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Chair

15 March 2022

Subject: DFARS Case 2018-D018 Proposed Rule for Noncommercial Computer Software Proposed
Rule – Small Business Technology Council (SBTC) Comments

Dear Mr. Johnson:

On behalf of the Small Business Technology Council (SBTC) and its member companies, I respectfully submit the following comments to the proposed amendments to the Defense Federal Acquisition Regulations Supplement (DFARS) sections 227 and 252.227 relating to Noncommercial Computer Software under DAR Publication Notice 20220128/ DFARS Case 2018-D018.

SBTC is the nation's largest association of small, technology-based companies in diverse fields, and is proud to serve as the technology council of the National Small Business Association (NSBA), the nation's oldest nonprofit advocacy organization for small business, serving more than 150,000 small companies throughout the United States. SBTC's membership are primary participants in the nation's Small Business Innovation Research/Small Business Technology Transfer (SBIR) program, which is a mainstay of American innovation, small business growth, and contribution to America's technology-based economy and the Department of Defense's continuing strengthening of its technology-based sources of strategic and tactical advantage.

We have provided one enclosure for review:
- Appendix A provides a detailed discussion of the proposed changes and SBTC's comments.

Thank you for your consideration of our comments. Please direct any questions to Mary Delahunty, SBTC Southwest Regional Chair (Email: mdelahunty@invocon.com; Ph: 281-292-9903 x117).

Sincerely,

Mary Delahunty

SBTC Southwest Regional Chair
Vice President & General Counsel, Invocon, Inc.

Jere W. Glover
SBTC Executive Director

Robert N. Schmidt
SBTC Co-Chair

Kevin Burns
SBTC Co-Chair

APPENDIX A - SBTC Comments and Rationale

SBTC provides below a listing of each DFARS section of concern followed by our comment on the requested change or revision. Changes proposed by the Government in its announcement are shown in bold font. SBTC-requested changes or revisions are indicated by stricken or underlined text in red font. Please note that the changes/revisions are also provided in MSWord review mode in the attached Appendix B.

Discussion DFARS 227.7103-2

SBTC Comment:

SBTC requests that the word minimum be retained as it is in the current version. Removing the word "minimum" can be interpreted to broaden the scope of what the Government considers in drafting requirements.

227.7103-2 Acquisition of technical data.

* * * * *

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's **minimum** **[life-cycle]** ~~minimum~~ needs for technical data. ~~Data~~ **[Technical data]** needs must be established giving consideration to the contractor's economic interests in **[technical]** data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the **[technical]** data; reprocurement needs; repair, maintenance and overhaul philosophies; spare and repair part considerations; and whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. When it is anticipated that the Government will obtain unlimited or government purpose rights in technical data that will be required for competitive spare or repair parts procurements, such data should be identified as deliverable **[technical]** data items. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when items or components can be acquired using performance specifications, form, fit**[,]** and function data, or when there are a sufficient number of alternate sources ~~which~~**[that]** can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.

Discussion DFARS 227.7203-2

SBTC Comment on DFAR 227.7203-2(b)(1):

SBTC requests that the word minimum be retained as it is in the current version of this clause. Removing the word "minimum" can be interpreted to broaden the scope of what the Government considers in drafting requirements. Additionally, SBTC proposes the addition of the additional language in clause (b)(1)(ii) below to emphasize the importance to requirements personnel of how stated requirements affect the willingness of business, and specifically small businesses to do business with the Government. Small businesses funded by individual owners or private investors consider the retention of their rights to privately funded software to be of the utmost importance. Companies fund internal research and development with the goal of achieving future revenues and growing their businesses, and will not invest in new R&D if they do not believe they can retain the fruits of their investment.

SBTC requests that the following factor (ii) should be added:

227.7203 Noncommercial computer software and noncommercial computer software documentation.

* * * * *

227.7203-2 Acquisition of noncommercial computer software and computer software documentation [and associated rights].

