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Data Rights: Current Developments & Pending DOD Changes

*W. Jay DeVecchio**

In a process at once overt yet stealthy, the Department of Defense (DOD) is developing proposed revisions to the Defense Federal Acquisition Regulation Supplement (DFARS) data rights provisions that will rewrite commercial software licenses in ways never before seen and guaranteed to be rejected by commercial software suppliers, as well as proposing authority to pressure contractors—in the guise of "specially negotiated license rights"—to negotiate away valuable intellectual property (IP) rights while increasing data delivery obligations. The DOD is doing this in plain view—if you know what to look for.

This BRIEFING PAPER discusses the proposed DFARS revisions in DFARS Case 2018-D071, "Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses," and DFARS Case 2018-D018, "Noncommercial Computer Software," implementing provisions of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 and the FY 2019 NDAA, that the DOD has issued in draft form seeking public comment.[1] The PAPER focuses on the potential impacts of the proposed regulatory changes on contractors and provides practical guidelines outlining steps contractors can take right now to address the DOD's actions and diminish their risks.

Increasing The Pressure On Data & Software Rights

In June 1995, after years of discussions with industry, the DOD issued a comprehensive and equitable rewrite of the DFARS addressing rights in technical data and in noncommercial computer software and software documentation.[2] 1995 was about the high water mark of the DOD's professed affection for commercial items, including software, and the DOD's respect for contractors' technical data investments. The water has been draining away ever since, and with it the DOD's fidelity to the core principals of those enlightened regulations in DFARS Subparts 227.71 and 227.72 and their principal contract clauses—DFARS 252.227-7013, "Rights in Technical Data—Noncommercial Items," and DFARS 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software

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Documentation."[3] Things quickly will be getting much worse for industry's rights in data if the DOD prevails in its proposed changes.

Let us look at two overarching principals of the 1995 regulations that are most at risk—*i.e.,* embracing commercial software and protecting private investment.

First, in 1995 the DOD took the remarkable step of eliminating any DFARS clause for commercial computer software.[4] There is none to be found. This makes a great deal of sense if one's goal is—as the DOD's was—to encourage innovative private sector software developers to offer their clever advanced technology to the DOD. How better to do this than by eliminating contract clauses alien to the commercial world. Instead, commercial computer software "shall be acquired under the *licenses customarily provided* to the public *unless* such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs."[5] The "unless" in that sentence leaves room for mischief, but the DOD—with a few exceptions tied to amorphous and inexplicable "user need"—largely has confined this exception to rejecting commercial license terms that conflict with sovereign rights. One really cannot, for example, litigate government contract disputes through American Arbitration Association (AAA) arbitration applying California law.[6]

The DOD correspondingly imposed clear limits on what contracting activities could do to infringe commercial software rights:

> Offerors and contractors shall *not* be required to—
>
> * * *
>
> (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.[7]

These common sense and longstanding rules are in jeopardy.

The *second* overarching principle was for the DOD to acquire only the noncommercial technical data and software "necessary to satisfy agency needs,"[8] while respecting contractors' private investment by precluding overt government coercion. This is seen in DFARS 227.7103-1(c), which essentially quotes verbatim the prohibitions of the DOD's main data rights statute, 10 U.S.C.A. § 2320(a)(2)(H):

> Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense . . . .[9]

Congress provided only limited exceptions to these preclusions and only for technical data, *not software*, allowing for unlimited government rights in "form, fit, and function data" (defined fairly)[10] and technical data "necessary for installation, operation, maintenance, or training [OMIT] purposes."[11] Recognizing, however, that government personnel almost inevitably would attempt to construe the definition of OMIT so expansively as to swallow all technical data, Congress wisely excluded contractors' most important technical data from OMIT—their "detailed manufacturing or process data [DPMD]"[12]—which are "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."[13]

All this worked well, more or less, for about 20 years. Then the DOD got restive. No matter what one hears from DOD upper echelons, the facts on the ground are that the DOD views contractors' statutory and common sense rights—accruing because of your time, money, and talent—to assert limited or restricted rights as "vendor lock," harmful to the DOD.

