(iv) geographical location.

If the contract requires that works of the type indicated above are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form) the clause at 1552.227-72, Rights in Data—Special Works, is to be used. (See 1527.7003(c).)

(2) *Separate acquisition of existing computer software.* (i) If the contract is for the separate acquisition of existing computer software, no specific contract clause contained in this subpart need be used. However, the contract must specifically address the Government's rights to use, disclose, and reproduce the software and must contain terms obtaining sufficient rights for the Government to fulfill the needs for which the software is being acquired. The restricted rights set forth in paragraph (b)(5) of this section should

be used as a guide and are usually the minimum the Government should accept. If the computer software is to be acquired with unlimited rights, the contract must also so state. In addition, the contract must adequately describe the computer programs and/or data bases, the form (tapes, punch cards, disc pack, and the like), and all the necessary documentation pertaining thereto. If the acquisition is by lease or license, the disposition of the computer software (by returning to the vendor or destroying) at the end of the term of the lease or license must be addressed. Also, the Contractor must reveal at the time of contracting any conditions on tapes, discs, or the like which limit use or access thereto, including built-in timer mechanisms and/or "self-destruct" devices.

(ii) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, such agreement shall be reviewed to assure that it is consistent with paragraph (d)(2)(i) of this section. Caution should be exercised in accepting a vendor's terms and conditions since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement, and the contract shall state this order of precedence.

(iii) If a prime Contractor under a contract containing the clause at 1552.227-71, Rights in Data—General, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to the Government, the Contracting Officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of paragraph (g)(3) of the clause in a collateral agreement incorporated in and made part of the contract. (See also 1527.7003(b)(5).)

(3) *Other existing works.* (i) Except for existing audiovisual and similar works pursuant to paragraph (d)(1) of this section, and existing computer software pursuant to paragraph (d)(2) of this section, no clause contained in this subpart need be included in (A) contracts solely for the acquisition of books, publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e., the off-the-shelf purchase of such items) unless reproduction rights of such items are to be obtained; or (B) contracts resulting from formal advertising that require only existing data to be

delivered unless reproduction rights for such data (other than limited-rights data) are to be obtained. If reproduction rights are to be obtained, such rights must be specifically set forth in the contract.

§ 1527.7004   Acquisition of data

(a) *General.* (1) It is important to recognize and maintain the conceptual distinction between contract terms whose purpose is to identify the data required for delivery to, or made available to, the Government (i.e., data requirements); and those contract terms whose purpose is to define the respective rights of the Government and the Contractor in such data (i.e., data rights). This section relates to data requirements; 1527.7003 to the data rights.

(2) It is EPA's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements are subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the Contractor, efforts should be made to keep the contract data requirements to a minimum.

(3) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the Contractor in the handling of the data, shall be specified in the contract.

(b) *Additional data requirements.* Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be possible or appropriate to ascertain all the data requirements at the time of contracting, the clause at 1552.227-74, Additional Data Requirements, is provided to enable the subsequent ordering by the Government of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. Data may be ordered under this clause at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The Contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the Contractor may be relieved of retention requirements for specified data items by the Contracting Officer at any time during the retention period required by

the clause. Any data ordered under the clause will be subject to the rights in data clause in the contract.

1527.7005 Solicitation provisions and contract clauses.

(a) The Contracting Officer shall insert the provision at 1552.227–70, Notification of Limited-Rights Data and Restricted Computer Software, in any solicitation containing the clause at 1552.227–71, Rights in Data—General. (See 1527.7003(b) (4) and (5).)

(b)(1) The Contracting Officer shall insert the clause at 1552.227–71, Rights in Data—General (see 1527.7003(b)), in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 1527.7003(c), but the clause at 1552.227–71, Rights in Data—General, shall be included in the contract and made applicable to data other than special works, as appropriate;

(ii) For the separate acquisition of existing works, as described in 1527.7003(d);

(iii) For a Small Business Innovative Research (SBIR) contract (see paragraph (h) of this section);

(iv) To be performed outside the United States, its possessions, and Puerto Rico, in which case the Contracting Officer, in conjunction with the patent attorney and the Project officer, shall develop a clause suitable for the particular acquisition;

(v) For architect-engineer services or construction work, in which case the Contracting Officer, in conjunction with the patent attorney and the Project Officer, shall develop a clause suitable for the particular acquisition. However, the clause at 1552.227–71, Rights in Data—General, may be included in the contract and made applicable to data pertaining to other than architect-engineer services and construction work;

(vi) For the operation of a Government-owned facility to perform research, development or production work, in which case the Contracting Officer, in conjuction with the patent attorney and the Project Officer, shall develop a clause suitable for the particular acquisition.

