Part 27 - Patents, Data, and Copyrights

Parent topic: Federal Acquisition Regulation

27.000 Scope of part.

This part prescribes the policies, procedures, *solicitation* provisions, and *contract clauses* pertaining to patents, data, and copyrights.

27.001 Definition.

United States, as used in this part, means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1 - General

27.101 Applicability.

This part applies to all agencies. However, agencies are authorized to adopt alternative policies, procedures, *solicitation* provisions, and *contract clauses* to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements. Any agency adopting alternative policies, procedures, *solicitation* provisions, and *contract clauses should* include them in the agency's published regulations.

27.102 General guidance.

(a) The Government encourages the maximum practical commercial use of inventions made under Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor *may* infringe a patent. The Government *may* authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions *may* be covered by U.S. patents.

(c) Generally, contractors providing *commercial products* and *commercial services should* indemnify the Government against liability for the infringement of U.S. patents.

(d) The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the Government will acquire only those rights essential to its needs.

(e) Generally, the Government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the Government.

Subpart 27.2 - Patents and Copyrights

27.200 Scope of subpart.

This subpart prescribes policies and procedures with respect to-

(a) Patent and copyright infringement liability;

(b) Royalties;

(c) Security requirements for patent applications containing classified subject matter; and

(d) Patented technology under trade agreements.

27.201 Patent and copyright infringement liability.

27.201-1 General.

(a) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal *Claims*. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (*e.g.*, while performing a contract).

(b) The Government *may* expressly authorize and consent to a contractor’s use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227-1, Authorization and Consent.

(c) Because of the exclusive remedies granted in 28 U.S.C. 1498, the Government requires notice and assistance from its contractors regarding any *claims* for patent or copyright infringement by inserting the clause at 52.227-2, Notice and Assistance, Regarding Patent and Copyright Infringement.

(d) The Government *may* require a contractor to reimburse it for liability for patent infringement

arising out of a contract for *commercial products* or *commercial services* by inserting the clause at 52.227-3, Patent Indemnity.

27.201-2 Contract clauses.

(a)

(1) Insert the clause at 52.227-1, Authorization and Consent, in *solicitations* and contracts except that use of the clause is-

(i) Optional when using *simplified acquisition procedures*; and

(ii) Prohibited when both complete performance and delivery are outside the *United States*.

(2) Use the clause with its *Alternate* I in all R&D *solicitations* and contracts for which the primary purpose is R&D work, except that this *alternate shall* not be used in *construction* and architect-engineer contracts unless the contract calls exclusively for R&D work.

(3) Use the clause with its *Alternate* II in *solicitations* and contracts for communication services with a common carrier and the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(b) Insert the clause at 52.227-2, Notice and Assistance Regarding Patent and Copyright Infringement, in all *solicitations* and contracts that include the clause at 52.227-1, Authorization and Consent.

(c)

(1) Insert the clause at 52.227-3, Patent Indemnity, in *solicitations* and contracts that *may* result in the delivery of *commercial products* or the provision of *commercial services* unless-

(i) part 12 procedures are used;

(ii) The *simplified acquisition procedures* of part 13 are used;

(iii) Both complete performance and delivery are outside the *United States*; or

(iv) The *contracting officer* determines after consultation with legal counsel that omission of the clause would be consistent with commercial practice.

(2) Use the clause with either its *Alternate* I (identification of excluded items) or II (identification of included items) if-

(i) The contract also requires delivery of items that are not *commercial products* or the provision of services that are not *commercial services*; or

(ii) The *contracting officer* determines after consultation with legal counsel that limitation of applicability of the clause would be consistent with commercial practice.

(3) Use the clause with its *Alternate* III if the *solicitation* or contract is for communication services

and facilities where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body.

(d)

(1) Insert the clause at 52.227-4, Patent Indemnity-*Construction* Contracts, in *solicitations* and contracts for *construction* or that are fixed-price for dismantling, demolition, or removal of improvements. Do not insert the clause in contracts solely for *architect-engineer services*.

(2) If the *contracting officer* determines that the *construction* will necessarily involve the use of structures, *products*, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the *contracting officer may* expressly exclude them from the patent indemnification by using the clause with its *Alternate* I. Note that this exclusion is for items, as distinguished from identified patents (see paragraph (e) of this subsection).

(e) It *may* be in the Government's interest to exempt specific U.S. patents from the patent indemnity clause. Exclusion from indemnity of identified patents, as distinguished from items, is the prerogative of the *agency head*. Upon written approval of the *agency head*, the *contracting officer may* insert the clause at 52.227-5, Waiver of Indemnity, in *solicitations* and contracts in addition to the appropriate patent indemnity clause.

(f) If a patent indemnity clause is not prescribed, the *contracting officer may* include one in the *solicitation* and contract if it is in the Government's interest to do so.

(g) The *contracting officer shall* not include in any *solicitation* or contract any clause whereby the Government agrees to indemnify a contractor for patent infringement.

27.202 Royalties.

27.202-1 Reporting of royalties.

(a) To determine whether royalties anticipated or actually paid under Government contracts are excessive, improper, or inconsistent with Government patent rights the *solicitation* provision at 52.227-6 requires prospective contractors to furnish royalty information. The *contracting officer shall* take appropriate action to reduce or eliminate excessive or improper royalties.

(b) If the response to a *solicitation* includes a charge for royalties, the *contracting officer shall*, before award of the contract, forward the information to the office having cognizance of patent matters for the *contracting activity*. The cognizant office *shall* promptly advise the *contracting officer* of appropriate action.

(c) The *contracting officer*, when considering the approval of a subcontract, *shall* require royalty information if it is required under the prime contract. The *contracting officer shall* forward the information to the office having cognizance of patent matters. However, the *contracting officer* need not delay consent while awaiting advice from the cognizant office.

(d) The *contracting officer shall* forward any royalty reports to the office having cognizance of patent matters for the *contracting activity*.

27.202-2 Notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of an existing license agreement and the *contracting officer* believes that the licensed patent will be applicable to a prospective contract, the Government *should* furnish the prospective *offerors* with-

(1) Notice of the license;

(2) The number of the patent; and

(3) The royalty rate cited in the license.

(b) When the Government is obligated to pay such a royalty, the *solicitation should* also require *offerors* to furnish information indicating whether or not each *offeror* is the patent owner or a licensee under the patent. This information is necessary so that the Government *may* either-

(1) Evaluate an *offeror*'s price by adding an amount equal to the royalty; or

(2) Negotiate a price reduction with an *offeror* when the *offeror* is licensed under the same patent at a lower royalty rate.

27.202-3 Adjustment of royalties.

(a) If at any time the *contracting officer* believes that any royalties paid, or to be paid, under a contract or subcontract are inconsistent with Government rights, excessive, or otherwise improper, the *contracting officer shall* promptly report the facts to the office having cognizance of patent matters for the *contracting activity* concerned.

(b) In coordination with the cognizant office, the *contracting officer shall* promptly act to protect the Government against payment of royalties-

(1) With respect to which the Government has a royalty-free license;

(2) At a rate in excess of the rate at which the Government is licensed; or

(3) When the royalties in whole or in part otherwise constitute an improper charge.

(c) In appropriate cases, the *contracting officer* in coordination with the cognizant office *shall* demand a refund pursuant to any refund of royalties clause in the contract (see 27.202-4) or negotiate for a reduction of royalties.

(d) For guidance in evaluating information furnished pursuant to 27.202-1, see 31.205-37. See also 31.109 regarding advance understandings on particular cost items, including royalties.

27.202-4 Refund of royalties.

The clause at 52.227-9, Refund of Royalties, establishes procedures to pay the contractor royalties under the contract and recover royalties not paid by the contractor when the royalties were included in the contractor's fixed price.

27.202-5 Solicitation provisions and contract clause.

(a)

(1) Insert a *solicitation* provision substantially the same as the provision at 52.227-6, Royalty Information, in-

(i) Any *solicitation* that *may* result in a negotiated contract for which royalty information is desired and for which *certified cost or pricing data* are obtained under 15.403; or

(ii) Sealed bid *solicitations* only if the need for such information is approved at a level above the *contracting officer* as being necessary for proper protection of the Government's interests.

(2) If the *solicitation* is for communication services and facilities by a common carrier, use the provision with its *Alternate* I.

(b) If the Government is obligated to pay a royalty on a patent involved in the prospective contract, insert in the *solicitation* a provision substantially the same as the provision at 52.227-7, Patents-Notice of Government Licensee. If the clause at 52.227-6 is not included in the *solicitation*, the *contracting officer may* require *offerors* to provide information sufficient to provide this notice to the other *offerors*.