For example, during the past five years various DOD entities have embarked on the following unsuccessful efforts:

- Request of proposal (RFP) provisions requiring giving up rights as a condition of award.
- A congressional push to grant the DOD a *perpetual* right to order delivery of data or software the DOD forgets to include as a deliverable (would they forget an airplane?) and pay only the cost of reproduction.

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- Contract clauses attempting to *grant OMIT rights in software*, directly contrary to law.[14]

- Lobbying Congress to eliminate due process protections when the government challenges data rights assertions by permitting the DOD to disseminate data and software pending a dispute and allowing contractors *only* a damage right.

- Lobbying Congress for the right to give contractors' most closely held trade secrets—*i.e.*, detailed limited rights manufacturing and process data—to their competitors whenever DMPD might be deemed useful for OMIT purposes.[15]

Foreshadowing The Future

Perhaps tired of being rebuffed, the DOD is taking a more nuanced approach, as described in an October 2019 DOD Instruction that should be required reading for contractors' proposal teams. It is DOD Instruction 5010.44, *Intellectual Property (IP) Acquisition and Licensing* (Oct. 16, 2019).[16] This is a well-written roadmap for how the DOD is going to pursue acquisition of rights in contractors' data and software, and reflects incremental gains the DOD has achieved with Congress.

Although its Policy Statement appears at first to be neutral and balanced, it subtly sets the stage for the DOD's aggressive actions that follow and are now pending, as we will see:

> 1.2. POLICY. Weapon and information systems acquired by DoD in support of the warfighter are, and will be, *increasingly dependent on technology for its operation, maintenance, modernization, and sustainment. Acquiring and licensing the appropriate IP is vital for ensuring the systems will remain functional, sustainable, upgradable and affordable*. Because balancing the interests of the U.S. Government and industry in IP can be difficult, early and effective understanding, planning, and communications between the U.S. Government and industry is critical, as is *ensuring delivery, acceptance, and management of the necessary IP deliverables (e.g., technical data and computer software), with appropriate license rights*. The DoD requires fair treatment of IP owners, and seeks to create conditions that encourage technologically advanced solutions to meet DoD needs.[17]

DOD's Goals & Their Effects

DOD Instruction 5010.44's "goals" to implement this policy are more overt. Here are two, for example:

- "Integrate IP planning fully into acquisition strategies and product support strategies to protect core DoD interests over *the entire life cycle*."[18]

- "[*U*]*se all available techniques early in the acquisition process* for identifying, acquiring, licensing, and enforcing the U.S. Government's rights to IP *necessary to support operation, maintenance, modernization, and sustainment*."[19]

The emphasized portions of these goals are easily translated into real-world acquisition activity and consequences for contractors: DOD solicitations increasingly will focus as much on data and software needed for long-term support, maintenance, and upgrades as it will (and largely does today) on IP for current operations. This means increased pressure in competitive proposals to provide broad rights in source code and manufacturing and process data, and at a low price.

Much of this pressure will come from contractor management pushing to lower the company's price for relinquishing its data rights: "We have to go low; our competitors will, and we will lose." The problem with this common view is not only that it is often incorrect, but also that it almost always either is shortsighted or is not based on thoughtful (or any) consideration of the long-term loss of value and market share resulting from giving up valuable rights.

Have you, as a contractor, evaluated the value of your data and software? If not, you should start. And the best practice would be to retain an independent third party to make the assessment. The reason you should is that the DOD understands the contractor mindset for low-balling and will be prepared to advance valuations to support low dollars for your rights. This will put contractors at a disadvantage if they have not done contrasting analyses. The DOD is not hiding its ball, as seen in another of the DOD's goals in DOD Instruction 5010.44:

> Acquire the necessary IP deliverables and associated license rights *at fair and reasonable prices. Improve. . . financial analysis and valuation practices for determining fair and reasonable prices* and appropriate needs for IP and IP rights in order to develop program budgets and evaluate proposals.[20]

The FAR Council is evaluating various valuation approaches now, such as Cost (replacement or reproduction cost); Market (comparable sales); or Income (predicted future income stream). Contractor and FAR Council beware, however: the Defense Contract Audit Agency never met an income or market value it liked: "I can't audit that, it's too speculative. Tell me instead what it cost to develop and let me see your records?"