(2) If a Contracting Officer determines, in accordance with 1527.7003(b)(2), to adopt the alternate definition of "Limited-Rights Data" in paragraph (a) of the clause, the clause shall be used with its Alternate I.

(c) The Contracting Officer shall insert the clause at 1552.227–72, Rights in Data—Special Works, in solicitations

and contracts primarily for the production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Acquisitions to which this clause applies are identified in 1527.7003(c). The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released or reproduced by the Contractor for other than contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(d) The Contracting Officer shall insert the clause at 1552.227–73, Rights in Data—Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 1527.7003(d)(1). The contract may set forth limitations consistent with the purposes for which the work is being acquired. The clause at 1552.227–72, Rights in Data—Special Works, shall be used if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(e) The Contracting Officer shall insert the clause at 1552.227–74, Additional Data Requirements, in all solicitations and contracts (except those using small purchase procedures) containing one of the rights in data clauses at 1552.227. The Contracting Officer may permit the Contractor to identify data the Contractor does not wish to deliver, and may specifically exclude in the contract any requirement that such data be delivered under a rights in data clause or ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data.

(f) While no specific clause of this subpart need be included in contracts for the separate acquisition of existing computer software, the Contracting Officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 1527.7003(d)(2).

(g) While no specific clause of this subpart need be included in contracts solely for the acquisition of books,

publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e., the off-the-shelf purchase of such items) (see 1527.7003(d)(3)), if reproduction rights are to be acquired the contract shall include terms addressing such rights. (See 1527.7003(d)(3).)

(h) The Contracting Officer shall insert the clause at 1552.227–75, Rights in Data Developed under Small Business Innovative Research (SBIR) Contracts, in SBIR solicitations and contracts.

2. Part 1552, Table of Contents, is amended by revising the entry for 1552.227–70 and by adding entries for 1552.227–71, 1552.227–72, 1552.227–73, 1552.227–74, and 1552.227–75 to read as follows:

PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

* * * * *

3. Subpart 1552.2 is amended by revising section 1552.227–70 and by adding sections 1552.227–71, 1552.227–72, 1552.227–73, 1552.227–74, and 1552.227–75 to read as follows:

1552.227–70 Notification of limited-rights data and restricted computer software.

As prescribed in 1527.7005(a), insert the following provision in solicitations:

Notification of Limited Rights Data and Restricted Computer Software (Apr 1984)

(a) This solicitation sets forth the work to be performed if a contract award results, and the Government's known requirements for data (as defined in the EPA Acquisition Regulation at 1527.7001). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause (EPA Acquisition Regulation, 1552.227–74), if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data—General clause (EPA Acquisition Regulation, 1552.227–71) that is to be included in this contract. Under this clause a Contractor may withhold from delivery data that qualifies as limited-rights data or restricted computer software, and deliver form, fit, and function data in lieu thereof. This clause also authorized the Government to require delivery of limited-rights data or restricted computer software that has been withheld or would otherwise be withholdable. In addition, this clause

provides the Government with the right to inspect such data at the Contractor's facility.

(b) The offeror's response to this solicitation shall, to the extent feasible, either state that none of the data qualifies as limited-rights data or restricted computer software, or identify which of the data qualifies as limited-rights data or restricted computer software. Any identification of limited-rights data or restricted computer software in the offeror's response is not determinative of the status of such data should a contract be awarded to the offeror.

(c) If this acquisition is solely for existing computer software and/or data bases, any resulting contract must contain provisions which cover the Government's right to use the software and, at the least, it should normally contain the rights set forth at EPA Acquisition Regulation 1527.7003(b)(5). Consult EPA Acquisition Regulation 1527.7003(d)(2) for further guidance. EPA will consider for incorporation in the contract a vendor's own license or other conditions provided they are not inconsistent with 1527.7003(b)(5) of 1527.7003(d)(2).

(End of provision)

Approved by the Office of Management and Budget under control number 2030–0012).

1552.227–71   Rights in data—general.

As prescribed in 1527.7005(b), insert the following clause in solicitations and contracts:

Rights in Data—General (Apr 1984)

(a) *Definitions.* "Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes computer software. The term does not include information incidental to contract administration, such as contract cost analysis or financial, business, and management information required for contract administration purposes.

"Form, fit, and function data," as used in this clause, means data describing, and sufficient to enable, physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements.

"Limited rights," as used in this clause, means the rights of the Government in limited-rights data as set forth in the Limited Rights Notice of paragraph (g)(2) of this clause.

"Limited-rights data," as used in this clause, means data that embodies trade secrets or is commercial or financial and confidential or privileged, but only to the extent that the data pertains to items, components, or processes developed at private expense, including minor modifications thereof.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret, or is commercial or financial data which is confidential or privileged, or is published copyrighted computer software.