(c) Insert the clause at 52.227-9, Refund of Royalties, in negotiated fixed-price *solicitations* and contracts when royalties *may* be paid under the contract. If a fixed-price incentive contract is contemplated, change "price" to "target cost and target profit" wherever it appears in the clause. The clause *may* be used in cost-reimbursement contracts where agency approval of royalties is necessary to protect the Government's interests.

27.203 Security requirements for patent applications containing classified subject matter.

27.203-1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, *may* be a violation of 18 U.S.C. 792, *et seq*. (Chapter 37-Espionage and Censorship), and related statutes, and *may* be contrary to the interests of national security.

(b) Upon receipt of a patent application under paragraph (a) or (b) of the clause at 52.227-10, Filing of Patent Applications-Classified Subject Matter, the *contracting officer shall* ascertain the proper security classification of the patent application. If the application contains classified subject matter, the *contracting officer shall* inform the contractor how to transmit the application to the *United States* Patent Office in accordance with procedures provided by legal counsel. If the material is classified "Secret" or higher, the *contracting officer shall* make every effort to notify the contractor within 30 days of the Government's determination, pursuant to paragraph (a) of the clause.

(c) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at 52.227-10, the *contracting officer shall* promptly submit that information to legal counsel in order that the steps necessary to ensure the security of the application will be taken.

(d) The *contracting officer shall* act promptly on requests for approval of foreign filing under paragraph (c) of the clause at 52.227-10 in order to avoid the loss of valuable patent rights of the Government or the contractor.

27.203-2 Contract clause.

Insert the clause at 52.227-10, Filing of Patent Applications-Classified Subject Matter, in all classified *solicitations* and contracts and in all *solicitations* and contracts where the nature of the work reasonably might result in a patent application containing classified subject matter.

27.204 Patented technology under trade agreements.

27.204-1 Use of patented technology under the United States-Mexico-Canada Agreement.

When questions arise with regard to use of patented technology under the *United States*-Mexico-Canada Agreement, the *contracting officer should* consult with legal counsel. Note that Article 20.6(a) of the Agreement discusses public health and pharmaceuticals.

27.204-2 Use of patented technology under the General Agreement on Tariffs and Trade (GATT).

Article 31 of Annex 1 C, Agreement on Trade-Related Aspects of Intellectual Property Rights, to GATT (Uruguay Round) addresses situations where the law of a member country allows for use of a patent without authorization, including use by the Government. Article 20.40 of the *United States*-Mexico-Canada Agreement preserves parties' rights under Article 31.

Subpart 27.3 - Patent Rights under Government Contracts

27.300 Scope of subpart.

This subpart prescribes policies, procedures, *solicitation* provisions, and *contract clauses* pertaining to inventions *made* in the performance of work under a Government contract or subcontract for experimental, developmental, or research work. Agency policies, procedures, *solicitation* provisions, and *contract clauses may* be specified in agency supplemental regulations as permitted by law, including 37 CFR 401.1.

27.301 Definitions.

As used in this subpart-

Invention means any invention or discovery that is or *may* be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or *may* be protectable under the Plant

Variety Protection Act (7 U.S .C. 2321, *et seq*.)

Made means-

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State *nonprofit organization* statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor *made* in the performance of work under a Government contract.

27.302 Policy.

(a) *Introduction*. In accordance with chapter 18 of title 35, U.S.C. (as implemented by 37 CFR part 401), Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies dated February 18, 1983, and Executive Order 12591, Facilitating Access to Science and Technology dated April 10, 1987, it is the policy and objective of the Government to-

(1) Use the patent system to promote the use of inventions arising from federally supported research or development;

(2) Encourage maximum participation of industry in federally supported research and development efforts;

(3) Ensure that these inventions are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery;

(4) Promote the commercialization and public availability of the inventions *made* in the *United States* by *United States* industry and labor;

(5) Ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and

(6) Minimize the costs of administering patent policies.

(b) *Contractor right to elect title*.

(1) Generally, pursuant to 35 U.S.C. 202 and the Presidential Memorandum and Executive order cited in paragraph (a) of this section, each contractor *may*, after required disclosure to the Government, elect to retain title to any *subject invention*.

(2) A contract *may* require the contractor to assign to the Government title to any *subject invention*-

(i) When the contractor is not located in the *United States* or does not have a place of business located in the *United States* or is subject to the control of a foreign government (see 27.303(e)(1)(i));

(ii) In exceptional circumstances, when an agency determines that restriction or elimination of the right to retain title in any *subject invention* will better promote the policy and objectives of chapter 18 of title 35, U.S.C. and the Presidential Memorandum;

(iii) When a Government authority, that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that the restriction or elimination of the right to retain title to any *subject invention* is necessary to protect the security of such activities;

(iv) When the contract includes the operation of a Government-owned, contractor-operated facility of the Department of Energy (DOE) primarily dedicated to the Department's naval nuclear propulsion or weapons related programs and all funding agreement limitations under 35 U.S.C. 202(iv) for agreements with small business concerns and *nonprofit organizations* are limited to inventions occurring under the above two programs; or

(v) Pursuant to statute or in accordance with agency regulations.

(3) When the Government has the right to acquire title to a *subject invention*, the contractor *may*, nevertheless, request greater rights to a *subject invention* (see 27.304-1(c)).

(4) Consistent with 37 CFR part 401, when a contract with a small business concern or *nonprofit organization* requires assignment of title to the Government based on the exceptional circumstances enumerated in paragraph (b)(2)(ii) or (iii) of this section for reasons of national security, the contract *shall* still provide the contractor with the right to elect ownership to any *subject invention* that-

(i) Is not classified by the agency; or

(ii) Is not limited from dissemination by the DOE within 6 months from the date it is reported to the agency.

(5) Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph (b).

(6) When a contract involves a series of separate *task orders*, an agency *may* structure the contract to apply the exceptions at paragraph (b)(2)(ii) or (iii) of this section to individual *task orders*.

(c) *Government license*. The Government *shall* have at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the *United States*, any *subject invention* throughout the world. The Government *may* require additional rights in order to comply with treaties or other international agreements. In such case, these rights *shall* be *made* a part of the contract (see 27.303).

(d) Government right to receive title.

(1) In addition to the right to obtain title to *subject inventions* pursuant to paragraph (b)(2)(i) through (v) of this section, the Government has the right to receive title to an invention-

(i) If the contractor has not disclosed the invention within the time specified in the clause; or

(ii) In any country where the contractor-

(A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;

(B) Has not filed a patent or plant variety protection application within the time specified in the clause;

(C) Decides not to continue prosecution of a patent or plant variety protection application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or

(D) No longer desires to retain title.

(2) For the purposes of this paragraph, filing in a European Patent Office Region or under the Patent Cooperation Treaty constitutes election in the countries selected in the application(s).

(e) *Utilization reports*. The Government has the right to require periodic reporting on how any *subject invention* is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. 202(5) and 37 CFR part 401, agencies *shall* not disclose such utilization reports to persons outside the Government without permission of the contractor. Contractors *should* mark as confidential/proprietary any utilization report to help prevent inadvertent release outside the Government.

(f) March-in rights.

(1) Pursuant to 35 U .S.C. 203, agencies have certain march-in rights that require the contractor, an assignee, or exclusive licensee of a *subject invention* to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a *subject invention* refuses to grant such a license, the agency can grant the license itself. March-in rights *may* be exercised only if the agency determines that this action is necessary-

(i) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve *practical application* of the *subject invention* in the field(s) of use;

(ii) To alleviate health or safety needs that are not reasonably satisfied by the contractor, assignee, or their licensees;

(iii) To meet requirements for public use specified by Federal regulations and these requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(iv) Because the agreement required by paragraph (g) of this section has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any *subject invention* in the *United States* is in breach of its agreement obtained pursuant to paragraph (g) of this section.

(2) The agency *shall* not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action *should* not be

taken. The agency *shall* provide the contractor an opportunity to dispute or appeal the proposed action, in accordance with 27.304-1(g).

(g) *Preference for United States industry*. In accordance with 35 U.S.C. 204, no contractor that receives title to any *subject invention* and no assignee of the contractor *shall* grant to any person the exclusive right to use or sell any *subject invention* in the *United States* unless that person agrees that any *products* embodying the *subject invention* or produced through the use of the *subject invention* will be manufactured substantially in the *United States*. However, in individual cases, the requirement for this agreement *may* be waived by the agency upon a showing by the contractor or assignee that reasonable but unsuccessful efforts have been *made* to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the *United States* or that under the circumstances domestic manufacture is not commercially feasible.

(h) Special conditions for *nonprofit organizations*' preference for small business concerns.

(1) *Nonprofit organization* contractors are expected to use reasonable efforts to attract small business licensees (see paragraph (i)(4) of the clause at 52.227-11, Patent Rights-Ownership by the Contractor). What constitutes reasonable efforts to attract small business licensees will vary with the circumstances and the nature, duration, and expense of efforts needed to bring the invention to the market.

