December 23, 2010

Defense Acquisition Regulations System
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DARS)
Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Re: Proposed Rule Regarding Patents, Data, and Copyrights (DFARS Case 2010-D001)

Dear Ms. Williams;

The Aerospace Industries Association (AIA) appreciates the opportunity to provide comments on the proposed rule "Regarding Patents, Data, and Copyrights (DFARS Case 2010-D001), published in the *Federal Register* on September 27, 2010 (75 F.R. 59412). The Federal Register notice requested the public to submit comments on the proposed rule, which is intended to simplify and clarify DFARS part 227, Patents, Data, and Copyrights. The notice also seeks public comment on a list of specific issues or topics. Because the scope of this rulemaking is vast and complex, our comments are broken into three parts. The first part identifies the core concerns that we have with the proposed rule. The second part provides AIA's answers to specific questions and topics that you raised in the proposed rule. The third part details specific concerns with specific portions of the proposed rule.

Core Concerns

- Change in funding definition: The proposed rule changes the funding definition without a clear rationale for why the change is necessary. This change signals a significant shift in policy on identifying rights ownership not mirrored in the underlying statute. Further, we believe that the change could prevent a Government contractor from meeting the new definition for "developed exclusively at private expense" when using independent research and development, overhead, bid and proposal, and perhaps even profit dollars, received on Government contracts. AIA objects to this result because its affect will be to significantly reduce the effectiveness of companies' internal investment in providing differentiated capability to DoD customers. .

- Computer software documentation: The proposed rule modifies the treatment of computer software documentation and its various subcategories, and shifts computer software design documentation to the category of "technical data." Under the proposed rule, only "detailed manufacturing or process data" is excluded from "technical data necessary for installation, operation, maintenance or training purposes." This change appears to reduce protection of critical software design materials, calling into question a contractor's ability to prevent

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application of unlimited rights to these kinds of design materials, as allowed by 252.227-7103(b)(v).

- Addition of the Right to "Access" Data and Software: The Government licenses in the existing regulations specify the rights granted by law. The addition of the right to "access" data/software raises ambiguities concerning the effect of such language. Because this is not one of the rights granted by law, it is not necessary. We are concerned that the addition of the right to "access" data and software could be read as somehow granting rights in data or software that has not yet been delivered or that is not a deliverable under the contract – but to which the Government is given "access" through provisions requiring the establishment of integrated data environments or via other means (e.g., informal exchanges during technical discussions, etc.).

- Delivery: Throughout the proposed rule, the phrase "delivered" has been replaced with "or otherwise provided." For example, proposed section 252.227-7013(a)(8)(iv) now states that a computer software user's documentation is required to be delivered or otherwise provided under a contract; proposed section 252.227-7013 (b)(1)(x) now includes the language "to be delivered or otherwise provided under this contract"; proposed sections 252.227-7013 (g) and (g)(2) deal with Marking Requirements that are "delivered or otherwise provided."

  The proposed rule is contrary to 10 U.S.C. 2320(b)(2) and (4), which both require technical data to be identified with a separate CLIN *for delivery*. There is no mention in the Code to support the "otherwise provided" proposed revisions.

- Markings for commercial data/software: The Federal Register notice proposes that these markings for commercial data and software be permitted, so long as they are consistent with best commercial practices and accurately reflect the Government's rights. It is not clear how these new criteria are to be met, or what would occur should the markings not meet both criteria? Will impermissible markings be ignored by the Government? The language in the proposed rule appears to be so open-ended that it could serve as a trap for commercial software companies that might not diligently revise their markings to "accurately reflect the Government's rights."

- Assertion Table elimination: Elimination of the assertion table as a required format for identifying a contractor's data rights is acceptable, but there are new requirements with which the contractor must now comply, including (a) identifying prior "substantially similar" deliverables and (b) providing copies of licenses. As to (a), "substantially similar" is undefined and the consequences of errors and/or reasonable differences of opinion about what is "substantially similar" remain unclear. Regarding (b), many negotiated licenses have confidentiality provisions. What happens if not all licenses are provided? Are the restrictions no longer applicable? Due to the lack of clarity surrounding these issues, we recommend that these new requirements be removed.

- Contractor Retention of Rights: In several instances, the proposed rule supports the policy that the Contractor retains all rights (including ownership) not granted to the Government. While this concept correctly states the law, the clauses need to be redrafted in order to convey a clearer understanding of the true nature of the Government's license rights *vis-a-vis* the Contractor.

Responses to Specific Issues or Topics

As to the list of specific issues or topics on which the Government has expressly requested comment, we provide the following:

p. 59418. *A new clause containing all definitions relevant to DFARS Part 227.* The Federal Register notice suggests that all definitions relevant to Part 227 – Department of Defense (DoD) should be combined into one clause, but asks whether having a separate clause necessary to interpret the "rights clauses" would lead to confusion.

AIA comment: It would be most beneficial if the Definitions were included in a single mandatory clause to shorten the length of the clauses, but if this approach is followed, each clause that relies on the Definitions clause for the meaning of terms used therein should include a sentence similar to the following:

> "Definitions. Controlling definitions applicable to the various terms used in this clause may be found in the clause at DFARS 252.227-XXXX, Definitions."

To assist Government and contractor personnel in identifying defined terms, such terms should be capitalized in each clause.

p. 59418. *Combining all relevant clause prescriptions into a single all encompassing proscriptive section?*

AIA comment: Such a combination would appear to outweigh the benefit of numerical cross references and enable the reader to quickly find pertinent portions.

p. 59419. *Renumbering the clauses*?

AIA comment: Renumbering the clauses into a more logical format will help the reader; however, given the vast number of clauses at issue, care must obviously be taken to get the clauses numbered right and avoid confusion.

p. 59419. *Addition of a scope section to the primary rights allocation clauses*

AIA comment: DoD is specifically seeking comments on whether or not the addition of a "Scope" section to the primary rights-allocation clauses would assist with the application of the doctrine of segregability. AIA believes a "Scope" section should be added because issues may arise as to which clause applies to which deliverable technical data or computer software. In addition, a "Scope" section would be an appropriate place to include language clarifying that DFARS 252.227-7015 applies to modifications of the type that meet the definition of a "commercial item."

Also, it should be noted that the guidance at PGI 227.7104-8(d) appears to be in conflict with FAR 2.101 in that it ignores the definition of commercial items, including minor modifications remaining within the definition of a commercial item. Therefore, the following PGI text appears to be incorrect in that 252.227-7013 may not need to be incorporated:

PGI paragraph: Doctrine of segregability. For example, when the contractor modifies a commercial item under the contract to meet DoD requirements, the clause at 252.227-7013 and the clause at 252.227-7015 are both incorporated in the contract: the clause at 252.227-7013 applies to the segregable portions of the commercial item that are to be modified under the contract, and the clause at 252.227-7015 is applied to the remainder of the (unmodified) portions of the commercial item.

Additional Comments

AIA is also submitting additional, specific comments on specific parts of the proposed rule. Specific comments are provided in Attachment A in DFARS numerical sequence.

Conclusion

AIA, on behalf of its member companies, thanks you for the opportunity to provide these comments and welcomes an opportunity to discuss them further with you. If you have any questions or need any additional information, please contact me at (703) 358-1045 or richard.sylvester@aia-aerospace.org.

Sincerely,

Richard K. Sylvester
Vice President, Acquisition Policy

Attachment

Attachment A

Specific Comments in numerical sequence

Pg 59412 Summary. The proposed rule integrates the coverage for computer software and technical data and eliminates redundant coverage for these subjects. Generally, combining 7013 and 7014 is more efficient when compared to the existing regulations. But, they still repeatedly state the definitions in other sections (new 7014, 7015, 7017, 7018). We suggest that they be streamlined; for example, combine 7017 and 7018.