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's **minimum [life-cycle]** ~~minimum~~ needs **[for computer software and computer software documentation. See PGI 227.7203-2(b) for further guidance on assessing life-cycle needs]**. In addition to desired software performance, compatibility, or other technical considerations, **[identification of life-cycle]** needs ~~determinations~~ should consider such factors as**[—**

> **(i)   The contractor's economic interests in software that has been developed at private expense;**

> **(ii)   The incentive for traditional and nontraditional contractors such as small businesses to continue to develop at private expense computer software solutions for Government applications and to submit bids to Government contracts;**

> **(ii~~i~~) The Government's costs to acquire, maintain, store, retrieve, and protect the computer software and computer software documentation;**

> **(ii~~i~~iv) M]**~~m~~ultiple site or shared use requirements~~,~~**[;**

> **(i~~v~~v) W]**~~w~~hether the Government's software maintenance needs will require the right to modify or have third parties modify the software~~,~~**[;]** and

> **[(~~v~~vi) A]**~~a~~ny special computer software documentation requirements.

SBTC Comment on DFAR 227.7203-2(b)(2):
SBTC proposes the revisions to (b)(2)(ii) as shown below. In the world of software, source code and detailed designs can be the very lifeblood of business. Any requirement for the delivery of source code or designs that were developed with private funding is an inherent disincentive to do business with the Government for small businesses. SBTC reiterates that businesses invest their funds in development to gain a future market share and create products including software for future revenues. The concept of turning over privately funded source code and designs in a Government contract requirement completely disregards the value of the intellectual property development, not to mention the sizable investment made to create the software for sale to customers -- Government or otherwise.

[(2)(i) *Procurement planning*. To the maximum extent practicable, when assessing the minimum life-cycle needs, data managers or other requirements personnel will address in the procurement planning and requirements documents (e.g., acquisition plans, purchase requests) the acquisition at appropriate times in the life cycle of all computer software, related recorded information, and associated license rights necessary to—

(A) Reproduce, build, or recompile the software from its source code and required software libraries (e.g., software libraries called, invoked, or linked by the computer software source code that are necessary for the operation of the software);

(B) Conduct required computer software testing and evaluation;

(C) Integrate and deploy computer programs on relevant hardware including developmental, operational, diagnostic, training, or simulation environments; and

(D) Sustain and support the software over its life cycle.

(ii) *Delivery of alternatives to source code and related software design details.* ~~The assessment of~~In assessing minimum life-cycle needs, the Government ~~should~~ shall consider alternatives to the delivery of source code and related software design details for privately developed computer software as necessary to meet the Government's needs, such as—

(A) Technical data and computer software sufficient to implement a modular open system approach or a similar approach (see PGI 227.7203-2(b)(2)(ii)(A) for guidance on alternatives to source code and related software design details);

(B) Access to technical data or computer software; see PGI 227.7203-2(b)(2)(ii)(B) and (C) for guidance on use of access agreements to contractor source code and related software design details;

(C) Software support and maintenance provided directly from the contractor; or

(D) Other contracting or licensing mechanisms including priced options, specially negotiated licenses, direct licensing between contractors for qualifying second sources, data escrow agreements, deferred delivery solutions, and subscription agreements. See PGI 227.7203-2(b)(2)(ii)(D) for guidance on use of escrow agreements.]

Discussion DFAR 252.227-7014(a)(15) and 252.227-7018(a)(18)

SBTC Comment:
SBTC requests that the Government leave the language in the existing DFARS as is with no change to the definition of "Restricted Rights." It is SBTC's position that the DOD proposed changes to the clauses effectively eviscerate the character of Restricted Rights and expand the Government's Rights to privately funded Noncommercial Software, taking the intellectual property developed by the contractor. The proposed rewrite of 252.227-7014(a)(15)(iii) and 252.227-7018(a)(18)(iii) allows the government to create derivative software from privately funded software without compensating the contractor. These expanded rights create a severe disincentive to businesses, and especially small businesses, to invest their funds in doing business with the Government or to risk their already-developed technology to develop new products for supply to the government. Small businesses invest their private funds heavily in new technology including software development to be able to compete with already established large companies.