(2) Small business concerns that believe a *nonprofit organization* is not meeting its obligations under the clause *may* report the matter to the Secretary of Commerce. To the extent deemed appropriate, the Secretary of Commerce will undertake informal investigation of the matter, and *may* discuss or negotiate with the *nonprofit organization* ways to improve its efforts to meet its obligations under the clause. However, in no event will the Secretary of Commerce intervene in ongoing negotiations or contractor decisions concerning the licensing of a specific *subject invention*. These investigations, discussions, and negotiations involving the Secretary of Commerce will be in coordination with other interested agencies, including the Small Business Administration. In the case of a contract for the operation of a Government-owned, contractor-operated research or production facility, the Secretary of Commerce will coordinate with the agency responsible for the facility prior to any discussions or negotiations with the contractor.

(i) Minimum rights to contractor.

(1) When the Government acquires title to a *subject invention*, the contractor is normally granted a revocable, nonexclusive, paid-up license to that *subject invention* throughout the world. The contractor's license extends to any of its domestic subsidiaries and *affiliates* within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The *contracting officer shall* approve or disapprove, *in writing*, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the *subject invention* pertains.

(2) In response to a third party's proper application for an exclusive license, the contractor's domestic license *may* be revoked or modified to the extent necessary to achieve expeditious *practical application* of the *subject invention*. The application *shall* be submitted in accordance with the applicable provisions in 37 CFR part 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved *practical application* and continues to make the benefits of the *subject invention*

reasonably accessible to the public. The license in any foreign country *may* be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or *affiliates* have failed to achieve *practical application* in that country. (See the procedures at 27.304-1(f).)

(j) *Confidentiality of inventions*. Publishing information concerning an invention before a patent application is filed on a *subject invention may* create a bar to a valid patent. To avoid this bar, agencies *may* withhold information from the public that discloses any invention in which the Government owns or *may* own a right, title, or interest (including a nonexclusive license) (see 35 U.S.C. 205 and 37 CFR part 401). Agencies *may* only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, agencies are not required to release copies of any document that is a part of a patent application for those *subject inventions*. (See also 27.305-4.)

27.303 Contract clauses.

(a)

(1) Insert a patent rights clause in all *solicitations* and contracts for experimental, developmental, or research work as prescribed in this section.

(2) This section also applies to *solicitations* or contracts for *construction* work or *architect-engineer services* that include-

(i) Experimental, developmental, or research work;

(ii) Test and evaluation studies; or

(iii) The design of a Government facility that *may* involve novel structures, machines, *products*, materials, processes, or equipment (including *construction* equipment).

(3) The *contracting officer shall* not include a patent rights clause in *solicitations* or contracts for *construction* work or *architect-engineer services* that call for or can be expected to involve only "standard types of *construction*" "Standard types of *construction*" are those involving previously developed equipment, methods, and processes and in which the distinctive features include only-

(i) Variations in size, shape, or capacity of conventional structures; or

(ii) Purely artistic or aesthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, whether or not they qualify for design patent protection.

(b)

(1) Unless an alternative patent rights clause is used in accordance with paragraph (c), (d), or (e) of this section, insert the clause at 52.227-11, Patent Rights-Ownership by the Contractor.

(2) To the extent the information is not required elsewhere in the contract, and unless otherwise specified by agency supplemental regulations, the *contracting officer may* modify 52.227-11(e) or otherwise supplement the clause to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all *subject inventions* required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all *subject inventions* or stating that there were none.

(iii) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any *subject invention* in any country or, upon request, copies of any patent application so identified.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor.

(3) Use the clause with its *Alternate* I if the Government *must* grant a foreign government a sublicense in *subject inventions* pursuant to a specified treaty or executive agreement. The *contracting officer may* modify *Alternate* I, if the *agency head* determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. When necessary to effectuate a treaty or agreement, *Alternate* I *may* be appropriately modified.

(4) Use the clause with its *Alternate* II in contracts that *may* be affected by existing or future treaties or agreements.

(5) Use the clause with its *Alternate* III in contracts with *nonprofit organizations* for the operation of a Government-owned facility.

(6) If the contract is for the operation of a Government-owned facility, the *contracting officer may* use the clause with its *Alternate* IV.

(7) If the contract is for the performance of services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the *contracting officer may* use the clause with its *Alternate* V. Since this provision is considered an exercise of an agency's "exceptional circumstances" authority, the *contracting officer must* comply with 37 CFR 401.3(e) and 401.4.

(c) Insert a patent rights clause in accordance with the procedures at 27.304-2 if the *solicitation* or contract is being placed on behalf of another Government agency.

(d) Insert a patent rights clause in accordance with agency procedures if the *solicitation* or contract is for DoD, DOE, or NASA, and the contractor is other than a small business concern or *nonprofit organization*.

(e)

(1) Except as provided in paragraph (e)(2) of this section, and after compliance with the applicable procedures in 27.304-1(b), the *contracting officer may* insert the clause at 52.227-13, Patent Rights-Ownership by the Government, or a clause prescribed by agency supplemental regulations, if-

(i) The contractor is not located in the *United States* or does not have a place of business located in the *United States* or is subject to the control of a foreign government;

(ii) There are exceptional circumstances and the *agency head* determines that restriction or elimination of the right to retain title to any *subject invention* will better promote the policy and objectives of chapter 18 of title 35 of the *United States* Code;

(iii) A Government authority that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that restriction or elimination of the right to retain any *subject invention* is necessary to protect the security of such activities; or

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of DOE primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) If an agency exercises the exceptions at paragraph (e)(1)(ii) or (iii) of this section in a contract with a small business concern or a *nonprofit organization*, the *contracting officer shall* use the clause at 52.227-11 with only those modifications necessary to address the exceptional circumstances and *shall* include in the modified clause greater rights determinations procedures equivalent to those at 52.227-13(b)(2).

(3) When using the clause at 52.227-13, Patent Rights-Ownership by the Government, the *contracting officer may* supplement the clause to require the contractor to-

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, a duplicate *shall* not be requested under the patent rights clause);

(ii) Submit interim and final invention reports listing *subject inventions* and notifying the *contracting officer* of all subcontracts awarded for experimental, developmental, or research work;

(iii) Provide the filing date, serial number, title, patent number, and issue date for any patent application filed on any *subject invention* in any country or, upon specific request, copies of any patent application so identified; and

(iv) Submit periodic reports on the utilization of a *subject invention*.

(4) Use the clause at 52.227-13 with its *Alternate* I if-

(i) The Government *must* grant a foreign government a sublicense in *subject inventions* pursuant to a treaty or executive agreement; or

(ii) The *agency head* determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. If other rights are necessary to effectuate any treaty or agreement, *Alternate* I *may* be appropriately modified.

(5) Use the clause at 52.227-13 with its *Alternate* II in the contract when necessary to effectuate an existing or future treaty or agreement.

27.304 Procedures.

27.304-1 General.

(a) *Status as small business concern or nonprofit organization*. If an agency has reason to question

the size or nonprofit status of the prospective contractor, the agency *may* require the prospective contractor to furnish evidence of its nonprofit status or *may* file a size protest in accordance with FAR 19.302.

(b) Exceptions.

(1) Before using any of the exceptions under 27.303(e)(1) in a contract with a small business concern or a *nonprofit organization* and before using the exception of 27.303(e)(1)(ii) for any contractor, the agency *shall* follow the applicable procedures at 37 CFR 401.

(2) A small business concern or *nonprofit organization* is entitled to an administrative review of the use of the exceptions at 27.303(e)(1)(i) through (e)(1)(iv) in accordance with agency procedures and 37 CFR part 401.

(c) *Greater rights determinations*. Whenever the contract contains the clause at 52.227-13, Patent Rights-Ownership by the Government, or a patent rights clause modified pursuant to 27.303(e)(2), the contractor (or an employee-inventor of the contractor after consultation with the contractor) *may* request greater rights to an identified invention within the period specified in the clause. The *contracting officer may* grant requests for greater rights if the *contracting officer* determines that the interests of the *United States* and the general public will be better served. In making these determinations, the *contracting officer shall* consider at least the following objectives (see 37 CFR 401.3(b) and 401.15):

(1) Promoting the utilization of inventions arising from federally supported research and development.

(2) Ensuring that inventions are used in a manner to promote *full and open competition* and free enterprise without unduly encumbering future research and discovery.

(3) Promoting public availability of inventions *made* in the *United States* by *United States* industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(d) *Retention of rights by inventor*. If the contractor elects not to retain title to a *subject invention*, the agency *may* consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraphs (d) (except paragraph (d)(1)(i)), (e)(4), (f), (g), and (h) of the clause at 52.227-11, Patent Rights-Ownership by the Contractor.