Increased Data Rights Pricing Pressure In Negotiations

This pressure is greatest for major weapon systems, due to § 835 of the FY 2018 NDAA, which, as later expanded in scope by § 867 of the FY 2019 NDAA,[21] became translated into 10 U.S.C.A. § 2439:

> The Secretary of Defense shall ensure, to the maximum extent practicable, that the Department of Defense, *before selecting* a

contractor for the engineering and manufacturing development of a major weapon system, production of a major weapon system, or sustainment of a major weapon system, *negotiates a price for technical data* to be delivered under a contract for such development, production, or sustainment.[22]

This pressure, however, certainly will not be limited to major weapon systems. This is evident in DFARS Case 2018-D071, addressing a range of proposed changes to negotiating prices for IP, including negotiating pricing per § 867 of the FY 2019 NDAA.[23] The draft proposed rule would revise DFARS 206.106, "Additional requirements for major systems," to add the requirement that assessments of the long-term technical data and computer software needs of major weapons systems and subsystems and corresponding acquisition strategies that provide for the technical data deliverables and associated license rights needed to sustain those systems and subsystems over their life cycle:

[(vi) *Identify*, to the maximum extent practicable*, the estimated cost for technical data, computer software, and associated license rights* as required by FAR 7.105(b)(14)(iii) *and summarize how the contracting officer intends to negotiate a price* for the data, software, and license rights. *See* [DFARS] *215.470(a) regarding the negotiation of a price* for the data, software, and license rights.][24]

In turn, these are the proposed revisions to DFARS 215.470(a):

[The contracting officer *shall*]~~DoD~~ *requires*~~*~~ [that offerors provide] *estimates of the prices of data* [*and associated license rights*] . . . . [To the maximum extent practicable, *before making a source selection decision . . . the contracting officer shall negotiate a price for data (including technical data and computer software) and associated license rights* . . . for the development, production, or sustainment of a system, subsystem, or component; or services. . .. [S]uch negotiations should *be based upon the use of appropriate intellectual property valuation practices and standards*.][25]

In other words, the DOD will be asking contractors in advance to put a price on their rights—one to be pitted against competitors.

A New Twist On Specially Negotiated Rights: De Facto Mandatory Negotiations

Another of the DOD's stated goals in DOD Instruction 5010.44 is to increase the use of specially negotiated rights:

Negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights. *This is most effective early in the life cycle, when competition is more likely*.[26]

Specially negotiated rights were intended originally to permit flexibility where the DOD previously had none—*e.g*., giving up unlimited rights. The current perspective is very different; it is intended to get around the 10 U.S.C.A. § 2320 preclusion on forcing contractors to give up rights, and doing it when competitive pressures on contractors are the greatest. "Who's forcing?" asks the CO: "We're negotiating and paying for rights."

Those negotiations are on the way, in the form of DFARS Case 2018-D071 draft proposed revisions to DFARS 227.7102-2, "Rights in technical data" related to commercial items:

(b) [Specially negotiated license rights.