Pg 59412, A.2 Subpart 212.5, Applicability of Certain Laws to the Acquisition of Commercial Items. This approach fails to recognize that intellectual property rights create a direct relationship between the Government and subcontractors. This entire section sets the basis for eliminating the exemption granted for commercial items and software from 10 U.S.C. 2320 and 2321.

The regulations have supported a direct relationship between the Government and subcontractors. For example, subcontractors assert data rights which are incorporated into the prime contracts. There are errors in the proposed rule (*e.g.*, 7037) with regards to subcontractor flowdowns for commercial items. Moreover, especially for commercial computer software licenses, and based on contract privity, the Government will not directly "negotiate" the subcontractor license with the subcontractor regarding terms that are inconsistent with Federal procurement law, thus requiring the prime contractor to negotiate with the subcontractor on behalf of the Government and to obtain the right to sublicense terms from the Government. We recommend further clarification in this area.

Page 59413 7. Subpart 227.71, Rights in technical data and computer software. In the next to last sentence "validating markings on deliverables," the Government's interest is, and should be, focused on ensuring that delivered data/software are appropriately marked, as described here. Thus, it is appropriate to reduce the marking burden on data/software prior to delivery caused by the words "delivered or otherwise provided." We recommend the deletion of "or otherwise provided" (or similar wording) throughout this rule to clarify the distinction between Government access before delivery and the Government's license after delivery. Without this clarification, a distinction in marking requirements based upon delivery is incongruous and could lead to the Government's demand for conforming markings whenever it has a right to access the data/software.

Page 59414 7. Subpart 227.71, Rights in technical data and computer software. At paragraph (c)(1), the term "access" is added to the well-established list of activities that are covered by the standard license grant for noncommercial technical data and computer software, in recognition of the emerging practice of providing the Government with remote (*e.g.,* internet-based) access to technical data or computer software that is maintained by the contractor, as an alternative to traditional delivery methods (*e.g.,* delivery on static electronic media such as CD–ROM or DVD).

Access to data/software during its development is indeed an emerging practice, but it is distinct from the penumbra of Government rights to "use, modify etc." that data/software. Those rights occur after the Government has possession of the data/software, i.e., after it is formally delivered. The concern about "access" only applies before delivery, as the Government obviously has access rights once it possesses the data/software.

Professors Nash and Cibinic note that the Government only has "inchoate rights" in data/software before the Government takes possession of it. In other words, the Government's unlimited rights do not include access; the Government only has unlimited rights after it has possession through delivery.

Prior to delivery, it is reasonable for contractors to expect that not all data/software may be accessed by the Government at all times and wherever it is located and stored. The "access license" proposed for the first time here does not address this nuance; it simply grants the Government a broad right to access data/software before and after delivery, wherever located, no matter what funds were used to develop it.

To address this access issue, we propose the adoption of a separate "interim access license," similar to that recently proposed for the NRO's Acquisition Manual equivalent data rights regulation, at DFARS 252.227-7013(m). This provision gives the contractor discretion as to which data to provide the Government interim access to before delivery. It also specifies that this interim access (and its specialized marking protocol) is limited to a specified integrated data environment (IDE) – a defined term that replaces "repository." This provision addresses the Government's interest in obtaining access to data/software before delivery, while protecting contractors' reasonable expectations that the contractor can protect from disclosure certain limited rights technical data and confidential business data before the data is required to be delivered.

While mention of "access" in a number of locations throughout this revision is not inherently problematic, its use as another penumbra right is a problem and, therefore, should be deleted widely throughout this revision.

Pg 59414, 7e. 252.227-7015, Rights in Technical Data and Computer Software -- Commercial. Section 227.7104 consolidates all of the existing DFARS coverage of the allocation of rights between the parties (*i.e.,* the Government, contractors, subcontractors, and third parties) for the various categories of technical data and computer software. The current language could lead to unnecessary misunderstandings and arguments between the contractor and the Government, especially as personnel change. See also proposed 7015(c), -7015(a)(13), -70YY (a)(2) Owner-Licensor definition.

Page 59417 7g.ii. Challenge for commercial computer software. We are concerned with the exclusion of the word "component" in the sentence beginning "The current 252-227-7037… item or process." Although 10 U.S.C. 2320 only refers to "item or process," the phrase "item, component or process" is the product of judicial recognition of a distinction between an "item" and a "component" of that item. Accordingly, we recommend adding "component(s)" throughout the rule.

Page 59418 7h. 227.7107, Safeguarding, use and handling of technical data and computer software. We recommend that the phrase "regarding contractor data repositories" be replaced with "contractor integrated data environments."

Page 59418 8. Subpart 227.72, Rights in Works. We support the concept of having a single definition clause relevant to DFARS Part 227.

DFARS 212.504. The proposed revision eliminates 10 U.S.C. 2320 and 2321 from the list of statutes that are inapplicable to subcontracts for commercial items. These statutory waivers originated in the context of the Federal Acquisition Streamlining Act (FASA) of 1994, in order to encourage use of commercial products in DoD procurements by minimizing the imposition of complex DoD procurement regulations on the commercial supply chain. We believe that by re-

imposing the flowdown requirements of the DFARS technical data clauses on all commercial subcontractors and suppliers, DoD is risking a return to the pre-1995 commercial environment in which vendors were reluctant to bid or accept government contracts for fear of losing technical data and rights to their competitors.

We recommend that the proposed elimination of the waiver of application of 10 U.S.C. 2320 and 2321 be deleted.

DFARS 212 .7101.

a. Delivery of Technical Data. The proposed definitions set forth in new clauses 252.227-7013 and-7015 contain a variety of new terms and provisions which affect the rights of contractors providing both non-commercial and commercial items and software. Specifically, a new Government minimum right of "access" is added but not defined. Although the stated intention is to address the "emerging practice of providing the government with remote ... access to technical data or computer software that is maintained by the contractor...," the use of this term would appear also to provide the Government the right to access undelivered technical data or other work in progress, and does not define or consider what rights of use, if any, the government may have in any pre-delivery technical data so accessed.

We recommend that a full definition of delivery of technical data in view of remote (internet) access be developed in cooperation with industry, and the governments rights to use, disclose, access, etc., such information prior to formal delivery be specifically addressed.

b. Computer Software and Computer Software Documentation. The newly proposed definitions of computer software and computer software documentation are explained as providing an analogous treatment as regards items, components, and processes and the technical data related thereto. In this new definitional structure, the computer software, defined as the computer program, source code, and source code listings is the "item" to be procured or developed on behalf of the government, while the computer software documentation, now including design details, algorithms, processes, flowcharts, formulas, etc. which describe the design, organization, and structure of the computer software, are included within the definition of technical data.

The new regulation clearly states that the Government receives unlimited rights in technical data necessary for installation, operation, maintenance, or training purposes. It is not clear whether computer software design documentation, a subset of computer software documentation, shall be considered detailed manufacturing or process data, which is exempted from the grant of unlimited rights. This ambiguity is increased by the nature of computer software in which such design details, processes, algorithms, flowcharts, etc. may be necessary for the maintenance, installation, etc. of the related computer software. The current definition of computer software recognizes the equivalence of this information and provides for treatment and protection comparable to that of the underlying software code. The current regulation also attempts to make a distinction between manufacturing data, as such would apply to an item or component which must be separately manufactured, and computer software, which has no comparable separate and distinct package of manufacturing data required for reproduction of identical copies of the original software.

We recommend that the definition and treatment of computer software and related information be provided to clearly prohibit the use of computer software documentation or design information for any type of reproduction or reverse engineering of computer software developed exclusively at private expense.

c. Developed Exclusively at Private Expense. Without discussion, the proposed regulation substitutes a new definition for "developed exclusively at private expense." While retaining indirect cost pools as a source of private expense funding, the new regulation redefines the remaining source of private expense funding as "costs not paid or reimbursed by the government". The current regulation treated this source of funding as "costs not allocated government contract". The revision appears to be an attempt to shift the contractor's burden of proof and scope of investigation from a review of the costs which have been allocated to a government contract to any costs paid or reimbursed by the government. For vendors of commercial items which do not use or maintain financial systems in accordance with the Cost Accounting Standards, this may be an overwhelming or impossible requirement.