(e) *Government assignment to contractor of rights in Government employees' inventions*. When a Government employee is a co-inventor of an invention *made* under a contract with a small business concern or *nonprofit organization*, the agency employing the co-inventor *may* license or assign whatever rights it *may* acquire in the *subject invention* from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202-204.

(f) *Revocation or modification of contractor's minimum rights*. Before revoking or modifying the contractor's license in accordance with 27.302(i)(2), the *contracting officer shall* furnish the contractor a written notice of intention to revoke or modify the license. The agency *shall* allow the contractor at least 30 days (or another time as *may* be authorized for good cause by the *contracting*

officer) after the notice to show cause why the license *should* not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) *Exercise of march-in rights*. When exercising march-in rights, agencies *shall* follow the procedures set forth in 37 CFR 401.6.

(h) *Licenses and assignments under contracts with nonprofit organizations*. If the contractor is a *nonprofit organization*, paragraph (i) of the clause at 52.227-11 provides that certain contractor actions require agency approval.

27.304-2 Contracts placed by or for other Government agencies.

The following procedures apply unless an interagency agreement provides otherwise:

(a) When a Government agency requests another Government agency to award a contract on its behalf, the request *should* explain any special circumstances surrounding the contract and specify the patent rights clause to be used. The clause *should* be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however, the request states that a clause of the *requesting agency* is required (*e.g.*, because of statutory requirements, a deviation, or exceptional circumstances), the awarding agency *shall* use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the *requesting agency*, then include the *requesting agency* clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then the *contracting officer shall* assure that the *requesting agency* clause applies only to that severable portion of the work and that the work for the awarding agency is subject to the appropriate patent rights clause.

(3) If the request states that a *requesting agency* clause is not required in any resulting contract, the awarding agency *shall* use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the *requesting agency*'s clause is the responsibility of the *requesting agency* unless the agencies agree otherwise. However, the awarding agency *may* not alter the *requesting agency*'s clause without prior approval of the *requesting agency*.

(c) The *requesting agency may* require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the *requesting agency* is responsible for the administration of any *subject inventions*. This responsibility *shall* be established in advance of awarding any contracts.

27.304-3 Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a

subcontract to be inappropriate or a subcontractor refuses to accept the clause, the *contracting officer*, in consultation with counsel, *shall* resolve the matter.

(c) It is Government policy that contractors *shall* not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.304-4 Appeals.

(a) The designated agency official *shall* provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at 52.227-11;

(2) A demand for a conveyance of title to the Government under 27.302(d)(1)(i) and (ii);

(3) A refusal to grant a waiver under 27.302(g), Preference for *United States* industry; or

(4) A refusal to approve an assignment under 27.304-1(h).

(b) Each agency *may* establish and publish procedures under which any of these actions *may* be appealed. These appeal procedures *should* include administrative due process procedures and standards for fact-finding. The resolution of any appeal *shall* consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200-206 and 2 10.

(c) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Disputes statute, the procedures under that statute will satisfy the requirements of paragraph (b).

27.305 Administration of patent rights clauses.

27.305-1 Goals.

(a) Contracts having a patent rights clause *should* be so administered that-

(1) Inventions are identified, disclosed, and reported as required by the contract, and elections are *made*;

(2) The rights of the Government in *subject inventions* are established;

(3) When patent protection is appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(5) Expeditious commercial utilization of *subject inventions* is achieved.

(b) If a *subject invention* is *made* under a contract funded by more than one agency, at the request of the contractor or on their own initiative, the agencies *shall* designate one agency as responsible for

administration of the rights of the Government in the invention.

27.305-2 Administration by the Government.

(a) Agencies *should* establish and maintain appropriate follow-up procedures to protect the Government's interest and to check that *subject inventions* are identified and disclosed, and when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. Follow-up activities for contracts that include a clause referenced in 27.304-2 *should* be coordinated with the appropriate agency.

(b)

(1) The *contracting officer* administering the contract (or other representative specifically designated in the contract for this purpose) is responsible for receiving invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information submitted by the contractor pursuant to a patent rights clause.

(i) For other than confirmatory instruments, if the contractor fails to furnish documents or information as called for by the clause within the time required, the *contracting officer shall* promptly request the contractor to supply the required documents or information. If the failure persists, the *contracting officer shall* take appropriate action to secure compliance.

(ii) If the contractor does not furnish confirmatory instruments within 6 months after filing each patent application, or within 6 months after submitting the invention disclosure if the application has been previously filed, the *contracting officer shall* request the contractor to supply the required documents.

(2) The *contracting officer shall* promptly furnish all invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses to legal counsel.

(c) *Contracting activities should* establish appropriate procedures to detect and correct failures by the contractor to comply with its obligations under the patent rights clauses, such as failures to disclose and report *subject inventions*, both during and after contract performance. Government effort to review and correct contractor compliance with its patent rights obligations *should* be directed primarily toward contracts that are more likely to result in *subject inventions* significant in number or quality. These contracts include contracts of a research, developmental, or experimental nature; contracts of a large dollar amount; and any other contracts when there is reason to believe the contractor *may* not be complying with its contractual obligations. Other contracts *may* be reviewed using a spot-check method, as feasible. Appropriate follow-up procedures and activities *may* include the investigation or review of selected contracts or contractors by those qualified in patent and technical matters to detect failures to comply with contract obligations.

(d) Follow-up activities *should* include, where appropriate, use of Government patent personnel-

(1) To interview agency technical personnel to identify novel developments *made* in contracts;

(2) To review technical reports submitted by contractors with cognizant agency technical personnel;

(3) To check the Official Gazette of the *United States* Patent and Trademark Office and other sources

for patents issued to the contractor in fields related to its Government contracts; and

(4) To have cognizant Government personnel interview contractor personnel regarding work under the contract involved, observe the work on site, and inspect laboratory notebooks and other records of the contractor related to work under the contract.

(e) If a contractor or subcontractor does not have a clear understanding of its obligations under the clause, or its procedures for complying with the clause are deficient, the *contracting officer should* explain to the contractor its obligations. The withholding of payments provision (if any) of the patent rights clause *may* be invoked if the contractor fails to meet the obligations required by the patents rights clause. Significant or repeated failures by a contractor to comply with the patent rights obligation in its contracts *shall* be documented and *made* a part of the general file (see 4.801(c)(3)).

27.305-3 Securing invention rights acquired by the Government.

(a) Agencies are responsible for implementing procedures necessary to protect the Government's interest in *subject inventions*. When the Government acquires the entire right, title, and interest in an invention by contract, the chain of title from the inventor to the Government *shall* be clearly established. This is normally accomplished by an assignment either from each inventor to the contractor and from the contractor to the Government, or from the inventor to the Government with the consent of the contractor. When the Government's rights are limited to a license, there *should* be a confirmatory instrument to that effect.

(b) Agencies *may*, by supplemental instructions, develop suitable assignments, licenses, and other papers evidencing any rights of the Government in patents or patents applications. These instruments *should* be recorded in the U.S. Patent and Trademark Office (see Executive Order 9424, Establishing in the *United States* Patent Office a Register of Government Interests in Patents and Applications for Patents, (February 18, 1944).

27.305-4 Protection of invention disclosures.

(a) The Government will, to the extent authorized by 35 U.S.C. 205, withhold from disclosure to the public any invention disclosures reported under the patent rights clauses of 52.227-11 or 52.227-13 for a reasonable time in order for patent applications to be filed. The Government will follow the policy in 27.302(j) regarding protection of confidentiality.

(b) The Government *should* also use reasonable efforts to withhold from disclosure to the public for a reasonable time other information disclosing a *subject invention*. This information includes any data delivered pursuant to contract requirements provided that the contractor notifies the agency as to the identity of the data and the *subject invention* to which it relates at the time of delivery of the data. This notification *shall* be provided to both the *contracting officer* and to any patent representative to which the invention is reported, if other than the *contracting officer*.

(c) For more information on protection of invention disclosures, also see 37 CFR 401.13.

27.306 Licensing background patent rights to third parties.

(a) A contract with a small business concern or *nonprofit organization shall* not contain a provision

allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not *subject inventions* unless the *agency head* has approved and signed a written justification in accordance with paragraph (b) of this section. The *agency head may* not delegate this authority and *may* exercise the authority only if it is determined that the-

(1) Use of the invention by others is necessary for the practice of a *subject invention* or for the use of a work object of the contract; and

(2) Action is necessary to achieve the *practical application* of the *subject invention* or work object.

(b) Any determination will be on the record after an opportunity for a hearing, and the agency *shall* notify the contractor of the determination by certified or registered mail. The notification *shall* include a statement that the contractor *must* bring any action for judicial review of the determination within 60 days after the notification.

