

Paperwork Burden Analysis

A. Justification

1. We request the renewal of the information collection requirement currently approved under OMB Control Number 0704-0369 for Subparts 227.71, Rights in Technical Data, and 227.72, Rights in Computer Software and Computer Software Documentation, and related clauses of the Defense Federal Acquisition Regulation Supplement (DFARS). The DFARS is on the web at <http://www.acq.osd.mil/dpap/dars/index.html>. DFARS Subparts 227.71 and 227.72 contain information collection requirements that are associated with rights in technical data and computer software. We must impose the information collection requirements to implement 10 U.S.C. 2320, Rights in technical data, and 10 U.S.C. 2321, Validation of proprietary data restrictions. We describe the relationships among the information collection requirements and the statutory requirements in the following analysis:

a. The Department of Defense must recognize and protect contractor rights in technical data that are associated with privately funded developments, per 10 U.S.C. 2320. Therefore, a contractor must notify the Government if it intends to use any privately developed items, components, or processes under a Government contract that would restrict the Government's rights to use, release, or disclose technical data delivered under the contract.

Section 2320(b)(1) of Title, United States Code, establishes a presumption that commercial items are developed at private expense whether or not a contractor submits a justification in response to a challenge notice. Therefore, we do not challenge a contractor's assertion that a commercial item, component, or process was developed at private expense unless the Government can demonstrate that it contributed to development of the item, component, or process. We do not use most of the data rights clauses in contracts for commercial items. We only use the clauses at DFARS 252.227-7015, Technical Data--Commercial Items, and 252.227-7037, Validation of Restrictive Markings on Technical Data, in contracts for commercial items, and the clause at DFARS 252.227-7015 does not contain any information collection requirements.

We insert the provisions and clauses at DFARS 252.227-7013, Rights in Technical Data--Noncommercial Items; 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation; 252.227-7017, Identification and Assertion of Use, Release, or Disclosure Restrictions; and 252.227-7018, Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program; in solicitations and contracts to require contractors to identify and mark data or software that must be protected from unauthorized release or disclosure. Once the contractor properly marks the data and software, we can protect it, as required by 10 U.S.C. 2320.

b. According to 10 U.S.C. 2320(a)(2)(D), DoD may disclose limited rights data to persons outside the Government, or allow those persons to use limited rights data, if the recipient agrees not to further release, disclose, or use the data. Therefore, the clause at DFARS 252.227-7013, Rights in Technical Data--Noncommercial Items, requires the contractor to identify and mark the data or software that is provided with limited rights.

c. According to 10 U.S.C. 2321(b), contractors and subcontractors of any tier must be prepared to furnish written justification for any asserted restriction on the Government's rights to use or release data. The clauses at DFARS 252.227-7019, Validation of Asserted Restrictions--Computer Software, and 252.227-7037, Validation of Restrictive Markings on Technical Data, require contractors and subcontractors to maintain adequate records and procedures to justify any asserted restrictions. We use 252.227-7037 when we buy commercial and noncommercial items.

d. Contractors and subcontractors at any tier that obtain data from the Government to which the Government has only limited rights must submit a "Use and Disclosure" agreement. The clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, contains this requirement. DoD must levy this requirement on contractors and subcontractors because 10 U.S.C. 2320 requires DoD to protect the rights of contractors that have developed items, components, or processes at private expense.

e. Offerors must identify any technical data or computer software that they previously delivered, or will

deliver under any other Federal contract, according to the provision at DFARS 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government. DoD needs this information to avoid paying for rights in technical data or computer software that the Government already owns.

2. The information collected--

a. Enables the Government to protect a contractor's or subcontractor's data or software from unauthorized release or disclosure. Data generators may suffer significant, adverse financial impacts if we do not protect privately developed data.

b. Facilitates the public release of technical data or computer software developed at the Government's expense.

c. Enables a contracting officer to determine whether the Government has already paid for rights in the data or software.

3. We use improved information technology to the maximum extent practicable. The information collection requirements may be submitted electronically where electronic submission is authorized by the contracting officer. Contractors may also maintain electronic records that meet the requirements of 252.227-7019, if that is their normal internal practice.

4. DoD data rights requirements in 10 U.S.C. 2320 and 2321 are different than those in the corresponding civilian agency statutes. Therefore, this rule does not duplicate the Federal Acquisition Regulation. Also, we cannot obtain similar information from any other source.