Proposed Change by Government:

DFARS 252.227-7014(a)(15) and 252.227-7018(a)(18) both contain the definition of "Restricted Rights" and the definition is identical in both places. The comments herein are provided in response to the proposed changes to the language in both 252.227-7014 and 25.227-7018. For ease of review, this discussion will refer to the changes in 252.227-7014.

DFARS 252.227-7014(a)(15)(iii) currently reads:
> (15) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—
>> (iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

The Government proposes to change the clause as shown below with change language in bold and underlined font:
> (15) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—
>> (iii) Make **and use a reasonable number of copies of the computer software** ~~required~~ **for safekeeping (archive), backup, development, testing, evaluation, integration, or modification purposes, or diagnosing and correcting deficiencies or vulnerabilities in a computer program;**

To be clear, we recommend rejecting all the added words above.

By revising the language as shown above, the Government has explicitly expanded the Government's rights to privately funded noncommercial computer software. The government is already permitted to modify under the circumstances listed in the existing clause but the revisions by DOD provide the Government a substantially expanded right in data to use private sector software for most purposes, without limitation and in direct competition with the company that spent its money to develop the software. Especially directed to software, this will have special negative impact on smaller, especially earlier stage companies whose entire intellectual property position may be in their new software and who may not have the ability to negotiate variances to protect their property. This would be chilling on the prospects for the companies, on their willingness to provide software and services to the government, and on the prospects for government contractors in general in competition with private sector competitors that do not dilute their intellectual property by offering government services, A reading of the entire definition of "Restricted Rights" provides the best context to evaluate the prior language.

Paragraph 252.227-7014(a)(15) and 252.227-7018(a)(18) enumerates all the actions the Government has with respect to the noncommercial computer software that was developed with wholly private funding. In reading the list (restated below), by apply a plain English meaning, paragraph (a)(15)(iii) clearly deals with making copies and is intended to restrict the number of copies made to a minimum number only for backup purposes – similar to restrictions placed by commercial software providers on commercial software (which is fully privately funded). There is no basis for the government expanding these actions to implement what would be in effect a "taking" of private property, nor would such taking be in the government's interests because of the chilling effect on the willingness of private sector contractors to invest in new technology and to provide any related services to the Government.

Analysis of Current Clause and Effect of New Language:

DFARS 252.227-7014(a)(15) is provided below in order to review the proposed change by the Government in the proper context. SBTC calls the Government's attention to the analysis of the enumerated rights below and how these rights would be affected by the Government's proposed change.

(a) *Definitions*. As used in this clause—

(15) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—

Subparagraph language:	Analysis and Comment
(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared <u>unless otherwise permitted by this contract</u>;	Limits the number of computers upon which the software can be loaded. **Comment:** The underlined language allows the Government and Contractor to negotiate language to allow for use on more than one computer. During the public hearing held on 10 March 2022, Government personnel indicated that the new language proposed for 252.227-7014(15)(a)(iii) and 252-227-7018(a)(18)(iii) would allow the Government to have the software on more than one computer at a time which directly contradicts the language in this subparagraph (a)(i). This interpretation by the DOD personnel proposing this DFARS change only serves to further demonstrate how the proposed language is an expansion of the Government's rights regarding privately funded software. It is the expansion that SBTC opposes for the reasons stated throughout.
(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;	Limits the Government from freely transferring the computer program to other agencies. <u>Comment</u>: This is an appropriate and long-accepted restriction.

Subparagraph language:	Analysis and Comment
(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;	The plain language of this clause specifically limits the scope of copies to those needed for archival, backup or modification. The scope of modification is addressed in the next item (iv) of this clause. Comment: As stated previously by adding the word "use" along with other words in the proposed revision, this language is rewritten to significantly expand the Government's rights at the expense of the contractor's rights.

(iv) Modify computer software provided that the Government may—
    (A) Use the modified software only as provided in paragraphs (a)(15)(i) and (iii) of this clause; and
 	
    (B) Not release or disclose the modified software except as provided in paragraphs (a)(15)(ii), (v), (vi) and (vii) of this clause;
	Allows the Government to modify the software subject to the restrictions in the prior clauses. Release of the software for other reasons is addressed in (v),(vi) and (vii) following.