Subpart 27.4 - Rights in Data and Copyrights

27.400 Scope of subpart.

This subpart sets forth policies and procedures regarding rights in *data* and copyrights, and *acquisition* of *data*. The policy statement in 27.402 applies to all *executive agencies*. The remainder of the subpart applies to all *executive agencies* except the Department of Defense.

27.401 Definitions.

As used in this subpart-

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

Form, fit, and function data means *data* relating to items, *components*, or processes that are sufficient to enable physical and functional interchangeability, and *data* identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For *computer software* it means *data* identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in *limited rights data* as set forth in a *Limited Rights* Notice.

Limited rights data means *data*, other than *computer software*, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such *data* pertain to items, *components*, or processes developed at private expense, including minor modifications. (Agencies *may*, however, adopt the following *alternate* definition: *Limited rights data* means *data* (other than *computer software*) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404-2(b)).

Restricted computer software means *computer software* developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted *computer software*, including minor modifications of the *computer software*.

Restricted rights means the rights of the Government in *restricted computer software* as set forth in a *Restricted Rights* Notice.

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

27.402 Policy.

(a) To carry out their missions and programs, agencies acquire or obtain access to many kinds of *data* produced during or used in the performance of their contracts. Agencies require *data* to-

(1) Obtain competition among suppliers;

(2) Fulfill certain responsibilities for disseminating and publishing the results of their activities;

(3) Ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments;

(4) Meet other programmatic and statutory requirements; and

(5) Meet specialized *acquisition* needs and ensure logistics support.

(b) Contractors *may* have proprietary interests in *data*. In order to prevent the compromise of these interests, agencies *shall* protect proprietary *data* from unauthorized use and disclosure. The protection of such *data* is also necessary to encourage qualified contractors to participate in and apply innovative concepts to Government programs. In light of these considerations, agencies *shall* balance the Government's needs and the contractor's legitimate proprietary interests.

27.403 Data rights-General.

All contracts that require *data* to be produced, furnished, acquired, or used in meeting contract performance requirements, *must* contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that *data*. *Data* rights clauses do not specify the type, quantity or quality of *data* that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the *data*. Accordingly, the contract *shall* specify the *data* to be delivered.

27.404 Basic rights in data clause.

This section describes the operation of the clause at 52.227-14, Rights in *Data*-General, and also the use of the provision at 52.227-15, Representation of *Limited Rights Data* and *Restricted Computer Software*.

27.404-1 Unlimited rights data.

The Government acquires *unlimited rights* in the following *data* except for copyrighted works as provided in 27.404-3:

(a) *Data* first produced in the performance of a contract (except to the extent the *data* constitute minor modifications to *data* that are *limited rights data* or *restricted computer software*).

(b) *Form, fit, and function data* delivered under contract.

(c) *Data* (except as *may* be included with *restricted computer software*) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, *components*, or processes delivered or furnished for use under a contract.

(d) All other *data* delivered under the contract other than *limited rights data* or *restricted computer software* (see 27.404-2).

27.404-2 Limited rights data and restricted computer software.

(a) *General*. The basic clause at 52.227-14, Rights in *Data*-General, enables the contractor to protect qualifying *limited rights data* and *restricted computer software* by withholding the *data* from the Government and instead delivering *form, fit, and function data*.

(b) *Alternate definition of limited rights data*. For contracts that do not require the development, use, or delivery of items, *components*, or processes that are intended to be acquired by or for the Government, an agency *may* adopt the *alternate* definition of *limited rights data* set forth in *Alternate* I to the clause at 52.227-14. The *alternate* definition does not require that the *data* pertain to items, *components*, or processes developed at private expense; but rather that the *data* were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(c) Protection of *limited rights data* specified for delivery.

(1) The clause at 52.227-14 with its *Alternate* II enables the Government to require delivery of *limited rights data* rather than allow the contractor to withhold the *data*. To obtain delivery, the contract *may* identify and specify *data* to be delivered, or the *contracting officer may* require, by written request during contract performance, the delivery of *data* that has been withheld or identified to be withheld under paragraph (g)(1) of the clause. In addition, the contract *may* specifically identify *data* that are not to be delivered under *Alternate* II or which, if delivered, will be delivered with *limited rights*. The *limited rights* obtained by the Government are set forth in the *Limited Rights* Notice contained in paragraph (g)(3) of *Alternate* II. Agencies *shall* not, without permission of the contractor, use *limited rights data* for purposes of manufacture or disclose the *data* outside the Government except as set forth in the Notice. Any disclosure by the Government *shall* be subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes that *may* be adopted by an agency in its supplement and added to the *Limited Rights* Notice of paragraph (g)(3) of *Alternate* II of the clause:

(i) Use (except for manufacture) by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.

(iv) *Emergency* repair or overhaul work.

(v) Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation, or for *emergency* repair or overhaul work by the foreign government.

(2) The provision at 52.227-15, Representation of *Limited Rights Data* and *Restricted Computer Software*, helps the *contracting officer* to determine whether the clause at 52.227-14 *should* be used with its *Alternate* II. This provision requests that an *offeror* state whether *limited rights data* are likely to be delivered. Where *limited rights data* are expected to be delivered, use *Alternate* II. Where negotiations are based on an *unsolicited proposal*, the need for *Alternate* II of the clause at 52.227-14 *should* be addressed during negotiations or discussions, and if *Alternate* II was not included initially it *may* be added by modification, if needed, during contract performance.

(3) If *data* that would otherwise qualify as *limited rights data* is delivered as a *computer database*, the *data shall* be treated as *limited rights data*, rather than *restricted computer software*, for the purposes of paragraph (g) of the clause at 52.227-14.

(d) Protection of *restricted computer software* specified for delivery.

(1) *Alternate* III of the clause at 52.227-14, enables the Government to require delivery of *restricted computer software* rather than allow the contractor to withhold such *restricted computer software*. To obtain delivery of *restricted computer software* the *contracting officer shall*-

(i) Identify and specify the deliverable *computer software* in the contract; or

(ii) Require by written request during contract performance, the delivery of *computer software* that has been withheld or identified to be withheld under paragraph (g)(1) of the clause.

(2) In considering whether to use *Alternate* III, *contracting officers should* note that, unlike other *data*, *computer software* is also an end item in itself. Thus, the *contracting officer shall* use *Alternate* III if delivery of *restricted computer software* is required to meet agency needs.

(3) Unless otherwise agreed (see paragraph (d)(4) of this subsection), the *restricted rights* obtained by the Government are set forth in the *Restricted Rights* Notice contained in paragraph (g)(4) (*Alternate* III). Such *restricted computer software* will not be used or reproduced by the Government, or disclosed outside the Government, except that the *computer software may* be-

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

(ii) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

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

(iv) Modified, adapted, or combined with other *computer software*, *provided* that the modified,

adapted, or combined portions of the derivative software incorporating any of the delivered, *restricted computer software shall* be subject to the same *restricted rights*;

(v) Disclosed to and reproduced for use by support service contractors or their subcontractors, in accordance with paragraphs (3)(i) through (iv) of this section; and

(vi) Used or copied for use with a replacement computer.

(4) The *restricted rights* set forth in paragraph (d)(3) of this subsection are the minimum rights the Government normally obtains with *restricted computer software* and will automatically apply when such software is acquired under the *Restricted Rights* Notice of paragraph (g)(4) of *Alternate* III of the clause at 52.227-14. However, the *contracting officer may* specify different rights in the contract, consistent with the purposes and needs for which the software is to be acquired. For example, the *contracting officer should* consider any networking needs or any requirements for use of the *computer software* from remote terminals. Also, in addressing such needs, the scope of the *restricted rights may* be different for the documentation accompanying the *computer software* than for the programs and databases. Any additions to, or limitations on, the *restricted rights* set forth in the *Restricted Rights* Notice of paragraph (g)(4) of *Alternate* III of the clause at 52.227-14 *shall* be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(5) The provision at 52.227-15, Representation of *Limited Rights Data* and *Restricted Computer Software*, helps the *contracting officer* determine whether to use the clause at 52.227-14 with its *Alternate* III. This provision requests that an *offeror* state whether *restricted computer software* is likely to be delivered under the contract. In addition, the need for *Alternate* III *should* be addressed during negotiations or discussions with an *offeror*, particularly where negotiations are based on an *unsolicited proposal*. However, if *Alternate* III is not used initially, it *may* be added by modification, if needed, during contract performance.

27.404-3 Copyrighted works.

(a) *Data* first produced in the performance of a contract.

(1) Generally, the contractor *must* obtain permission of the *contracting officer* prior to asserting rights in any copyrighted work containing *data* first produced in the performance of a contract. However, contractors are normally authorized, without prior approval of the *contracting officer*, to assert copyright in technical or scientific articles based on or containing such *data* that is published in academic, technical or professional journals, symposia proceedings and similar works.