We recommend that the definition of "developed exclusively at private expense" be returned to the current wording, which has been used and understood by all parties for the past 15 years.

DFARS 227-7103-3(b). The language, "Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data, consistent with the policies of this subpart," appears to contradict other parts of the FAR that purport to indicate a preference, or at least not cause a detriment, with offering commercial items and/or software. With many solicitations inexplicably seeking Unlimited Rights or Government Purpose Rights, when simple maintenance of the delivered system and software are all that is discussed elsewhere in the solicitation, this area of guidance/policy would benefit from more discussion and clarification.

DFARS 227.7104-2(a)(3). This section appears troubling in that it purports to sanction violation of intellectual property rights when cost savings to the Government outweigh the lack of a license. Patent rights are excluded. While copyright is likely addressed by authorization and consent, it appears that trade secret violations would not be within the Executive Branch authority to authorize.

Contractor Retention of Rights:
See proposed sections:
227.7104-1(a)
227.7104-7
252.227-7013 (c)
252.227-7014 (c)
252.227-7015(c)
252.227-7021 (c)

As presently drafted, this message conveys the idea that the creator of the data initially holds a number of different license rights that are like so many physical tokens and when one token is given (granted) to the Government, it is taken away from the contractor and the contractor can no longer practice that right. This approach misstates what is really happening and greatly confuses attempts to discuss and understand licensing under DFARS. This phrasing exposes an error in the way the Government typically thinks of license rights by assuming that exclusivity is always transferred with transferred data rights. Under DFARS, exclusivity is rarely transferred. It is transferred in the newly proposed clause at 252.227-7020 (c) but is not in the usual DFARS data clauses in a DoD contract.

What actually happens when license rights are transferred to the Government is that the original creator of the data initially holds all legal rights in the data item exclusively. Some of

those legal rights are then granted (transferred) by contract to the Government as limited rights, restricted rights, Government purpose rights, unlimited rights, special license rights, etc. The originating contractor does not itself lose rights granted to the Government, but only loses the exclusivity of those rights, since now the Government can also practice those rights transferred to it that previously were exclusively the legal rights of the contractor alone. The contractor still has the right to practice all the same rights in data it could initially, except it is no longer the exclusive holder of those rights that were transferred to the Government and the contractor has lost the right to compel the Government to stop practicing rights that the contractor granted to the Government in the contract. In order for the contractor to transfer a license right to the Government, the contractor must necessarily continue to own that same right. Otherwise, the contractor would have no basis to grant the license. You cannot transfer license rights if you do not yourself own those rights in the first place.

Thus, we recommend that, to more accurately state what is really happening, and to reduce confusion between the Government and contractors that exists today and that the proposed clauses threaten to perpetuate, the following proposed sections should be slightly modified. In the following suggested edits, underlining indicates an insertion and strike out indicates a deletion. The following sections should be redrafted as follows:

227.7104–1 General.
(a) *Grant of license.* The Government obtains rights in technical data and computer software under an irrevocable license granted or obtained for the Government by the contractor. The contractor (or licensor) retains all rights in the data ~~not~~ notwithstanding those rights granted to the Government.

227.7104–7 Retention of rights by offerors, contractors, or third parties.
The offeror, contractor, or other third party owner or licensor retains all intellectual property rights (including ownership) in technical data and computer software ~~except~~ notwithstanding those rights granted to the Government.

252.227-7013(c)
(c) *Contractor rights in technical data or computer software.* The Contractor (or other third party owner or licensor) retains all intellectual property rights for technical data and computer software (including ownership) developed under this contract ~~except~~ notwithstanding those rights granted to the Government as specified under paragraph (b) of this clause.

252.227-7014(c)
(c) *Contractor rights in technical data or computer software.* The Contractor retains all intellectual property rights for technical data and computer software (including ownership) developed under this contract ~~except~~ notwithstanding those rights granted to the Government as specified under paragraph (b) of this clause.

252.227-7015 (c)
(c) *Contractor Rights.* The Contractor retains all intellectual property rights (including ownership) ~~not~~ notwithstanding those rights granted to the Government in paragraph (b) of this clause.

252.227-7021 (c)
(c) *Contractor rights.* The Contractor retains all intellectual property rights (including ownership) ~~not~~ notwithstanding those rights granted to the Government in paragraph (b) of this clause.

Note that, in the clause at 252.227-7020, all of the contractor's rights in the work are transferred to the Government by contract and no rights are retained by the contractor unless separately negotiated. This transfer of exclusivity is a different result than in the clauses enumerated above and the existing proposed wording in 252.227-7020 (c) appears correct. We rommend that 252.227-7020 be redrafted to conform to discussion above.

DFARS 252.227(a)(7). Proposed regulation is unchanged.

We recommend clarifying this definition to include depot-level maintenance to avoid negotiations under proposed regulation 7013(b)(1)(v), as follows:

"Detailed manufacturing or process data" means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process. This includes depot-level maintenance data.

DFARS 252.227-7013 and Related Regulations.

a. Addition of the Right to "Access" Data and Software: We appreciate the fact that the DAR Council is attempting to address "access", an important issue in 21st century government contracting. Contractors are receiving an increasing number of requests from Government contracting agencies to obtain access to non-final technical data and computer software. This is often work-in-process or draft information that may contain information proprietary to a single contractor or multiple contractors. These requests for access often require real-time or near real-time access to the non-final information through an integrated digital environment. The Government's desire to access this information is understandable as it seeks to increase efficiency. Providing such access to non-final information can help reduce costs and accelerate schedules. However, while we recognize and appreciate these benefits, the proposed DFARS revisions do not provide adequate protection of contractor intellectual property rights.

The Government licenses in the existing regulations specify the rights granted by copyright law and trade secret law (i.e., use and disclose are trade secret rights, and the rights to reproduce, distribute, prepare derivative works, publicly display, and publicly perform are copyright rights). The addition of the right to "access" data/software raises ambiguities, as described below, concerning the effect of such language. Because this is not one of the rights granted by copyright or trade secret law, it is not necessary in a license grant. The Government's rights to access data/software will instead be determined by other provisions in the contract that address what must be delivered, and how those deliveries will occur. Thus, given the questions that the insertion of this "right" raises, we recommend that the access right be deleted from the license grants.

We are concerned that the addition of the right to "access" data and software could be read as somehow granting rights in data or software that has not yet been delivered or that is not a deliverable under the contract – but to which the Government is given "access" through provisions requiring the establishment of integrated data environments or via other means (e.g., informal exchanges during technical discussions, etc.). The addition of an "access" right in

existing licenses, however, should not be read as somehow defining the scope of rights, or granting the Government specific rights in such non-deliverable/pre-delivery data or software. The data rights statute, (10 U.S.C. Section 2320(b)) requires the Government to identify and list data deliverables so that contractors can clearly understand what is being provided and the associated requirements regarding assertions and marking. Much of the data to which the Government is given informal access is not so listed, asserted or marked, and suddenly requiring all such data to be subject to the same formal requirements would violate the statutory requirement to identify data deliverables.

If the Government wishes to address its license rights in non-deliverable/pre-delivery data and software, further revisions are necessary to establish a new category of information and a new category of rights for access to that information. We believe that it should expressly do so in a manner similar to the AIA proposal for addressing "*non-final*" data previously provided to the DAR Council (AIA letter of 23 April 2009) or in the proposed data rights regulations recently issued by the National Reconnaissance Office – which establishes a new "NRO Access to Interim Data License" to clarify the Government's rights in data informally accessed by the Government during contract performance.