5. The collections are the minimums consistent with applicable laws, regulations, and prudent business practices. We do not expect the collections to have a significant impact on a substantial number of small businesses or other small entities. We obtain fewer Government rights from certain types of small business contractors under the clause at DFARS 252.227-7018 than are typically obtained from large businesses. This helps reduce the paperwork burden on those small businesses.

6. Data rights vary from contract to contract. Contracting officers may negotiate nonstandard data rights licenses that are tailored to a particular acquisition. We must obtain

disclosure agreements and require appropriate standardized restrictive legends in order to protect contractor's rights in data developed at private expense or data to which the Government has limited rights. We must understand any limitations on data proposed for use under a Government contract to make an informed source selection. We also must know if the data were previously delivered under a Government contract to avoid paying again for data rights we already own.

7. We will not collect information in a manner that requires explanation of special circumstances.

8. We solicited public comments on this analysis in the Federal Register on February 8, 2010, 2010 (75 FR 6185, as required by 5 CFR 1320.8(d)). We received no comments in response.

9. We will not provide a payment or gift to respondents to this information collection requirement.

10. We will disclose the information collected only to the extent consistent with prudent business practices and the Freedom of Information Act. We do not provide an assurance of confidentiality to respondents.

11. We will not ask sensitive questions.

12. *Information Collection burden on the public.* DoD specialists who are most knowledgeable of the requirements and the need for the information reviewed the collection frequency. The requirements are the minimum information and frequency that will support reasonable and prudent Government operations. Contracting officers could not perform their administrative functions effectively and efficiently if the information were collected less frequently. Also, per statute, contractors must maintain records that support the validity of any assertions of restrictions on the Government's rights to use or distribute technical data or computer software that are deliverables under a Government contract.

We estimated the hour burden using information generated from the Federal Procurement Data System (FPDS), discussions with personnel at the military departments and defense agencies, and good business judgment. We estimate that we receive an average of four responses to each

noncommercial solicitation. We calculated the burdens on a respondent basis, a contract basis, and a data-item basis because those are the most logical groupings for the broad spectrum of types of information that will be submitted under this information collection requirement.

a. *Respondent basis.* Some of the provisions and clauses require an offeror under a solicitation to provide information if it is asserting restrictions in data rights or computer software rights to information contained in the proposal. Therefore, we can calculate the burden for that subset of requirements on the basis of the estimated number of offerors under solicitations that contain data rights clauses. We insert the provisions in solicitations where data rights might be an issue. Except for the clause at 252.227-7037, we do not insert the clauses in solicitations for commercial items and use them less frequently in simplified acquisitions (\$100,000 or less), so we reflect two different frequencies of information requirements in our calculations. According to the DD Form 350 database, we awarded approximately 42,000 noncommercial contracts between \$25,000 and \$100,000 and 13,000 noncommercial contracts over \$100,000 in fiscal year 2008, the last year for which we reviewed the data in detail. We have no reason to predict any substantial change in this data. There are three major subgroups of information requirements that vary according to the number of respondents. These are (1) those related to disclosure agreements; (2) those related to identification and assertion of rights; and (3) those related to identification of previously delivered data. We have calculated each of these separately:

(1) *Nondisclosure agreements for solicitations that contain technical data to which the Government has other than unlimited rights.* This category addresses the clauses at DFARS 252.227-7013, Rights in Technical Data--Noncommercial Items; DFARS 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation; and DFARS 252.227-7018, Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program. We estimate that we will insert one of the applicable clauses in 50 percent of noncommercial solicitations. There were approximately 55,000 noncommercial awards made in fiscal year 2008 that involved acquisition of technical data or computer software. We estimate that we received, on average, four responses to each solicitation. The frequency

rate for simplified and regular acquisitions is the same. We also estimate that it will take each offeror, on average, one hour to prepare and submit the nondisclosure agreement to the Government. We estimate the burden for this requirement is:

Number of responses	
(.5* 55,000 * 4)	110,000
Avg. hours per response	<u> 1</u>
Estimated hours	110,000
Cost per hour ¹	<u> x \$30.00</u>
Total annual cost	\$ 3,300,000