(2) The contractor *must* make a written request for permission to assert its copyright in works containing *data* first produced under the contract. In its request, the contractor *should* identify the *data* involved or furnish copies of the *data* for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which the permission is requested. Generally, a *contracting officer should* grant the contractor's request when copyright protection will enhance the appropriate dissemination or use of the *data* unless the-

(i) *Data* consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;

(ii) *Data* are intended primarily for internal use by the Government;

(iii) *Data* are of the type that the agency itself distributes to the public under an agency program;

(iv) Government determines that limitation on distribution of the *data* is in the national interest; or

(v) Government determines that the *data should* be disseminated without restriction.

(3) *Alternate* IV of the clause at 52.227-14 provides a substitute paragraph (c)(1) granting permission for contractors to assert copyright in any *data* first produced in the performance of the contract without the need for any further requests. Except for contracts for management or operation of Government facilities and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise, *Alternate* IV *shall* be used in all contracts for basic or applied research to be performed solely by colleges and universities. *Alternate* IV *shall* not be used in contracts with colleges and universities if a purpose of the contract is for development of *computer software* for distribution to the public (including use in *solicitations*) by or on behalf of the Government. In addition, *Alternate* IV *may* be used in other contracts if an agency determines that it is not necessary for a contractor to request further permission to assert copyright in *data* first produced in performance of the contract. The *contracting officer may* exclude any *data*, or items or categories of *data*, from the provisions of *Alternate* IV by expressly so providing in the contract or by adding a paragraph (d)(4) to the clause, consistent with 27.404-4(b).

(4) Pursuant to paragraph (c)(1) of the clause at 52.227-14, the contractor grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all *data* (other than *computer software*) first produced in the performance of a contract. For *computer software*, the scope of the Government's license includes all of the above rights except the right to distribute to the public. Agencies *may* also obtain a license of different scope if the *contracting officer* determines, after consulting with legal counsel, such a license will substantially enhance the dissemination of any *data* first produced under the contract or if such a license is required to comply with international agreements. If an agency obtains a different license, the contractor *shall* clearly state the scope of that license in a conspicuous place on the medium on which the *data* is recorded. For example, if the *data* is delivered as a report, the terms of the license *shall* be stated on the cover, or first page, of the report.

(5) The clause requires the contractor to affix the applicable copyright notices of 17 U.S .C. 401 or 4 02, and acknowledgment of Government sponsorship, (including the contract number) to *data* when it asserts copyright in *data*. Failure to do so could result in such *data* being treated as *unlimited rights data* (see 27.404-5(b)).

(b) *Data* not first produced in the performance of a contract.

(1) Contractors *shall* not deliver any *data* that is not first produced under the contract without either-

(i) Acquiring for or granting to the Government a copyright license for the *data*; or

(ii) Obtaining permission from the *contracting officer* to do otherwise.

(2) The copyright license the Government acquires for such *data* will normally be of the same scope as discussed in paragraph (a)(4) of this subsection, and is set forth in paragraph (c)(2) of the clause at 52.227-14. However, agencies *may* obtain a license of different scope if the agency determines, after consultation with its legal counsel, that such different license will not be inconsistent with the

purpose of acquiring the *data*. If a license of a different scope is acquired, it *must* be so stated in the contract and clearly set forth in a conspicuous place on the *data* when delivered to the Government. If the contractor delivers *computer software* not first produced under the contract, the contractor *shall* grant the Government the license set forth in paragraph (g)(4) of *Alternate* III if included in the clause at 52.227-14, or a license agreed to in a collateral agreement made part of the contract.

27.404-4 Contractor's release, publication, and use of data.

(a) In contracts for basic or applied research with universities or colleges, agencies *shall* not place any restrictions on the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. statutes. However, agencies *may* restrict the release or disclosure of *computer software* that is or is intended to be developed to the point of practical application (including for agency distribution under established programs). This is not considered a restriction on the reporting of the results of basic or applied research. Agencies *may* also preclude a contractor from asserting copyright in any *computer software* for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is acquired.

(b) Except for the results of basic or applied research under contracts with universities or colleges, agencies *may*, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's exercise of its rights in *data* first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party. Any of these restrictions *shall* be expressly included in the contract.

27.404-5 Unauthorized, omitted, or incorrect markings.

(a) Unauthorized marking of *data*.

(1) The Government has, in accordance with paragraph (e) of the clause at 52.227-14, the right to either return *data* containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies *shall* not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(i) If the contractor fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the Government *may* cancel or ignore the markings.

(ii) If the contractor provides a written justification substantiating the propriety of the markings, the *contracting officer shall* consider the justification.

(A) If the *contracting officer* determines that the markings are authorized, the contractor will be so notified *in writing*.

(B) If the *contracting officer* determines, with concurrence of the *head of the contracting activity*, that the markings are not authorized, the contractor will be furnished a written determination which becomes the final agency decision regarding the appropriateness of the markings and the markings

will be cancelled or ignored and the *data* will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. The markings will not be cancelled or ignored until final resolution of the matter, either by the *contracting officer*'s determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed.

(3) The foregoing procedures *may* be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request. In addition, the contractor *may* bring a *claim*, in accordance with the Disputes clause of the contract, that *may* arise as the result of the Government's action to remove or ignore any markings on *data*, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(b) Omitted or incorrect notices.

(1) *Data* delivered under a contract containing the clause without a *limited rights* notice or *restricted rights* notice, and without a copyright notice, will be presumed to have been delivered with *unlimited rights*, and the Government assumes no liability for the disclosure, use, or reproduction of the *data*. However, to the extent the *data* has not been disclosed without restriction outside the Government, the contractor *may*, within 6 months (or a longer period approved by the *contracting officer* for good cause shown), request permission of the *contracting officer* to have the omitted *limited rights* or *restricted rights* notices, as applicable, placed on qualifying *data* at the contractor's expense. The *contracting officer may* permit adding appropriate notices if the contractor-

(i) Identifies the *data* for which a notice is to be added;

(ii) Demonstrates that the omission of the proposed notice was inadvertent;

(iii) Establishes that use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to any disclosure or use of any such *data* made prior to the addition of the notice or resulting from the omission of the notice.

(2) The *contracting officer may* also-

(i) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the *data* on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

27.404-6 Inspection of data at the contractor's facility.

Contracting officers may obtain the right to inspect *data* at the contractor's facility by use of the clause at 52.227-14 with its *Alternate* V, which adds paragraph (j) to provide that right. Agencies *may* also adopt *Alternate* V for general use. The *data* subject to *inspection may* be *data* withheld or withholdable under paragraph (g)(1) of the clause. *Inspection may* be made by the *contracting officer* or designee (including nongovernmental personnel under the same conditions as the *contracting officer*) for the purpose of verifying a contractor's assertion regarding the *limited rights* or *restricted rights* status of the *data*, or for evaluating work performance under the contract. This

right *may* be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract *may* specify *data* items that are not subject to *inspection* under paragraph (j) of the *Alternate*. If the contractor demonstrates to the *contracting officer* that there would be a possible conflict of interest if *inspection* were made by a particular representative, the *contracting officer shall* designate an *alternate* representative.

27.405 Other data rights provisions.

27.405-1 Special works.

(a) The clause at 52.227-17, Rights in *Data*-Special Works, is for use in contracts (or *may* be made applicable to portions thereof) that are primarily for the production or compilation of *data* (other than *limited rights data* or *restricted computer software*) for the Government's own use, or when there is a specific need to limit distribution and use of the *data* or to obtain indemnity for liabilities that *may* arise out of the content, performance, or disclosure of the *data*. Examples are contracts for-

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

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

(3) Surveys of Government establishments;

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

(5) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

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

(7) Investigatory reports;

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

(9) The development of *computer software* programs, where the program-

(i) *May* give a commercial advantage; or

(ii) Is agency mission sensitive, and release could prejudice agency mission, programs, or follow-on *acquisitions*.

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

works are acquired.

(c) Paragraph (c)(1)(ii) of the clause, which enables the Government to obtain assignment of copyright in any *data* first produced in the performance of the contract, *may* be deleted if the *contracting officer* determines that such assignment is not needed to further the objectives of the contract.

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

(e) When the audiovisual or other special works are produced to accomplish a public purpose other than *acquisition* for the Government's own use (such as for production and distribution to the public of the works by other than a *Federal agency*) agencies are authorized to modify the clause for use in contracts, with rights in *data* provisions that meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

27.405-2 Existing works.