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of paragraph (g)(3) of this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract.

"Unlimited rights," as used in this clause, means the right of the Government, without additional cost to the Government, to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitutes manuals or instructional and/or training material, and

(iv) All other data delivered under this contract unless provided otherwise for limited-rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Contractor shall have the right to—

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract unless provided otherwise in paragraph (d) of this clause;

(ii) Protect from unauthorized disclosure and use that data which is limited-rights data or restricted computer software to the extent provided in paragraph (g) of this clause;

(iii) Substantiate use of, add or correct limited rights or restricted rights notices and to take other appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause.

(c)(1) *Data first produced in the performance of this contract.* Unless provided otherwise in paragraph (d) of this clause, the Contractor may establish claim to copyright subsisting in scientific and technical articles based on or derived from data first produced in the performance of this contract and published in academic, technical, or professional journals. The prior, express written permission of the Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract in accordance with EPA Acquisition Regulation 1527,7003(b)(6). When claim to copyright is made, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 to the data when such data is delivered to the Government, and include that notice as well as acknowledgment of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable

worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause; provided, however, that if such data is computer software the Government shall acquire a copyright license as set forth in paragraph (g)(3) of this clause or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.

(3) The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) *Release, publication and use of data.* (1) The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, subject, however, to the clause at 1552.237–70, Contract Publication Review Procedure and the copyright provisions of paragraphs (c)(1) and (c)(2) of this clause.

(2) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contains restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract is marked with the notices specified in paragraphs (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, the Contracting Officer may either return the data to the Contractor, or cancel or ignore the markings. However, markings will not be cancelled or ignored unless—

(i) The Contracting Officer makes written inquiry to the Contractor concerning the propriety of the markings, providing the Contractor 30 days to respond; and

(ii) The Contractor fails to respond within the 30 day period (or a longer time approved by the Contracting Officer for good cause shown), or the Contractor's response fails to substantiate the propriety of the markings.

(2) The Contracting Officer shall consider the Contractor's response, if any, and determine whether the markings shall be cancelled or ignored. The Contracting Officer shall furnish written notice to the Contractor of the determination, which shall be a final decision under the Contract Disputes Act.

(3) The Environmental Protection Agency reserves the right to modify the above procedures when implementing the Freedom

of Information Act (5 U.S.C. 552) if necessary to respond to a request for data thereunder.

(f) *Omitted or incorrect markings.* (1) Data delivered to the Government without any notice authorized by paragraph (g) of this clause, or without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also (i) permit correction at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(g) *Protection of limited-rights data and restricted computer software.* (1) When data other than that listed in paragraphs (b)(1) (i), (ii), and (iii) of this clause is specified to be delivered under this contract and qualifies as either limited-rights data or restricted computer software the Contractor, if it desires to continue protection of such data, shall withhold such data and not furnish it to the Government under this contract. As a condition to this withholding the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited-rights data that is formatted as a computer data base for delivery to the Government is to be treated as limited-rights data and not restricted computer software.

(2) Notwithstanding paragraph (g)(1) of this clause, this contract may identify and specify the delivery of limited-rights data, or the Contracting Officer may, at any time during contract performance and for a period of 3 years after acceptance of all items to be delivered under this contract, require by written request the delivery of limited-rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Contractor may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with such Notice:

Limited Rights Notice (Apr 1984)

(a) This data is submitted with limited rights under Government contract No. —— (subcontract ——, if appropriate). It may be reproduced and used by the Government with the express limitation that it will not, without permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose this data outside the Government for the following purposes, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use by support service Contractors.

(2) Evaluation by nongovernment evaluators.

(3) Use by other Contractors participating in the Government's program of which this contract is a part, for information and use in connection with the work performed under their contracts.

(4) Emergency repair or overhaul work.

(5) Release to a foreign government, as the interests of the United States may require, for information or evaluation, or for emergency repair or overhaul work by such government.

(b) This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of notice)

(3)(i) Notwithstanding paragraph (g)(1) of this clause, this contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may, at any time during contract performance and for a period of 3 years after acceptance of all items to be delivered under this contract, require by written request the delivery of restricted computer software that has been withheld. If delivery of such computer software is so required, the Contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) above, in accordance with the Notice:

Restricted Rights Notice (Apr 1984)

(a) This computer software is submitted with restricted rights under Government contract No. —— (and subcontract ——, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided below or as otherwise expressly stated in the contract.

(b) This computer software may be—

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer may be transferred;

(2) Used with a backup computer if the computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined or adapted portions of the derivative software incorporating restricted computer software shall be subject to the same restricted rights; and

(5) Disclosed and reproduced for use by support Contractors or their subcontractors in accordance with paragraphs (b) (1) through (4) of this notice, provided the Government makes such disclosure subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted software, it is licensed to the Government,

without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this notice.