Finally, the addition of PGI examples and guidance for data managers and PCOs would help alleviate confusion on what "access" is and how it should be used. Encryption, saving additional copies, cyber threats, etc...may all need to be addressed within the PGI. The PGI guidance could also help increase awareness in the contracting community that it is DoD policy, as described in DFARS 227.7102 and *Intellectual Property: Navigating Through Commercial Waters*, to acquire only those deliverables and license rights necessary to accomplish acquisition strategies.

b. Clarification of the Treatment of Modifications to Commercial Items: Currently, DFARS 227.7102-3 prescribing when a contracting officer should include DFARS 252.227-7015 in a contract, states in paragraph (b) that the Government should use 252.227-7013 in lieu of the -7015 clause if the Government is paying for any portion of the "development" of a commercial item. This instruction can be read consistently with the definition of "commercial item" in FAR 2.101 because presumably, if the Government-funded changes arise to the level of "development" under the regulations, then such development effort would *not* be categorized as a "minor modification" or as a "modification of a type customarily made in the commercial marketplace." Conversely, if a modification qualifies as such, then, pursuant to the definition for "commercial item" in FAR 2.101, ***the entire item remains a commercial item***, and thus should be treated in accordance with DFARS 252.227-7015.

Section 227.7104-8(a)(2) of the proposed regulation, however, provides that DFARS 252.227-7013 for non-commercial items should apply not only in cases where the Government funds the further development of a commercial item, but also where the Government pays for any portion of the costs of ***any*** modification. This change overlooks the fact that if a modification is minor or customary, the entire item remains a commercial item, and there should be no need to bring portions of that item under the regulations governing the Government's rights in non-commercial data/software. The funding used to create minor/customary modifications is not a relevant factor for determining the Government's rights if the modification otherwise qualifies as minor/customary under the regulations. Except in one limited circumstance specified in FAR 2.101, funding is ***only*** relevant in determining the Government's rights once an item as a whole is no longer commercial, i.e., once the modification is no longer minor or customary. Thus, we recommend deleting the phrase, "or modification" from this section.

c. Clarification of the Data to Which the Government Obtains Unlimited Rights. In the current regulations, consistent with 10 U.S.C. 2320(a), the Government is granted unlimited rights in technical data *pertaining to an item, component or process* developed exclusively with Government funds, *or* in technical data developed with Government funds in contracts that did not require the development, manufacture, construction or production of an item, component or process. That language has been modified in both the Part 227 regulations and in the -7013 clause.

Proposed DFARS 227.7104-3(b)(2) addresses technical data that do not pertain to items or processes, and states that certain contracts may require the creation of technical data for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items or processes. This language is consistent with the current regulations. Paragraph (c)(4) of this same provision which describes the technical data in which the Government is granted unlimited rights, however, simplifies this language and simply states that the Government is granted unlimited rights when the "technical data or computer software, or the items, processes to which the technical data pertain, are developed exclusively with Government funds." This simplification of the language creates an ambiguity in situations where a contractor may be asked to create a new report or analysis relating to a component already developed exclusively at private expense. In such cases, the development of the technical data itself may be exclusively funded by the Government, but the underlying component is funded exclusively by the contractor. In such cases, because of the continuing sensitivity of such data, we believe that the language should be modified or guidance provided to clarify that such data will be provided with limited rights – in other words, if the data pertains to an item developed exclusively at private expense, then that is what governs the determination of the Government's rights – and not the funding used to create the new data itself. In addition, whatever formulation is adopted for paragraph 252.227-7013(b)(1) should be used consistently for the other rights categories – but as currently drafted, this new formulation is used only for unlimited rights and Government purpose rights – the description of data to which the Government obtains limited rights (in paragraph (b)(3)) was not modified. We recommend that this inconsistency be corrected.

d. Third party technical data or computer software – Contracting Officer Approval and Marking Requirements: Proposed DFARS 252.227-7013(d)(1) requires contractors to obtain written contracting officer approval prior to incorporating any third party technical data or computer software to be furnished with less than unlimited rights into contract deliverables. The changes shown below are needed to proposed DFARS 252.227-7013(d)(1) to establish that the inclusion (and negotiation) of third party technical data and computer software assertions on the contract data assertion list constitutes the necessary contracting officer approval to incorporate such third party data into contract deliverables. Proposed DFARS 252.227-7013(d)(2) should be modified, as show below, to clarify marking requirements for *commercial* third party technical data and software. In the following suggested edits, underlining indicates an insertion. The following sections should be redrafted to say:

252.227-7013(d)
(d) *Third party technical data or computer software.* (1) The Contractor shall not incorporate any third party owned or licensed technical data or computer software in the technical data or computer software to be delivered or otherwise provided under this contract unless— (i) The Contractor has obtained for the Government the license rights necessary to perfect a license in the deliverable technical data or computer software of the appropriate scope set forth in paragraph (b) of this clause; (ii) The third party technical data or computer software is listed on an attachment to this contract in

accordance with paragraph (f) of this clause; or (iii) The Contracting Officer has granted specific written approval to do so.

(2) The Contractor shall ensure that any such license rights obtained from third parties and granted to the Government are identified and asserted pursuant to paragraph (f) of this clause, and such technical data and computer software are appropriately marked pursuant to paragraph (g) of this clause or paragraph (d) of the clause at DFARS 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

e. Release from Liability: DFARS 252.227-7013(e): The proposed regulation, in paragraph (e) significantly shifts the burden of proof from the current regulation, which requires the contracting officer to establish a reasonable basis for challenging an assertion of restrictive rights in data or software, to a new standard wherein the contracting officer need only find that the contractor's written explanation is "not sufficient" to enable the contracting officer to validate the contractor's assertion. Thus, the contractor is now required, under the revised definition of "created exclusively at private expense," to establish the source of every single dollar of development funding for the underlying item, component, or computer program, or risk their written submission being ruled as "not sufficient". A *de minimus* gap in funding determination could, therefore, lead to a lengthy and expensive challenge, when in fact, there is no evidence or indication that would reasonably support such a challenge.

We recommend that the provision of paragraph (e) establishing that the mere determination by the contracting officer that the contractor's written explanation does not provide sufficient information to evaluate be inserted data rights restriction shall constitute reasonable grounds for questioning the validity thereof should be deleted.

f. Marking Requirements: We recommend that paragraph (g)(1)(i) be modified to reflect the standard Government and industry practice of placing the entire data rights legend on the cover of the CDRL or other deliverable item, and then using an abbreviated statement on the subsequent pages of the document to refer the reader back to that legend included on the cover. For example, the first sentence of paragraph (g)(1)(i) could be modified to read,

"The authorized legends shall be placed on the transmittal document or storage media, and for printed material, on the title/cover page of the printed material containing technical data or computer software for which restrictions are asserted. Mark each subsequent sheet or data with abbreviated marking(s) to indicate the applicable restrictive rights assertion(s) and refer to the title/cover page for additional information."

In paragraph (g)(6) of 252.227-7013 setting forth the legend for negotiated license rights, it states that this legend should not be used where the restrictive period for Government purpose rights has been modified. Although implied, the Government may wish to add a statement clarifying that in such cases, the Government purpose rights legend should be used.