The clause at 52.227-18, Rights in *Data*-Existing Works, is for use in contracts exclusively for the *acquisition* (without modification) of existing works such as, motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract *may* set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are means of exhibition or transmission, time, type of audience, and geographical location. However, if the contract requires that works of the type indicated in this paragraph are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form), then see 27.405-1.

27.405-3 Commercial computer software.

(a) When *contracting* other than from GSA's Multiple Award Schedule contracts for the *acquisition* of commercial *computer software*, no specific *contract clause* prescribed in this subpart need be used, but the contract *shall* specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software. Section 12.212 sets forth the guidance for the *acquisition* of *commercial computer software* and states that *commercial computer software* or commercial computer software documentation *shall* be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs. The clause at 52.227-19, Commercial *Computer Software* License, *may* be used when there is any confusion as to whether the Government's needs are satisfied or whether a customary commercial license is consistent with Federal law. Additional or lesser rights *may* be negotiated using the guidance concerning *restricted rights* as set forth in 27.404-2(d), or the clause at 52.227-19. If greater rights than the minimum rights identified in the clause at 52.227-19 are needed, or lesser rights are to be acquired, they *shall* be negotiated and set forth in the contract. This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227-19 when used. Examples of greater rights *may* be those necessary for networking purposes

or use of the software from remote terminals communicating with a host computer where the software is located. If the *computer software* is to be acquired with *unlimited rights*, the contract *shall* also so state. In addition, the contract *shall* adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.

(b) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, the *contracting* officer *shall* ensure that the agreement is consistent with paragraph (a) of this subsection. The *contracting officer should* exercise caution in accepting a vendor's terms and conditions, since they *may* be directed to commercial sales and *may* not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement *shall* be addressed in the contract and the contract terms *shall* take precedence over the vendor's standard commercial agreement. If the clause at 52.227-19 is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, reproduce or disclose the *computer software* are reconciled by that clause.

(c) If a prime contractor under a contract containing the clause at 52.227-14, Rights in *Data*-General, with paragraph (g)(4) (*Alternate* III) in the clause, acquires restricted *computer software* from a subcontractor (at any tier) as a separate *acquisition* for delivery to or for use on behalf of the Government, the *contracting officer may* approve any additions to, or limitations on the *restricted rights* in the *Restricted Rights* Notice of paragraph (g)(4) in a collateral agreement incorporated in and made part of the contract.

27.405-4 Other existing data.

(a) Except for existing works pursuant to 27.405-2 or *commercial computer software* pursuant to 27.405-3, no clause contained in this subpart is required to be included in-

(1) Contracts solely for the *acquisition* of books, periodicals, and other printed items in the exact form in which these items are to be obtained unless reproduction rights are to be acquired; or

(2) Other contracts that require only existing *data* (other than *limited rights data*) to be delivered and the *data* are available without disclosure prohibitions, unless reproduction rights to the *data* are to be obtained.

(b) If the reproduction rights to the *data* are to be obtained in any contract of the type described in paragraph (b)(1) (i) or (ii) of this section, the rights *shall* be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line *data* base services in the same form as they are normally available to the general public.

27.406 Acquisition of data.

27.406-1 General.

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

contract.

(b) The *contracting officer shall* specify in the contract all known *data* requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the *data*. Further, and to the extent feasible, in *major system acquisitions*, the *contracting officer shall* set out *data* requirements as separate *line items*. In establishing the contract *data* requirements and in specifying *data* items to be delivered by a contractor, agencies *may*, consistent with paragraph (a) of this subsection, develop their own contract schedule provisions. Agency procedures *may*, among other things, provide for listing, specifying, identifying source, assuring delivery, and handling any *data* required to be delivered, first produced, or specifically used in the performance of the contract.

(c) *Data* delivery requirements *should* normally not require that a contractor provide the Government, as a condition of the *procurement*, *unlimited rights* in *data* that qualify as *limited rights data* or *restricted computer software*. Rather, *form, fit, and function data may* be furnished with *unlimited rights* instead of the qualifying *data*, or the qualifying *data may* be furnished with *limited rights* or *restricted rights* if needed (see 27.404-2(c) and (d)). If greater rights are needed, they *should* be clearly set forth in the *solicitation* and the contractor fairly compensated for the greater rights.

27.406-2 Additional data requirements.

(a) In some *contracting* situations, such as experimental, developmental, research, or demonstration contracts, it *may* not be feasible to ascertain all the *data* requirements at contract award. The clause at 52.227-16, Additional *Data* Requirements, *may* be used to enable the subsequent ordering by the *contracting officer* of additional *data* first produced or specifically used in the performance of these contracts as the actual requirements become known. The clause *shall* normally be used in *solicitations* and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for *data* are believed to be known at the time of *contracting* and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the *contracting officer* believes the contract effort will in the future exceed $500,000, even though the initial award does not, the *contracting officer may* include the clause in the initial award.

(b) *Data may* be ordered under the clause at 52.227-16 at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the *data* into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of *data*, the *contracting officer may* relieve the contractor of the retention requirements for specified *data* items at any time during the retention period required by the clause. The *contracting officer may* permit the contractor to identify and specify in the contract *data* not to be ordered for delivery under the clause if the *data* is not necessary to meet the Government’s requirements for *data*. Also, the *contracting officer may* alter the clause by deleting the term "or specifically used" in paragraph (a) of the clause if delivery of the *data* is not necessary to meet the Government’s requirements for *data*. Any *data* ordered under this clause will be subject to the clause at 52.227-14, Rights in *Data*-General, (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract. *Data* authorized to be withheld under such clause will not be required to be delivered under the clause at 52.227-16, except as provided in *Alternate* II or *Alternate* III, if included (see 27.404-2(c) and (d)).

(c) Absent an established program for dissemination of *computer software*, agencies *should* not order additional *computer software* under the clause at 52.227-16, for the sole purpose of disseminating or marketing the software to the public. In ordering software for internal purposes, the *contracting officer shall* consider, consistent with the Government's needs, not ordering particular source codes, algorithms, processes, formulas, or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

27.406-3 Major system acquisition.

(a) The clause at 52.227-21, *Technical Data* Declaration, Revision, and Withholding of Payment-*Major Systems*, implements 41 U.S.C. 2302(e). When using the clause at 52.227-21, the section of the contract specifying *data* delivery requirements (see 27.406-1(b)) *shall* expressly identify those *line items* of *technical data* to which the clause applies. Upon delivery of the *technical data*, the *contracting officer shall* review the *technical data* and the contractor's declaration relating to it to assure that the *data* are complete, accurate, and comply with contract requirements. If the *data* are not complete, accurate, or compliant, the *contracting officer should* request the contractor to correct the deficiencies, and *may* withhold payment. Final payment *shall* not be made under the contract until it has been determined that the delivery requirements of those *line items* of *data* to which the clause applies have been satisfactorily met.

(b) In a contract for, or in support of, a *major system* awarded by a civilian agency other than NASA or the U.S. Coast Guard, the following applies:

(1) The *contracting officer shall* require the delivery of any *technical data* relating to the *major system* or *supplies* for the *major system*, that are to be developed exclusively with Federal funds if the delivery of the *technical data* is needed to ensure the competitive *acquisition* of *supplies* or services that will be required in substantial quantities in the future. The clause at 52.227-22, *Major System*-Minimum Rights, is used in addition to the clause at 52.227-14, Rights in *Data*-General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98-577 in *technical data* developed exclusively with Federal funds.

(2) *Technical data*, relating to a *major system* or *supplies* for a *major system*, procured or to be procured by the Government and also relating to the design, development, or manufacture of *products* or processes offered or to be offered for sale to the public (except for such *data* as *may* be necessary for the Government to operate or maintain the product, or use the process if obtained by the Government as an element of performance under the contract), *shall* not be required to be provided to the Government from persons who have developed such *products* or processes as a condition for the *procurement* of such *products* or processes by the Government.

27.407 Rights to technical data in successful proposals.

The clause at 52.227-23, Rights to Proposal *Data* (Technical), allows the Government to acquire *unlimited rights* to *technical data* in successful proposals. Pursuant to the clause, the prospective contractor is afforded the opportunity to specifically identify pages containing *technical data* to be excluded from the grant of *unlimited rights*. This exclusion is not dispositive of the protective status of the *data*, but any excluded *technical data*, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in subpart 15.2 or 15.6 (or agency supplements) relating to proposal information (*e.g.*, will be used for evaluation purposes only). If there is a need to have access to any of the excluded *technical data* during contract performance,

consideration *should* be given to acquiring the *data* with *limited rights*, if they so qualify, in accordance with 27.404-2(c).