Notes: 1. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

2. All cost estimates are rounded to the nearest dollar.

(2) *Identification and assertion of limited rights in data.* This category addresses the provision at DFARS 252.227-7017, Identification and Assertion of Use, Release, or Disclosure Restrictions. We use the provision in all noncommercial solicitations. We estimate that 25 percent of offerors for acquisitions between \$25,000 and \$100,000 and 75 percent of offerors for acquisitions over \$100,000 will assert limited rights. There were approximately 42,000 noncommercial awards between \$25,000 and \$100,000 and 13,000 noncommercial awards over \$100,000 made in fiscal year 2008. We estimate that we received, on average, four responses to each solicitation. We estimate that it will take each offeror that asserts limited rights, on average, one hour to identify the restricted rights to the Government and defend them. We estimate that it will take the offerors that do not assert restricted rights in each category 15 minutes each to determine that they will not restrict the Government's rights in data and report that determination to the Government. We estimate the burden for this requirement is:

Number of assertions of limited rights	
((25% of 42,000) + (75% of 13,000))	
* 4	81,000
Avg. hours per response	<u> 1</u>
Estimated hours	81,000

Number of negative responses	
((75% of 42,000) + (25% of 13,000)) * 4	139,000

Avg. hours per response	<u>x .25</u>
Estimated Hours	34,750
Total estimated hours	115,750
Cost per hour ¹	<u>x \$30.00</u>
Total annual cost	\$ 3,472,500

Notes: 1. Based on equivalent 2010 GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

2. All cost estimates are rounded to the nearest dollar.

(3) *Identification of previously delivered data.*

This category addresses the provision at DFARS 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government. We estimate that 10 percent of offerors for acquisitions between \$25,000 and \$100,000 and 30 percent of offerors for acquisitions over \$100,000 will have previously delivered data to the Government. There were approximately 42,000 noncommercial awards between \$25,000 and \$100,000 and 13,000 noncommercial awards over \$100,000 made in fiscal year 2008. We estimate that we received, on average, four responses to each solicitation. We estimate that it will take each offeror that has previously delivered data, on average, one hour to identify that data to the Government. We estimate the burden for this requirement is:

Number of previous data deliveries ((10% of 42,000) + (30% of 13,000) * 4	32,400
Avg. hours per response	<u>x 1</u>
Estimated hours	32,400
Cost per hour ¹	<u>x \$30.00</u>
Total annual cost	\$ 972,000

Notes: 1. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

2. All cost estimates are rounded to the nearest dollar.

b. *Contract basis.* We can calculate one of the information collection requirements on a contract basis. Contractors and subcontractors at any tier that obtain data from the Government to which the Government has only limited rights must submit a "use and disclosure" agreement. The clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, contains this requirement. We do not insert the clause in solicitations for commercial items and

use it less frequently in simplified acquisitions (\$100,000 or less), so we reflect two different frequencies of information requirements in our calculations. According to the DD Form 350 database, we awarded approximately 42,000 noncommercial contracts between \$25,000 and \$100,000 and 13,000 noncommercial contracts over \$100,000 in fiscal year 2008, the last year for which we have data. We estimate that subcontractors will need to submit a disclosure agreement on 2.5 percent of contracts between \$25,000 and \$100,000 (25 percent of contracts between \$25,000 and \$100,000 will require subcontracted effort and only 10 percent of that group will require a disclosure agreement). We also estimate that subcontractors will need to submit a disclosure agreement on 56.25 percent of contracts over \$100,000 (75 percent of contracts over \$100,000 will require subcontracted effort and 75 percent of that group will require a disclosure agreement). We estimate that three submittals will be required under each relevant contract between \$25,000 and \$100,000, and five submittals will be required for each relevant contract over \$100,000. The submittals occur after contract award. We also estimate that 50 percent of those submittals could be covered by class disclosure agreements that could apply across many contracts or subcontracts. We estimate that a contractor will take, on the average, one-and-a-half hours to copy and provide the contracting officer the required evidence. The estimated burden for this requirement is:

Number of disclosure statements required	
(((.025 * 42,000)*3) +	
((.5625 * 13,000)*5)) * .5	
Avg. hours per response	19,856
Estimated hours	<u> x 1.5</u>
Cost per hour ¹	29,784
Total annual cost	<u> x \$30.00</u>
	\$ 893,520

Notes: 1. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

2. All cost estimates are rounded to the nearest dollar.

c. *Data item basis.* We can calculate four of the information collection requirements and one recordkeeping requirement on a data item basis.