Paragraph (g)(8) sets forth permissible markings for technical data/software deliverables. We propose that the Government consider permitting other markings, such as "proprietary" markings, provided that it is clear from such marking what legends govern the Government's use of such technical data/software. This could ultimately save the Government significant costs if contractors do not have to remove their standard commercial markings every time data is delivered to the Government.

g. Revised definitions of computer software and computer software documentation: "Computer software design documentation" (e.g., algorithms, process flows and design details)

was moved from the definition of computer software to the definition of computer software documentation, a type of technical data. Proposed DFARS 252.227-7013 and 252.227-7015 need to be slightly modified as shown below in order to expressly exclude "computer software design documentation" from technical data necessary for installation, operation, maintenance, or training purposes. These changes are consistent with the existing clause language that expressly excludes detailed manufacturing or process data. In the following suggested edits, underlining indicates an insertion and strike out indicates a deletion. The following sections should be redrafted to read:

252.227-7013(b)(1)(v)
(v) Technical data necessary for installation, operation, maintenance, or training purposes (other than computer software design documentation and detailed manufacturing or process data);

252.227-7015(b)(2)(iv)
(iv) Are necessary for operation, maintenance, installation, or training (other than computer software design documentation and detailed manufacturing or process data); or

DFARS 252.227-7013(a)(6). The definition of computer software documentation is revised to include computer software user's documentation (new term) and computer software design documentation (also new term), with all collectively defined as technical data relating to computer software.

We recommend a revision to the definition of computer software documentation to divide out the two terms. The latter term could be explicitly included in the proposed unlimited rights (UR) section of (b)(1)(v).

7013(a)(6) and new (7) Computer software documentation means technical data relating to computer software, including computer software design . . . , and excluding computer software.

Computer software user's documentation means technical data relating to computer software, including user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software to a user, and excluding computer software.

DFARS 252.227-7013 (b) (1) (x). Note this applies to both commercial and noncommercial computer software.

Without this definition, we recommend revising 7013(b)(1)(v) (below) to treat hardware user manuals and software user manuals consistently. Under these proposed regulations, a contractor can co-mark these types of documents with a copyright marking and an UR marking.

7013(b)(1)(v)Technical data necessary for installation, operation, maintenance, or training purposes, including computer software user's documentation and excluding detailed manufacturing or process data.

DFARS 252.227-7013 (g). At DFARS 252.227-7013 (g) (2) the proposed clause requires the use of "unlimited rights" legend on technical data or computer software that is also marked with a contractor's copyright legend as permitted by 17 USC 401 or 402. This introduces the

concept of coexistent data markings appearing on delivered technical data for the first time in the DFARS. Contractors having significant non-government business may mark proprietary data and information with protective legends that do not conform to the listed DFARS-permitted markings, but which provide significant protection for such data in commercial and enter company exchanges.

We understand the DoD's interest in receiving technical data and computer software which are clearly labeled as to any restrictions, etc. to be imposed on the government; however, the interpretation of the current regulation which prohibits the presence of any other legend of a restrictive nature on delivered technical data greatly increases the administrative and logistical burden on the contractor to strike off or revise its typical restrictive legends for delivery under government contract.

We suggest that the regulation be revised so as to permit the contractor to mark delivered technical data with both a conforming legend under the DFARS, as well as its standard commercial or other restrictive legend, provided that it is clear that the government's rights are not restricted or impacted thereby.

DFARS 252.227-7013(g)(1). We suggest that paragraph (g)(1)(i) be modified to reflect the standard Government and industry practice of placing the entire data rights legend on the cover of the CDRL or other deliverable item, and then using an abbreviated statement on the subsequent pages of the document to refer the reader back to that legend included on the cover. For example, the first sentence of paragraph (g)(1)(i) could be modified to read,

> "The authorized legends shall be placed on the transmittal document or storage media, and for printed material, on the title/cover page of the printed material containing technical data or computer software for which restrictions are asserted. Mark each subsequent sheet or data with abbreviated marking(s) to indicate the applicable restrictive rights assertion(s) and refer to the title/cover page for additional information."

DFARS 252.227-7013 (g) (8). The proposed clause enumerates exactly six legends that will be permitted for the marking and protection of technical data and computer software. No marking shall mean unlimited rights, see (g) (2).

AIA supports the idea of regulations addressing the UR/copyright issue, because the "All rights reserved" marking issue comes up frequently and requires resolution between the Government and the contractor. We would like to see this section expanded to include the ability to co-mark technical data and computer software with other company proprietary markings. As long as the Government marking is clear, it should not matter to the Government that another statement is on the data and this should be clear that it is not a non-conforming marking.

We recommend changing the clauses as follows:

7013(g)(8) Authorized markings. Except as provided in paragraphs (g)(7) and (g)(9) of this clause. . . .

7013(g)(9) Contractor and subcontractor company markings. Technical data or computer software that is delivered to the Government with other than Unlimited Rights, may also be marked with a company marking such as a proprietary statement in addition to the relevant marking required in paragraphs (g)(3) through (g)(7) of this clause. Such a company

marking shall not be an unjustified or nonconforming marking as provided for in paragraph (i) of this clause.

DFARS 252.227-7013(k)(2)(iii). Under the proposed clause, if the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the contractor shall notify the Government of the use of the clause. If appropriate pursuant to DFARS 227.7014-8(d), the Contracting Officer will modify the prime contract to include the new clause.

This notification requirement creates an unnecessary burden on the contractor. The mere fact that the clause may be in a subcontract does not mean that technical data or computer software will be delivered under the prime contract. The text as written requires the Contractor to notify the Government regardless of data delivery. (Same for 7014 and 7015).

We recommend that this clause be deleted.

DFARS 252.227-7013(k)(1). The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (e) [sic] of this clause.

There appears to be a typo in the clause. We recommend changing to "and the identification, assertion, and delivery processes of paragraph (f) of this clause."

DFARS 252.227-7014 and Related Regulations

a. SBIR data rights protection period. The proposed clause eliminates any reference to a date-certain expiration of the SBIR data rights period, as a result of the DoD's implementation of the SBA policy directive requiring that SBIR data rights may be extended throughout multiple future awards if the SBIR data is appropriately referenced and protected in subsequent SBIR awards. As the DoD points out, with this new procedure, it may be impossible for SBIR contractors – and the DoD – to know the expiration date of the SBIR protection period. This proposed change will create confusion and impact the DoD's ability to validate restrictive markings on SBIR data. It may also slow the progress of technology transition. We recommend that DoD retain the date-certain expiration of the SBIR data rights period set forth in the existing DFARS SBIR clause, and work with the SBA to revise the SBIR policy directive as part of the joint harmonization efforts.

b. Government rights upon expiration of the SBIR protection period. The DoD is seeking public comments regarding the merits of the DFARS approach (i.e., unlimited rights after the expiration of the SBIR protection period) or the SBA's interpretation of its current policy directive (i.e., what amounts to perpetual Government purpose rights (GPR) after the expiration of the protection period). If the SBA's interpretation of its current policy directive is implemented, then the SBA and the DoD should clarify exactly what rights the Government has after the expiration of the protection period, using existing rights category definitions (e.g., "perpetual GPR").