27.408 Cosponsored research and development activities.

(a) In contracts involving cosponsored research and development that require the contractor to make substantial contributions of funds or resources (*e.g.*, by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, *component*, process, or *computer software*, developed or produced under the contract are not readily segregable, the *contracting officer may* limit the *acquisition* of, or acquire less than *unlimited rights* to, any *data* developed and delivered under the contract. Agencies *may* regulate the use of this authority in their supplements. Lesser rights *shall*, at a minimum, assure use of the *data* for agreed-to Governmental purposes (including reprocurement rights as appropriate), and address any disclosure limitations or restrictions to be imposed on the *data*. Also, consideration *may* be given to requiring the contractor to directly license others if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties *may* vary, no specific clauses are prescribed, but a clause providing less than *unlimited rights* in the Government for *data* developed and delivered under the contract (such as license rights) *may* be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, a clause *may* be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (*i.e.*, Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. A clause *may* be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other *data* rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, this type of clause *may* not be appropriate where the purpose of the contract is to produce *data* for dissemination to the public, or to develop or demonstrate technologies that will be available, in any event, to the public for its direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding for the contract) and so identified in the contract, any resulting *data may* be treated under this clause as *limited rights data* or *restricted computer software* in accordance with 27.404-2(c) or (d), as applicable; or if this treatment is inconsistent with the purpose of the contract, rights to the *data may*, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

27.409 Solicitation provisions and contract clauses.

(a) Generally, a contract *should* contain only one *data* rights clause. However, where more than one is needed, the contract *should* distinguish the portion of contract performance to which each pertains.

(b)

(1) Insert the clause at 52.227-14, Rights in *Data*-General, in *solicitations* and contracts if it is contemplated that *data* will be produced, furnished, or acquired under the contract, unless the

contract is-

(i) For the production of special works of the type set forth in 27.405-1, although in these cases insert the clause at 52.227-14, Rights in *Data*-General, and make it applicable to *data* other than special works, as appropriate (see paragraph (e) of this section);

(ii) For the *acquisition* of existing *data*, *commercial computer software*, or other existing *data*, as described in 27.405-2 through 27.405-4 (see paragraphs (f) and (g) of this section);

(iii) A small business innovation research contract (see paragraph (h) of this section);

(iv) To be performed outside the *United States* (see paragraph (i)(1) of this section);

(v) For *architect-engineer services* or *construction* work (see paragraph (i)(2) of this section);

(vi) For the management, operation, design, or *construction* of a Government-owned facility to perform research, development, or production work (see paragraph (i)(3) of this section); or

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized (see 27.408).

(2) If an agency determines, in accordance with 27.404-2(b), to adopt the *alternate* definition of "*Limited Rights Data*" in paragraph (a) of the clause, use the clause with its *Alternate* I.

(3) If a *contracting officer* determines, in accordance with 27.404-2(c) that it is necessary to obtain *limited rights data*, use the clause with its *Alternate* II. The *contracting officer shall* complete paragraph (g)(3) to include the purposes, if any, for which *limited rights data* are to be disclosed outside the Government.

(4) In accordance with 27.404-2(d), if a *contracting officer* determines it is necessary to obtain *restricted computer software*, use the clause with its *Alternate* III. Any greater or lesser rights regarding the use, reproduction, or disclosure of *restricted computer software* than those set forth in the *Restricted Rights* Notice of paragraph (g)(4) of the clause *shall* be specified in the contract and the notice modified accordingly.

(5) Use the clause with its *Alternate* IV in contracts for basic or applied research (other than those for the management or operation of Government facilities, and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise) to be performed solely by universities and colleges. The clause *may* be used with its *Alternate* IV in other contracts if in accordance with 27.404-3(a), an agency determines to grant permission for the contractor to assert *claim* to copyright subsisting in all *data* first produced without further request being made by the contractor. When *Alternate* IV is used, the contract *may* exclude items or categories of *data* from the permission granted, either by express provisions in the contract or by the addition of a paragraph (d)(4) to the clause (see 27.404-4).

(6) In accordance with 27.404-6, if the Government needs the right to inspect certain *data* at a contractor's facility, use the clause with its *Alternate* V.

(c) In accordance with 27.404-2(c)(2) and 27.404-2(d)(5), if the *contracting officer* desires to have an *offeror* state in response to a *solicitation* whether *limited rights data* or *restricted computer software* are likely to be used in meeting the *data* delivery requirements set forth in the *solicitation*, insert the provision at 52.227-15, Representation of *Limited Rights Data* and *Restricted Computer Software*, in any *solicitation* containing the clause at 52.227-14, Rights in *Data*-General. The contractor's

response *may* provide an aid in determining whether the clause *should* be used with *Alternate* II and/or *Alternate* III.

(d) Insert the clause at 52.227-16, Additional *Data* Requirements, in *solicitations* and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for *data* are believed to be known at the time of *contracting* and specified in the contract (see 27.406-2). This clause *may* also be used in other contracts when considered appropriate. For example, if the contract is for basic or applied research to be performed by a university or college, and the *contracting officer* believes the contract effort will in the future exceed $500,000, even though the initial award does not, the *contracting officer may* include the clause in the initial award.

(e) In accordance with 27.405-1, insert the clause at 52.227-17, Rights in *Data*-Special Works, in *solicitations* and contracts primarily for the production or compilation of *data* (other than *limited rights data* or *restricted computer software*) for the Government's internal use, or when there is a specific need to limit distribution and use of the *data* or to obtain indemnity for liabilities that *may* arise out of the content, performance, or disclosure of the *data*. Examples of such contracts are set forth in 27.405-1.

(1) Insert the clause if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(2) The contract *may* specify the purposes and conditions (including time limitations) under which the *data may* be used, released, or reproduced by the contractor for other than contract performance.

(3) Contracts for the production of audiovisual works, sound recordings, etc. *may* include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the *data* is acquired.

(4) The clause *may* be modified in accordance with paragraphs (c) through (e) of 27.405-1.

(f) Insert the clause at 52.227-18, Rights in *Data*-Existing Works, in *solicitations* and contracts exclusively for the *acquisition*, without modification, of existing audiovisual and similar works of the type set forth in 27.405-2. The contract *may* set forth limitations consistent with the purposes for which the work is being acquired. While no specific clause of this subpart is required to be included in contracts solely for the *acquisition*, without disclosure prohibitions, of books, publications, and similar items in the exact form in which the items exist prior to the request for purchase (*i.e.*, the off-the-shelf purchase of such items), or in other contracts where only existing *data* available without disclosure prohibitions is to be furnished, if reproduction rights are to be acquired, the contract *shall* include terms addressing such rights. (See 27.405-4.)

(g) In accordance with 27.405-3, when *contracting* (other than from GSA's Multiple Award Schedule contracts) for the *acquisition* of *commercial computer software*, the *contracting officer may* insert the clause at 52.227-19, *Commercial Computer Software* License, in the *solicitation* and contract. In any event, the *contracting officer shall* assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405-3.

(h) If the contract is a Small Business Innovation Research (SBIR) contract, insert the clause at 52.227-20, Rights in *Data*-SBIR Program in all Phase I, Phase II, and Phase III contracts awarded

under the Small Business Innovation Research Program established pursuant to 15 U.S.C. 638. The SBIR protection period *may* be extended in accordance with the Small Business Administration's "Small Business Innovation Research Program Policy Directive" (September24,2002).

(i) Agencies *may* prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts-

(1) To be performed outside the *United States*;

(2) For *architect-engineer services* and *construction* work (*e.g.*, the clause at 52.227-17, Rights in *Data*-Special Works); or

(3) For management, operation, design, or *construction* of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(j) In accordance with 27.406-3(a), insert the clause at 52.227-21, *Technical Data* Declaration, Revision, and Withholding of Payment-*Major Systems*, in contracts for *major systems acquisitions* or for support of *major systems acquisitions*. This requirement includes contracts for detailed design, development, or production of a *major system* and contracts for any individual part, *component*, subassembly, assembly, or subsystem integral to the *major system*, and other property that *may* be replaced during the service life of the system, including spare parts. When used, this clause requires that the *technical data* to which it applies be specified in the contract (see 27.406-3(a)).

(k) In accordance with 27.406-3(b), in the case of civilian agencies other than NASA and the U.S. Coast Guard, insert the clause at 52.227-22, *Major System*-Minimum Rights, in contracts for *major systems* or contracts in support of *major systems*.

(l) In accordance with 27.407, if a *contracting officer* desires to acquire *unlimited rights* in *technical data* contained in a successful proposal upon which a contract award is based, insert the clause at 52.227-23, Rights to Proposal *Data* (Technical). Rights to *technical data* in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, the *contracting officer shall* follow 27.404 to assure that the rights are appropriately addressed.

Subpart 27.5 - Foreign License and Technical Assistance Agreements

27.501 General.

Agencies *shall* provide necessary policy and procedures regarding foreign technical assistance agreements and license agreements involving intellectual property, including avoiding unnecessary royalty charges.