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—
    (A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;
    (B) Such contractors or subcontractors are subject to the use and non-disclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement (DFARS) or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure
	This paragraph addresses the scope of what service contractors and subcontractors can do with the software.
	
	Comment: The language proposed for addition in (a)(15)(iii) and (a)(18)(iii) expands on the permissible uses by service contractors/subcontractors of the privately funded software which would reduce the rights of the company who funded the development. SBTC opposes this as it would substantially expand the rights of the government to use other companies to service government interests using the data developed at private expense by the original developer.

of Government-Furnished Information Marked with Restrictive Legends; (C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and (D) Such use is subject to the limitations in paragraphs (a)(15)(i) through (iii) of this clause;	

The remaining sections of DFARS 252.227-7014(a)(15) and 252.227.7018(a)(18) further demonstrate the intention to limit the uses of privately funded software, and for good reason: to ensure businesses who have invested private funding in development are protected with respect to their intellectual property rights when doing business with the Government.

Analysis of Government's Change and Statutory Requirements

Adding "use" language and listing other actions for which copies can be made results in eviscerating the Restricted Rights and making them almost the equivalent of Government Purpose Rights which is not the statutory intent of any of the laws and Executive Order listed in DFARS SUBPART 227.72-- RIGHTS IN COMPUTER SOFTWARE AND COMPUTER SOFTWARE DOCUMENTATION *(Revised September 23, 2016)*

SBTC has reviewed the statutes cited in DFAR 227.7200. The following section highlights and discusses statutory language indicating the legislative intent to protect contractors' rights in those items, technologies and products developed at private expense.

In **10 U.S.C. 2305(subsection(d)(4)),** shown below, the underlined language precludes the Government from requiring from an offeror information that would compromise it competitively with respect to an item developed under private funding except under circumstances where the offeror would be unable to meet the government's delivery needs.

> **(4)(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror <u>shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if the item was developed exclusively at private expense</u> unless the head of the agency determines that-**
>
>> **(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or**
>>
>> **(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.**

In **10 U.S.C. 2320**, the limits on the Government's rights to items developed exclusively at private expense are stated in (a)(2)(B),(C), and (G). The statutory language below repeatedly emphasizes

restrictions on use of items or processes developed exclusively at a contractor's or subcontractor's private expense. None of the language in the statute requires a contractor to permit the Government to use privately funded technology conduct development. We provide this information to emphasize that the Government's proposed expansions of its use rights are contrary to the words and intent of the clause in general, and the changes should not be made.

(B) Development exclusively at private expense.-Except as provided in subparagraphs (C), (D), and (G), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, <u>the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons</u>.

(C) Exception to subparagraph (b).-Subparagraph (B) does not apply to technical data that-

(i) constitutes a correction or change to data furnished by the United States;
(ii) relates to form, fit, or function;
(iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component); or
(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(D) Exception to subparagraph (b).-Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if-

(i) such release, disclosure, or use-

(I) is necessary for emergency repair and overhaul;
(II) is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or
(III) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

****

(G) Modular system interfaces developed exclusively at private expense or with mixed funding.-Notwithstanding subparagraphs (B) and (E), the United States shall have government purpose rights in technical data pertaining to a modular system interface developed exclusively at private expense or in part with Federal funds and in part at private expense and used in a modular open system

approach pursuant to section 2446a of this title, except in any case in which the Secretary of Defense determines that negotiation of different rights in such technical data would be in the best interest of the United States. Such modular system interface shall be identified in the contract solicitation and the contract. For technical data pertaining to a modular system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data.

(H) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract-

    (i) to sell or otherwise relinquish to the United States any rights in technical data except-

        (I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;

        (II) rights in technical data described in subparagraph (C); or

        (III) under the conditions described in subparagraph (D); or

    (ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

Conclusion:

SBTC members appreciate the efforts of DOD to update the DFARS in accordance with current statutory direction. SBTC requests that DOD personnel review the comments provided herein and seriously consider the effect on small businesses and how some of the proposed changes would significantly discourage innovative companies to do business with the Department of Defense.