DFARS 252.227-7015 and Related Regulations

a. Listing of Commercial Data to be Delivered With Restrictions. In subsection (d)(1) of **252.227-7015**, the contractor is required to list all commercial technical data and computer software that will be delivered with restrictions. In the case of a simple commercial product like a flashlight, listing all commercial technical data the contractor is willing to deliver with restrictions is perhaps less burdensome. If the product is a more complex item, such as a major

system including a commercial aircraft being sold as the basis of a military product, then the number of items of commercial technical data that the contractor may be willing to deliver with restrictions may number in the hundreds of thousands, if not more, where the actual number of items of commercial technical data and commercial computer software to eventually be delivered is unknown. In such a situation, where the Government's interest in any one particular commercial item among so many such items is unknown at the outset, it is unreasonable to require the contractor to specifically list each and every such possible commercial technical data or computer software item that the Government may want. If the Government has not specified which actual items of commercial technical data or commercial computer software it requires, then the contractor should be allowed to provide general information describing classes of such commercial items. Once the Government identifies a particular commercial technical data or computer software item in which it is interested, it can determine what class of such items that item falls in on the contractor's general listing, and ascertain the restrictions the contractor intends to apply, and if necessary can then inquire further with specificity. This approach relieves both the Government and the contractor of the unnecessary burden of being absolutely specific from the onset and allows the natural development of the contract to dictate which commercial technical data or computer software items ultimately will become deliverable, if any.

b. Marking of Commercial Technical Data and Software. In subsection (d)(2) of **252.227-7015**, all deliverable commercial technical data and computer software must be marked to accurately indicate the license rights granted to the Government. Failure to properly mark allows the Government to escape liability if the technical data or computer software is used or disclosed contrary to contract license terms. The 252.227-7015 clause allows and even encourages custom negotiation of license rights. However, commercial computer software, by its nature, usually means that source code for the software is not available to the contractor and the contractor usually has no way to modify the software to add any sort of legend. This raises the issue of what marking technique for commercial computer software is acceptable under the contract to notify the Government of restrictions. Must a legend display when the software runs? If so, this may also violate the current requirement at DFARS 227.7203-10(b)(1) that no such legends be used if they will delay operation of the software if it might be used in combat, although this DFARS provision may go away in the revised Part 227 and would no longer be a concern. Is a label on the media on which the software is provided sufficient? Is a label or statement in or attached to the computer software documentation sufficient? When the software is loaded into an electronic box, such as a Line Replaceable Unit, what marking technique should be used where the computer software documentation will not be available? Pushing this marking problem off on the contractor without any sort of guidance as to what will be an acceptable method for notifying the Government of its license rights, as the proposed regulations do, and then expecting to rely on the commercial computer software not being marked to escape liability for software misuse by the Government or a third party is simply unfair and unacceptable to contractors. Where special rights are negotiated for commercial software, must those special rights be marked on the computer software (how?) or is the recitation of the negotiated license in the contract terms sufficient? The answers to the questions should be provided in the regulations so that contractors will know how to proceed.

c. Releasing the Government from Liability. Under **252.227-7015** (e)(2)(i) and (ii), the contractor agrees to release the Government from liability and seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed contractor commercial data marked with restrictive legends. Since in such a situation it is the Government and not the contractor who will most likely have additional information regarding the provision of contractor commercial data to the offending party, and the purpose for which the offending party was authorized to use the data, the Government should have an obligation in commercial data misuse matters similar to the contractor's obligation under FAR 52.227-2,

Notice and Assistance, in patent infringement claim matters, to advise the contractor of any such misuse of the contractor's data known to the Government and to supply any additional information uniquely within the Government's possession and control so as to aid the contractor in protecting its rights. The Government can be free of liability where it has acted within its rights, but should not be allowed to simply walk away. This seems absolutely the least the contractor should be able to expect of the Government. The clause as presently drafted seems to take a position that places all responsibility for investigating the commercial data misuse situation on the contractor and allows the Government to escape any involvement in a situation that the Government helped to create. For the Government to avoid any involvement at all seems unfair and ought to be unacceptable to contractors.

d. Automatic Deletion of Commercial Software License Terms. Licensing of commercial computer software obtained from third parties to the Government will always be a problem under the proposed regulations. The Government is requiring in the proposed regulations that any commercial license terms that are prohibited by federal procurement law are stricken from the license. The first thing missing from DFARS Part 227 is some indication of where to find out what terms, in the Government view, are prohibited by federal procurement law. A brief explanation of what terms are prohibited and where to find more information would be very helpful. Such terms as limitations of liability and indemnities are the cornerstone of a commercial software supplier's pricing scheme and acceptable risk allocation scheme used to maintain a viable business model. If a limitation of liability or indemnity is stricken, then the commercial computer software supplier is supposed to "promptly enter into negotiations to resolve any issues raised by striking the inconsistent provisions." But how will a supplier replace a limitation of liability if it cannot have a limitation of liability? The Government likens this result to a "severability provision", but severability provisions are intended to deal with minor clauses that for one reason or another may transgress the laws of a particular jurisdiction, not to the basic clauses that structure the deal. Likening the proposed terms to a severability provision reveals a fundamental misunderstanding of the nature, function and purpose of commercial software licenses.

The most likely response from a commercial software supplier who cannot give up essential liability protections will be to simply cancel the deal and not sell to the contractor for the Government. In many cases Government business would simply not be worth the perceived company destroying risk to such a commercial software supplier, especially a small supplier. The commercial software supplier's alternative is to sell the license in the software without a limitation of liability clause and likely be put out of business at the first occurrence of damages. This prospect does not appeal to software companies. Although word processor software may carry less risk for the software supplier, it is not without risk entirely. Software of the type the Government buys for major military programs carries the potential for thousands of times greater risk, if not more, the risk being hard to quantify and remaining largely unknown until it materializes in the form of catastrophic damages at which point it is too late for the software supplier without a limitation of liability.

Another problem the proposed approach creates is disruption of existing, ongoing programs. On one current contract, the contractor received a request from the Contracting Officer to impose the new proposed terms with respect to commercial software on almost the same day the proposed changes to Part 227 were released for public comment. Acceptance of such terms at the late stages of a program underway for almost a decade would mean that if commercial software suppliers would not accept the Government's new terms at that point, then the commercial software, already built into the contractor's design solution might simply be no longer available, leaving a massive hole in the contractor's solution at the point of delivery. This would require the contractor to find another supplier willing to accept the Government's terms

and then re-qualify and integrate that new software, or be forced to develop a custom solution from scratch, thus delaying the program another several years and introducing much greater cost and risk while ignoring the Congressional imperative to utilize commercial items to the maximum extent possible. We recommend that the cost of such disruption be borne by the Government if the proposed terms were to be imposed in that manner.

DFARS 252.227-7015 (a) (1). Under the proposed regulation, the definition of commercial computer software is revised to bring computer software requiring only minor modifications to meet contract requirements under the provisions of the -7013 clause. The addition of the -7013 clause labeling requirements and administrative burden reduces the incentive for commercial vendors to offer or sell commercial items or software to the Government. Here, a commercial software vendor offering providing an existing software product to the Government is required to carefully segregate any minor customization or modification, such as may be provided to any of its large commercial customers, from its pre-existing software code in order to avoid having the delivered software fall outside of the definition of software properly delivered with restricted rights. Such un-segregated software risks falling within the definition of mixed funded development, and, hence, delivery with Government purpose rights, per -7013, which eventually devolve into unlimited rights.

We recommend that the definition of commercial computer software be restored to the current definition, specifically including software that would be available to the public in time to meet delivery requirements under the contract and/or which would require only minor modification.

DFARS 252.227-7015 (b) (1). The proposed regulation newly introduces the concept of "standard commercial license rights", and variously requires such standard licenses to be attached to the contract (-7015 (b) (1)), specified in the pre-award identification and assertion of license restrictions (-7017 (c) (4) (ii)), and the software itself marked to indicate restrictions on access, use, modification, etc. consistent with best commercial practices (-7015 (d) (2). Commercial computer software, for example, is frequently delivered without source code, object code, detailed design information, algorithms, etc. and with documentation or manuals sufficient only for the use of the code for its intended purpose. Commercial vendors of such code often rely on the non-delivery of proprietary code, documentation, etc., as opposed to written license agreements or other contractual vehicles for the protection of their proprietary information and commercial advantage. Under the proposed regulation, commercial item and computer software vendors may risk loss of their proprietary and commercial rights when required to deliver typically unavailable data, algorithms, design details, or source code to the government in the absence of a pre-existing customary software license agreement.

We recommend that the proposed regulation be revised to accommodate actual commercial computer software and commercial item data delivery practices and licensing. In the event of the government requires additional data or information relating to a commercial computer software product or item, the government must negotiate such data delivery and rights with the contractor, subcontractor or supplier.