(d) Any other rights or limitations regarding the use, duplication or disclosure of this computer software are to be expressly stated in the contract.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part."

(End of Notice)

(ii) Where it is impractical to include the above Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice (Short Form) (Apr 1984)

Use, reproduction, or disclosure is subject to restrictions set forth in contract No. —— (and subcontract ——, if appropriate) with —— (name of Contractor and subcontractor).

(End of notice)

(h) *Subcontracting.* The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(i) *Relationship 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.

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data items listed as not subject to this paragraph, that the Contracting Officer or other Federal Government employee may, at all reasonable times up to 3 years after acceptance of all items to be delivered under this contract, inspect at the Contractor's facility any data withheld under paragraph (g)(1) of this clause, or any data specifically used in the performance of this contract, for the purpose of evaluating work performance or verifying the Contractor's assertion pertaining to the limited rights or restricted rights status of the data.

(End of clause)

Alternate I (Apr 1984). As prescribed in 1527.7005(b)(2), substitute the following definition for "Limited Rights Data" in paragraph (a) of the clause:

"Limited-rights data," as used in this clause, means data developed at private expense that embodies trade secrets or is commercial or financial and confidential or privileged.

(Approved by the Office of Management and Budget under control number 2030–0012.)

§ 1552.227–72 Rights in data—special works.

As prescribed in 1527.7005(c), insert the following clause in solicitations and contracts:

Rights in Data—Special Works (Apr 1984)

(a) *Definitions*

"Data," as used in this clause, means recorded information regardless of form or medium on which it may be recorded. The term includes computer software. The term does not include information incidental to contract administration, such as contract cost analyses or financial, business, and management information required for contract administration purposes.

"Unlimited rights," as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have—

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) of this clause.

(ii) The right to limit exercise of claim to copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in such data, in accordance with paragraph (c)(1) of this clause.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) of this clause

(2) The Contractor shall have, to the extent permission is granted in accordance with paragraph (c)(1) of this clause, the right to establish claim to copyright subsisting in data first produced in the performance of this contract.

(c) *Copyright.* (1) *Data first produced in the performance of this contract.* (i) The Contractor agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any data first produced in the performance of this contract without the prior written permission of the Contracting Officer. When claim to copyright is made the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 to such data when delivered to the Government, and include that notice as well as acknowledgment of Government sponsorship on the data when published or deposited in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(ii) If the Government desires to obtain ownership of copyright in data first produced in the performance of this contract and permission has not been granted as set forth in paragraph (c)(1)(i) of this clause, the Contracting Officer may direct the Contractor to establish, or authorize the establishment of a claim to copyright in such data and to assign, or obtain the assignment of, such copyright to the Government or its designated assignee.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(d) *Release and use restrictions.* Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor release, reproduce, distribute or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) *Indemnity.* (1) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

1552.227-73 Rights in data—existing works.

As prescribed in 1527.7005(d), insert the following clause in solicitations and contracts:

Rights in Data—Existing Works (Apr 1984)

(a) Except as otherwise provided in this contract, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under this contract or for which this clause is specifically made applicable.

(b) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract, or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction, and do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

1552.227-74 Additional data requirements.

As prescribed in 1527.7005(e), insert the following clause in solicitations and contracts (except those using small purchase procedures):

Additional Data Requirements (Apr 1984)

(a) In addition to the data (as defined in the rights in data clause included in this contract) specified elsewhere in this contract to be delivered, the Contracting Officer may at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The rights in data clause included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Contractor to deliver any data which is specifically identified in this contract as not subject to this clause.

(c) When data is to be delivered under this clause, the Contractor will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(d) The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any time during the 3-year period set forth in paragraph (a) of this clause.

(End of clause)

(Approved by the Office of Management and Budget under control number 2030-0012.)

1552.227-75 Rights in data developed under Small Business Innovative Research (SBIR) contracts.

As prescribed in 1527.7005(h), insert the following clause in Small Business Innovative Research solicitations and contracts:

Rights in Data Developed Under Small Business Innovative Research (SBIR) Contracts (Apr 1984)

All rights to data, including computer software, developed under the terms of this contract shall remain with the Contractor, except that the Government shall have the limited right to use such data, including computer software, for Government purposes and shall not have the right to release such data or software outside the Government without permission of the Contractor for a period of two years from completion of the project under which the data or software was generated. However, effective at the conclusion of the two-year period, the Government shall retain a royalty free license for Government use of any data or software delivered under this contract, even if it is patented or copyrighted.

5