(1) The parties *should negotiate special license rights* whenever doing so will *more equitably address* the parties' interests than the standard license rights provided in the clause. *To the maximum extent practicable*, if *either party* desires a special license, the parties *shall* enter into good faith negotiations]~~If additional rights are needed, contracting activities must negotiate with the contractor~~ to determine if there are acceptable terms for transferring such rights. [*However, the licensor is not obligated to provide the Government greater rights, and the contracting officer is not required to accept lesser rights, than the rights provided in the standard grant of license*.][27]

This is an ambitious step from current policy forbidding the DOD from acquiring commercial technical data beyond those customarily provided to the public (plus form, fit, or function data or data necessary for limited OMIT activities) and from requiring contractors to relinquish additional rights in those data.[28] Well, you say, "That final caveat looks good, and we can decline to negotiate." In theory, yes, but will contractors decline in a major procurement? The DOD is counting on them not to. And the DOD is emphasizing its ability to bring contractors to the negotiating table by reiterating what essentially are mandatory negotiations, via another change to the regulations, this one related to noncommercial technical data—DFARS 227.7103-5 "Government rights":

(d) [Specially]~~Specifically~~ negotiated license rights.

(1) [To the maximum extent practicable, n]~~N~~egotiate specific licenses ~~when~~[whenever doing so will more equitably address the parties' interests than the standard license rights provided in the clause.] ~~the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in data in which it does not have rights~~. [*If either party desires a special license, the parties shall enter into good faith negotiations to determine if there are acceptable terms for transferring such rights* . . . .][29]

More Rigorous Delivery Requirements

One of the most common misconceptions held by government and contractor personnel is that the data rights clauses require delivery of the data and software for which they define rights. The clauses do nothing of the sort. There is not a word about delivery in them.[30] This makes sense, because the purpose of the clauses is only to define license rights received by the government. If the government requires delivery of technical data or software, it has to specify those things as deliverables just like any other deliverable under a government contract.

Likely because of this misunderstanding, the government has tended to be lax in identifying data deliverables, and even sometimes lax in including "deferred ordering" clauses, such as DFARS 252.227-7027, "Deferred Ordering of Technical Data or Computer Software," that would allow the government to order data or software generated in the performance of the contract.

The DOD, understandably, is trying to focus contracting officers and the acquisition corps on the importance of specifying data deliverables. This is reflected in another of the DOD's goals in DOD Instruction 5010.44, as well as in recent solicitations. Here is the goal:

> Clearly identify and match data deliverables with the license rights in those deliverables. Data or software deliverables are of no value unless and until the license rights to use it are attached, and the U.S. Government actually obtains and accepts those deliverables.[31]

How does this translate for contractors? This means contractors increasingly will be required to create a proposal table that (1) lists all data and software deliverables—for prime and all its subcontractors—with (2) their corresponding rights identified, (3) tied to a specific contract line item number (CLIN) and contract data requirements list (CDRL), and with (4) copies of all prime and subcontractor commercial computer software licenses attached. Piling on, the DOD lately has even taken to requiring offerors to provide in their proposals written and evidentiary support for each data rights assertion, a daunting administrative burden, particularly for prime contractors responsible for collecting such information across their extensive supply chains.

Commercial software suppliers also may be required by the RFP to provide noncommercial rights, alien (and often unacceptable) to their business. This will be very difficult for commercial software suppliers, and there is more bad news in store.

Assault On Commercial Computer Software

Each of the changes proposed above also is being made to the DOD regulations applicable to *noncommercial* computer software. That is typical practice at the DOD; whenever changes are made to the technical data regulations, the DOD strives for consistency in the software regulations. What is *atypical* is applying those changes *to commercial computer software*. Recall, the original intent of the DFARS was to eliminate any clause for commercial computer software,[32] and instead to rely principally on contractors' standard commercial licenses.[33] If the government wanted different rights, it had to negotiate for them but rarely did. And when it did, it typically was to eliminate clauses inconsistent with the sovereign's rights—disputes and indemnity.[34]

Now, there is a significant shift in the DOD's emphasis and drive, reflected in two contemplated revisions under DFARS Case 2018-D071[35] and DFARS Case 2018-D018.[36] The former anticipates "mandatory" negotiations to modify commercial licenses, while the latter for the first time imposes noncommercial principles on commercial software. Consider these excerpts from the DFARS cases.