DFARS 252.227-7015 (b) (2). Notwithstanding the prior paragraph, the government has the right to require unlimited rights in technical data (iv) necessary for operation, maintenance, installation or training (other than detailed manufacturing or process data)

With computer software, the distinction between maintenance data and detailed design data is not clear. If the government truly has a need to maintain commercial computer software, it must, therefore, receive delivery and rights in the source code.

2(iv) Detailed manufacturing or process data is not defined in proposed 7015 and there is no reference to computer software user's documentation

DFARS 252.227-7015 (b) (4). The new regulation has several concepts, including, for the data covered by (b) (2) of the clause, that the government may require the contractor to grant the Government license rights up to and including unlimited rights beyond the standard commercial rights, provided the contractor shall be entitled to reasonable compensation for granting such additional rights. The clause goes on to state that the parties may also, if they wish, negotiate specialized license rights.

This implies that the unlimited rights in the (b) (2) data are mandatory, with the contractor receiving only reasonable compensation. The negotiation of specialized license rights appears to be a separate category of rights and compensation, which the parties may negotiate.

This appears to be a subtle change from the prior regulation in which additional data rights, particularly for technical data related to commercial computer software, where subject to negotiation. This clause, coupled with the requirement to flow down the DFARS technical data regulations to all subcontractors and suppliers, does not match with current commercial supply chain management practices and realities.

Contractors already "assert" commercial item technical data and computer software on programs where the Government permits it. It is a good practice for larger Government contractors, but not one that will be easy for smaller, typically commercial only contractors.

We recommend that the clause provide an exemplary standard commercial marking that will be acceptable.

DFARS 252.227-7015(c)

We recommend that a more direct statement of ownership be provided.

DFARS 252.227-7015(e)(2)

The purpose of the section is unclear. Why would contractors be required to release the Government from liability and pursue the recipient directly? We recommend that more discussion of the purpose of the section be provided.

DFARS 252.227-7017(c)(4) (ii),(iii), (v). These assertion regulations adds commercial as a basis of assertion, requires licenses to be attached to the proposal, and requires the offeror to identify previously delivered technical data or computer software.

Commercial as a basis for assertion is a practice already followed, and support we its inclusion. We would like to see revised language saying that the licenses should be attached but may be attached after award. Practically, licenses are not always negotiated during the proposal process. The requirement to identify previously delivered technical data or computer software appears to be burdensome and vague. Is program name acceptable, or prior contract number?

DFARS 252.227-7017 (c)(5). The signature section has been changed, but it still appears to be unclear. The proposed section requires signature by an official authorized to obligate the

offeror AND an official authorized to obligate each company asserting restrictions. But the term "offeror" is defined to mean an offeror's subcontractors and suppliers at 7017(a)(14).

Prime contractors spend administration time redoing assertions for the supply chain for incorporation into the proposal. As the clause is currently written, it is hard to understand the Government intent. Should the prime also be required to sign assertions or can the prime merely attach a cover letter and flow them up? Why is there no second requirement to sign commercial assertions? We recommend clarification.

DFARS 252.227-7017 (g). This clause provides a listing of the minimum sufficient information to be provided in the event a Contracting Officer wishes to evaluate the contractors' original or additional data rights assertions.

Current regulation does not have such minimum standards for evaluation information. The standard for post award assertions is consistent with the current regulations. (e.g., 7013(e)(3)). See discussion on 7018.

DFARS 252.227-7018(e)(1). Post award assertions may be identified after award only when based on (i) new information; or (ii) inadvertent omissions, unless the inadvertent omissions would have materially affected the source selection decision.

We recommend that this language read "inadvertent omission or inadvertent error" to cover assertions that have been incorporated into the prime contract but still need correcting.

DFARS 252.227-7017 and -7018. (*Comments apply to both clauses unless otherwise indicated.*)

a. Definitions. Both clauses begin with a long litany of definitions repeated from the basic data rights clauses. The addition of definitions complicates otherwise relatively straightforward clauses, and provides another example of how AIA supports DoD's proposal of having a stand-alone definitions clause that will be applicable to all Part 227 clauses.

b. Scope of Assertions Obligation. Subparagraph (b) ("Scope") of the -7017 clause states that the requirements of this provision apply only to technical data and computer software "to be delivered *or otherwise provided* with other than unlimited rights." The existing clause does not include the "otherwise provided" language and refers only to the delivery of data. If the requirements for submitting assertions are made to apply to all data that is "otherwise provided" to the Government, the assertions lists will need to include assertions for *all* technical data or computer software to which the Government may be given access, for example, through an integrated data environment or other electronic database, but that will not ultimately be a deliverable under the contract. This substantially broadens the assertion requirements and will lead to unnecessarily lengthy assertions lists as contractors try to anticipate all data that the Government might be *provided* under the contract – especially in light of increasing Government demands to have insight/access to the contractor's internal systems on which working documents, drafts and non-deliverable data are stored. The Government cannot expect that contractors should be listing every piece of data that will be provided or to which the Government is given access through these informal means. As drafted, however, these regulations would appear to require such assertions because providing informal access to documents and software in this manner could be interpreted as "*providing*" the Government with such data/software. If the Government requires assertions for every piece of data or software to which the Government may be given access through such informal means, then contractors will be much less willing to share works in progress, undeliverable documents, etc. This could

potentially reduce the Government's ability to participate in integrated product teams, etc. for major weapons programs. In addition, it will lead to substantially greater costs to police such data, which costs will eventually be passed through to the Government.

We recommend that the "otherwise provided" language be removed from paragraphs (b) and (c)(3) (two places) in the -7017 clause, and in paragraph (d) in the -7018 clause. Note that the "otherwise provided" language does not appear in paragraph (b) of the -7018 clause.

c. Submission of Licenses. Subparagraph (c)(2) the -7017 clause and subparagraph (f)(4)(ii) of the -7018 clause require the offeror/contractor to submit copies of negotiated, commercial and other non-standard licenses with its assertions. This requirement will be administratively burdensome to prime contractors, subcontractors, and suppliers. The cost and schedule impacts will be significant given the additional time that will be required to prepare the assertion list and gather the necessary supporting information (e.g., copies of licenses). Accordingly, we recommend the deletion of this new requirement in light of its affordability initiatives. Alternatively, language should be added to indicate that the duty to provide such licenses should be "to the extent then reasonably available." This would recognize the fact that contractors are not always able to obtain copies of such licenses by the time a proposal must be submitted.

Additionally, proposed third party licenses may or may not be transferable to the Government (e.g., when there is a redistribution license grant and transferability is not required). In such cases, various terms and conditions (e.g., indemnification provisions) may only be applicable to licensees and not Government end users. When reviewing such third party licenses to determine whether or not they are consistent with Federal procurement law, the DoD should pay careful attention to whether or not such terms are or are not applicable to the Government.

d. Requiring Subcontractor Signatures on Prime Contract Assertions Lists. The requirement to have all entities whose assertions are included in the assertions list sign that assertions list is administratively burdensome, especially during the rush of preparing a proposal, and does not appear to provide the Government with any particular benefit.

We recommend that this requirement be deleted. If the Government decides to retain this requirement, then language should be added expressly stating that such signatures may be provided in counterparts, or may be obtained electronically, etc. to provide some flexibility.

e. Requests for Supplemental Information. While the Government has always had the opportunity to request additional information regarding the assertions, industry has seen a growing practice of the Government requiring justifications for all assertions during the proposal stage. This is a significant administrative burden, especially if the items in question were developed several years ago, or were developed by a company that has been sold a number of times, thus necessitating a search of very old or missing records. In large, complex programs with hundreds of assertions, this is all but impossible at the proposal stage. Moreover, the Government may challenge an assertion after the assertions are added to the contract. Thus, we recommend adding language in the regulation or the PGI clarifying that requests prior to contract award should be limited to instances where the Government has a reasonable basis for questioning the assertion, and reminding the contracting officer of the presumption regarding private funding for commercial items. We also recommend wording similar to the standard required for the Government to challenge unjustified assertions/markings under the current 252.227-7037, i.e., the Government must have reasonable grounds to challenge an assertion/marking.