First, regarding mandatory negotiations to modify commercial licenses, DFARS Case 2018-D017 would revise DFARS 227.7202-3, "Rights in commercial computer software or commercial computer software documentation," as follows:

> (b) [The parties *should negotiate special license rights* whenever doing so will more equitably address the parties' interests than the standard license rights provided in the license customarily provided to the public.]~~If the Government has a need for rights not conveyed under the license customarily provided to the public, the Government must negotiate with the contractor~~ [To the maximum extent practicable, *if either party desires a special license, the parties shall enter into good faith negotiations*] to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto [and shall, support the Government's product support strategy (e.g., as described in the life cycle sustainment plan)].[37]

Second, applying noncommercial rights to commercial software, DFARS Case 2018-D018 would revise DFARS 227.7202, "Commercial computer software and commercial computer software documentation," by adding the following requirement:

> 227.7202-1 Policy.
>
> * * * * *
>
> [(d) When establishing contract requirements and negotiation objectives to meet agency needs, *the Government shall consider the factors identified in* [DFARS] *227.7203-2(b) and (c), adapted as appropriate for commercial computer software* and computer software documentation.][38]

Let us pause here for a moment. This sounds innocuous. It is not. DFARS 227.7203-2, "Acquisition of noncommercial computer software and computer software documentation," has *never* been applied to commercial software, and for good reason. It has nothing to do with commercial software, until now. And it includes terms that are unknown in commercial software agreements that assuredly will be unacceptable to commercial software suppliers. Think about the consternation that will be created by the italicized portions of the proposed DFARS 227.7203-2:

> 227.7203-2 Acquisition of noncommercial computer software and computer software documentation [and associated rights].
>
> * * * * *
>
> [(2)(i) [The CO]. . .must address the acquisition at appropriate times in the life cycle of *all computer software, related data, and associated license rights necessary to*—

(A) Reproduce, build, or recompile the software from its source code and required software libraries;

(B) Conduct required computer software testing; and

(C) Deploy computer programs on relevant system hardware.

(ii) Needs determinations should be made as early as practicable, preferably before or during a competitive phase (10 U.S.C. 2322a).][39]

Guidelines: What All Contractors Should Do Today

These DOD proposals invite action by contractors and their industry groups to comment on the pending changes, challenge them, and work with congressional liaisons to explain why the proposals are contrary to the very things the DOD needs—innovation, private investment, and engaging commercial software suppliers. The proposals also invite internal education for contractor personnel, allowing them to recognize issues when they first arise, raise them with management, and resist them appropriately when necessary.

Thus, these *Guidelines* provide suggestions for actions contractors can take immediately to address the issues discussed in this PAPER and to mitigate the risks posed by the DOD's recent initiatives. They are not, however, a substitute for professional representation in any specific situation.

1. *Revisit* with your contracts team some of the basics of data rights—*e.g.*, what is technical data vs. software; what the DFARS data rights clauses do (rights of use) and not do (delivery).

2. *Carefully review* RFPs promptly for any data rights clauses other than the standard DFARS/FAR clauses. Bear in mind that the *government* properly *can* request offerors to relinquish Limited or Restricted rights and provide Government Purpose Rights (GPR) or Unlimited rights and may create an incentive for doing so in exchange for payment by the government—typically a *paid option* to deliver data and software with GPR. But the government *cannot require relinquishment as a condition of being responsive or eligible for award.*

3. *Do not* panic if you see a clause requesting a priced option for giving up data rights and providing GPR or Unlimited rights.

4. *Do not* assume your competitors are going to provide those rights at no cost or low cost.

5. *Do get* an independent, unbiased (meaning from outside the company) assessment of the value of the data rights you will be giving up. You then can fairly assess what you have to gain from winning the contract compared to what you will lose in future value for losing data rights.

6. *Consider* (and price) strategies that provide GPR or Unlimited rights in the option or out years, or after a certain volume of production. By those times, you might have recouped or significantly diminished the loss of IP value.

7. *Remember* that the government *cannot downgrade* your evaluation for declining to give up Limited or Restricted rights—*i.e.,* declining to provide GPR or Unlimited rights when you otherwise can assert Limited or Restricted rights.

8. *Be aware*, however, that the government *can evaluate you more favorably* if you elect to provide GPR or Unlimited rights.

9. *Keep in mind* that the government *can require* contractors to deliver DMPD as OMIT data—which an agency can reasonably define—but the DMPD must still be subject to Limited rights. That is, the government *cannot require GPR or Unlimited rights in DMPD* or downgrade you for declining to provide those rights.

10. *Be mindful of timelines* for raising protest issues: challenges to the terms of an RFP must be raised *prior to the time for submission of initial proposals*. Contractor personnel must *be attuned* to this timing—and to these data rights issues—so these matters can get raised to legal and management in sufficient time to make informed decisions about how best to address the clauses.

ENDNOTES:

[1]Defense Federal Acquisition Regulation Supplement: Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses (DFARS Case 2018-D071), 84 Fed. Reg. 60988 (Nov. 12, 2019) (advance notice of proposed rulemaking implementing National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 835, 131 Stat. 1283, 1470 (2017) (adding 10 U.S.C.A. §§ 2439, 2320(f)); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 867, 132 Stat. 1636, 1901 (2018) (amending 10 U.S.C.A. § 2439)); Defense Federal Acquisition Regulation Supplement: Noncommercial Computer Software (DFARS Case 2018-D018), 85 Fed. Reg. 2101 (Jan. 14, 2020) (advance notice of proposed rulemaking implementing National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 871, 131 Stat. 1283, 1496 (2017) (adding 10 U.S.C.A. § 2322a)). For the text of the draft proposed rules ("strawmen"), visit https://www.regulations.gov/. See also Open DFARS Cases as of 4/19/2021, https://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf.

[2]60 Fed. Reg. 33464 (June 28, 1995).

[3]For civilian agency contracts, see the principal Federal Acquisition Regulation clause at FAR 52.227-14, "Rights in Data—General."

[4]DFARS 227.7202-4; see 60 Fed. Reg. 33464 (June 28, 1995).

[5]DFARS 227.7202-1(a) (emphasis added). See generally DeVecchio, "Taking the Mystery Out of Data Rights," 18-8 Briefing Papers 1 (July 2018); DeVecchio, "Licensing Com-

mercial Software to the Government: Notice, Subcontracting & Pricing Issues," 15-6 Briefing Papers 1 (May 2015).

[6]See generally DeVecchio, "Taking the Mystery Out of Data Rights," 18-8 Briefing Papers 1 (July 2018); DeVecchio, "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions & Answers (Including § 815) / Edition II," 12-6 Briefing Papers 1 (May 2012); DeVecchio, "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions and Answers," 10-10 Briefing Papers 1 (Sept. 2010).

[7]DFARS 227.7202-1(c) (emphasis added).

[8]DFARS 227.7103-1(a) (noncommercial technical data); DFARS 227.7203-1(a) (noncommercial computer software and noncommercial computer software documentation).

[9]DFARS 227.7103-1(c); see also DFARS 227.7203-1(c).

[10]See DFARS 252.227-7013(a)(11) (defining "form, fit, and function data" as "technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items").

[11]DFARS 227.7103-5(a)(4), (5); see 10 U.S.C.A. § 2320(a)(2)(C), (H).

[12]DFARS 227.7103-5(a)(5); see 10 U.S.C.A. § 2320(a)(2)(C), (H).

[13]DFARS 252.227-7013(a)(6).

[14]See DeVecchio, "Feature Comment: Data Rights Assault: What in the H (clause) Is Going On Here? Air Force Overreaching on OMIT Data," 60 GC ¶ 8 (Jan. 17, 2018).

[15]See DeVecchio "The Data Rights Black Hole: DOD Lobbies Congress To Eliminate Proprietary Rights in Your Most Valuable Trade Secrets—Your Detailed Manufacturing and Process Data," Morrison & Foerster Government Contracts Insights (Apr. 16, 2020).