Finally, there should be a 30 or 60 day time period by which the Contracting Officer may request supplemental information.

In addition, one item of supplemental information that may be sought is the contract number under which the technical data or computer software were produced. We would suggest adding, "if applicable" at the end of that sentence because in many instances, there will be no such contract if an item was developed at private expense.

f. Post Award Assertion Issue. Because of the requirement for pre-award assertions, it would seem that any post-award assertion should simply be handled as an amendment to the pre-award assertions, whether it is to modify the pre-award assertions or to add to them. If that were the case, the instructions regarding post-award assertions could be deleted, and this clause could simply point the offeror back to the requirements of the -7017 clause for the information that must be submitted for a post-award assertion. This would significantly simplify this clause.

DFARS 252.227–7020

a. License vs. Assignment of Third Party Works. Presently, third party works incorporated into contractor work only require a **license** from the third party. Moreover, this license only applies to works "delivered" under the contract. Under the proposed rules, the contractor must obtain an **assignment** of third party works; and the assignment is required for deliverables AND for works produced, created, or generated under the contract.

Obtaining assignment of third party rights is not always practical or equitable, and may be impossible to obtain. Third Parties are unlikely to assign ownership of their intellectual property. We recommend that this requirement be modified to reflect the current practice of licensing third party works.

b. Government-Furnished Third Party Works. Under the current clause for Government-furnished information that the contractor incorporates into a work, the contractor (a) need not obtain a license if that information is from a third party; and (b) no contractor indemnification of the Government was required. The proposed clause removes contractor protection for incorporated third party information furnished by the Government and requires that the contractor indemnify the Government for Government-furnished information. This requires the contractor to verify that the Government obtained the appropriate rights to provide this data to the contractor. The Government, however, is in a much better position to determine this. As further described in the discussion of DFARS 252.227-7025 below, these two contractor protections should be reinstated.

DFARS 252.227-7025 and Related Regulations.
This clause appears to be used with the prescribed Use and Non-Disclosure Agreement at 227-7107-2(d). A potential problem noted in the current DFARS and continuing in the proposed DFARS changes is that by looking only at 227-7107-2, the Government appears to be taking the position that it can release as Government Furnished Information, a contractor's limited rights technical data or restricted rights computer software, or licensed commercial technical data and computer software under either the prescribed Use and Non-Disclosure Agreement or to contractors having the clause at DFARS 252.227-7025 in their contract. The implication of the change is that the Government can release information without going to the data owner first and securing their written permission. If it is not actually taking this position, it is certainly creating the impression that it is taking this position.

Section 227.7107-2(a) does not indicate that the contractor or licensor's permission is required to release some restricted technical data and computer software. Subsection 227.7107-2(a), standing alone, implies that as long as the Agreement is signed, any data subject to any restrictions is releasable. This implication is not correct. If the data is subject to limited or restricted rights, and if the release is not for emergency repair or overhaul or to a foreign government for information and evaluation, or to a service contractor to diagnose or correct deficiencies in software, the Government must obtain the data owner's permission, but this is not mentioned in 227.7107-2(a).

Support for the proposition that the Contractor's permission is required for release outside the Government of some classes of technical data and computer software is found in proposed 252.227-7013(a)(15), in proposed 252.227-7013(a)(18)(ii), in proposed 252.227-7014(a)(15) and (a)(18)(ii), in proposed 252.227-7025(a)(10) and (14)(ii), and in proposed 252.227-7015(b)(3)(ii).

Government request for indemnification in 252.227-7025(g)(1) for any unauthorized access by a recipient would suggest that the Government take responsibility without indemnification if it discloses to that recipient without first securing any required Contractor or licensor permission to make the first disclosure. The existing wording in subsection (g)(1) appears to make the recipient contractor responsible to indemnify the Government if the Government improperly discloses to that recipient in the first place (unauthorized access by the contractor). This wording further removes any incentive the Government has to ensure it has all necessary permissions before it proceeds with the release. The wording of the clause needs to be corrected to indicate that the contractor's "unauthorized access" is something other than receiving the Government Furnished Data improperly disclosed to it in the first place.
In 252.227-7025(j) the clause uses the term "Contractor's organization" and uses this term again in (j)(1). This terminology appears to authorize a recipient contractor to disclose outside its organization provided the Use and Non-Disclosure Agreement or 252.227-7025 are in place. Again, this raises the issue of first obtaining contractor or licensor permission which seems to be ignored in the proposed regulations. Another issue is the meaning of the undefined term "Contractor's organization". This term being undefined, is susceptible to a wide range of interpretations, some of which would be inappropriate. If the Government is imposing this requirement, it is incumbent on the Government to define this term or provide a process by which it can be defined in any given circumstance. This same issue of definition of "Contractor's organization" arises when operating under the clause at DFARS 252.204-7000.

DFARS 252.227-7026. The only material change to this clause relates to the time period available for the Government to exercise its deferred delivery rights. Under the proposed text, the Government may exercise its right any time within two years of acceptance of all items to be delivered or otherwise provided under the contract or termination of the contract.

The change in the clause will likely add ambiguity to when the two year request period definitively ends. Is there actually an "acceptance" of items not delivered but otherwise provided under the contract? We recommend this be clarified.

DFARS 252.227-7027. The time period available for the Government to exercise its deferred ordering rights is changed to expire three years after acceptance of all items to be delivered or otherwise provided under the contract or termination of the contract, whichever is later.

The addition of the phrase "or otherwise provided" will add ambiguity as to when the three-year request period definitively ends. Is there actually an "acceptance" of items not delivered but otherwise provided under the contract? We recommend this be clarified.

DFARS 252.227-7030.

This clause has been expanded substantially so that it now imposes potential withholding of payment penalties not only based on the non-delivery of technical data but also on the non-delivery of computer software. We recommend that this clause be limited to "non-commercial computer software" or perhaps "Contractor generated computer software" or perhaps "Government funded computer software" because a commercial vendor may be withholding the software from the contractor. We also recommend that language be added to the effect that, "the government cannot combine this clause with other payment withholding clauses under the regulations." Without such language the Government could aggregate its withholding leading to substantially inequitable results. The Government should also consider addition of a proportionality standard which would prevent withholding a significant percentage of a multi-billion dollar contract based upon a single missing piece of software or even a single missing drawing.

DFARS 252.227-7033. We recommend adding language to the effect of, "By accepting this clause, Construction Contractor, Subcontractor, or any lower tier Subcontractor hereby grants the limited license described above to the Government notwithstanding any proprietary markings to the contrary on the Shop Drawings."

DFARS 252.227-7037. Paragraph (e) shifts the burden from the Contracting Officer to the contractor in the event if a challenge is mounted. For other than commercial items, if the Contracting Officer requests a written explanation for any asserted restriction and the contractor's response fails to provide sufficient information to enable the contracting officer to evaluate such restriction, such failure shall constitute reasonable grounds for questioning the validity of the asserted restriction.

The revised regulation, taken in combination with the new definition of "developed exclusively at private expense" would presumably offer the Contracting Officer the opportunity to rule that reasonable grounds exist for a challenge in the event the contractor was unable to account for every dollar spent on the development of an item or computer software (not sufficient). This shift in the burden was intentional, and requires the contractor to prove 100% validity, as opposed to requiring the contracting officer to find reasonable grounds for supporting a challenge.

For commercial item presumption challenges, the text should clearly reflect the comments that "the Government may request information from the contractor, but the contractor is not required to provide such information." In practice, without clear regulations, the Contracting Officer is going to force compliance.

We recommend that the commercial presumption (see pg 59417 middle column, iii.) should be expressly included in this clause.