[16]Available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/501044p.PDF. See generally Nash, "Specially Negotiated Licenses: The Intellectual Property Solution?," 33 Nash & Cibinic Rep. NL ¶ 71 (Dec. 2019).

[17]DOD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing ¶ 1.2 (Oct. 16, 2019) (emphasis added).

[18]DOD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing ¶ 1.2.b.(1) (Oct. 16, 2019) (emphasis added).

[19]DOD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing ¶ 2.4.b (Oct. 16, 2019) (emphasis added).

[20]DOD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing ¶ 2.4.b (Oct. 16, 2019) (emphasis added).

[21]National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 835, 131 Stat. 1283, 1470 (2017) (adding 10 U.S.C.A. § 2439J; John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 867, 132 Stat. 1636, 1901 (2018) (amending 10 U.S.C.A. § 2439).

[22]10 U.S.C.A. § 2439 (emphasis added).

[23]Defense Federal Acquisition Regulation Supplement: Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses (DFARS Case 2018-D071), 84 Fed. Reg. 60988 (Nov. 12, 2019) (advance notice of proposed rulemaking). For the text of the draft proposed rule ("strawman"), visit https://www.regulations.gov/.

[24]DFARS Case 2018-D071, Draft Proposed Rule, DFARS 207.106 (emphasis added).

[25]DFARS Case 2018-D071, Draft Proposed Rule, DFARS 215.470(a) (emphasis added).

[26]DOD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing ¶ 1.2.b.(3) (Oct. 16, 2019) (emphasis added).

[27]DFARS Case 2018-D071, Draft Proposed Rule, DFARS 227.7102-2(b)(1) (emphasis added).

[28]DFARS 227.7102-1.

[29]DFARS Case 2018-D071, Draft Proposed Rule, DFARS 227.7103-5(d)(1) (emphasis added).

[30]See DFARS 252.227-7013; DFARS 252.227-7014. See generally DeVecchio, "Taking the Mystery Out of Data Rights," 18-8 Briefing Papers 1 (July 2018).

[31]DOD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing ¶ 1.2.b.(6) (Oct. 16, 2019) (emphasis added).

[32]DFARS 227.7202-4; see 60 Fed. Reg. 33464 (June 28, 1995).

[33]DFARS 227.7202-1(a). See generally DeVecchio, "Taking the Mystery Out of Data Rights," 18-8 Briefing Papers 1 (July 2018); DeVecchio, "Licensing Commercial Software to the Government: Notice, Subcontracting & Pricing Issues," 15-6 Briefing Papers 1 (May 2015).

[34]See generally DeVecchio, "Taking the Mystery Out of Data Rights," 18-8 Briefing Papers 1 (July 2018); DeVecchio, "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions & Answers (Including § 815) / Edition II," 12-6 Briefing Papers 1 (May 2012); DeVecchio, "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions and Answers," 10-10 Briefing Papers 1 (Sept. 2010).

[35]Defense Federal Acquisition Regulation Supplement: Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses (DFARS Case 2018-D071), 84 Fed. Reg. 60988 (Nov. 12, 2019) (advance notice of proposed rulemaking). For the text of the draft proposed rule ("strawman"), visit https://www.regulations.gov/.

[36]Defense Federal Acquisition Regulation Supplement: Noncommercial Computer Software (DFARS Case 2018-D018), 85 Fed. Reg. 2101 (Jan. 14, 2020) (advance notice of proposed rulemaking). For the text of the draft proposed rule ("strawman"), visit https://www.regulations.gov/.

[37]DFARS Case 2018-D071, Draft Proposed Rule, DFARS 227.7202-3(b).

[38]DFARS Case 2018-D018, Draft Proposed Rule, DFARS 227.7202-1(d).

[39]DFARS Case 2018-D018, Draft Proposed Rule, DFARS 227.7203-2.

BRIEFING PAPERS