(1) *Requirement for marking data that has restricted data rights.* The clauses at DFARS 252.227-7013, Rights in Technical Data--Noncommercial Items; 252.227-7014,

Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation; and DFARS 252.227-7018, Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program, require contractors to mark each instance where data is furnished with restricted rights. We estimate that contractors will provide data with restricted data rights on 3 percent of data submissions for contracts between \$25,000 and \$100,000 and 25 percent of data submissions for contracts over \$100,000. Much of that data will be submitted as part of a proposal. We estimate that we received, on average, four responses to each solicitation in fiscal year 2008. We estimate that a contractor needs half an hour to prepare and submit the properly marked data to the Government. The estimated burden for this requirement is:

Number of data requirements ((.03* 42,000) + (.25 * 13,000))	
* 4	18,040
Avg. hours per response	<u>x .5</u>
Estimated hours	9,020
Cost per hour ¹	<u>x \$30.00</u>
Total annual cost	\$ 270,600

Notes: 1. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

2. All cost estimates are rounded to the nearest dollar.

(2) *Respond to Government challenge of restricted rights.* The clauses at DFARS 252.227-7019, Validation of Asserted Restrictions--Computer Software, and 252.227-7037, Validation of Restrictive Markings on Technical Data, require contractors and subcontractors to justify any asserted restrictions. We estimate that the Government will challenge 1 percent of data submissions on contracts between \$25,000 and \$100,000 and 5 percent of data submissions on contracts over \$100,000. We use 252.227-7037 on all acquisitions, including those for commercial items. This requirement applies during the source-selection phase and during contract performance. We estimate that we received, on average, four responses to each solicitation during fiscal year 2008 and we estimate that we will challenge 25 percent of the restrictive markings in proposals. We also estimate that it will take approximately 10 hours for the contractor to respond to and resolve the Government's challenge. The estimated burden for this requirement is:

Number of challenges ¹	
(.01 * 5 * 78,000)	3,900
+	+
(.05 * .6 * 19,000 * 5)	2,850
+	+
(.05 * .4 * 19,000 * 50)	19,000
+	+
((78,000 + 19,000) * 4 * .25)	<u>97,000</u>
	122,750

(483,750 * .25)	122,750
Avg. hours per response	<u>x 10</u>
Estimated hours	1,227,500
Cost per hour ²	<u>x \$30.00</u>
Total annual cost	\$36,825,000

Notes: 1. We also use the clause at DFARS 252.227-7037 in contracts for commercial items. There were approximately 78,000 contracts between \$25,000 and \$100,000 and 19,000 contracts over \$100,000 awarded in fiscal year 2008 (commercial and noncommercial combined). We stayed with our estimate of four proposals in response to each solicitation.

2. Based on equivalent 2010 GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

3. All cost estimates are rounded to the nearest dollar.

(3) *Post award notice of restrictions.* The clauses at DFARS 252.227-7013, Rights in Technical Data-- Noncommercial Items; 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation; and 252.227-7018, Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program, require contractors to identify and mark data or software that must be protected from unauthorized release or disclosure. We estimate that data restrictions will be identified on 5 percent of contracts between \$25,000 and \$100,000, and 25 percent of contracts over \$100,000. We estimate that 33 percent of those submissions will be aggregated and that it will take one hour for the contractor to identify the data restrictions in each instance. The estimated burden for this requirement is:

Number of postaward notices of restrictions ¹ ((.05 * 42,000) + (.25 * 13,000)) * .67	3,585
Avg. hours per response	<u>x 1</u>

Estimated hours	3,585
Cost per hour ²	<u>x \$30.00</u>
Total annual cost	\$ 107,550

Notes: 1. We calculated the number of data submissions in paragraph (2) of this section.

2. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

3. All cost estimates are rounded to the nearest dollar.

d. *Total of the burdens in a through c* ¹:

Number of respondents	55,000
Number of responses per respondent ²	<u>x 9.6</u>
Number of responses	526,630
Avg. hours per response ³	<u>x 2.9</u>
Estimated hours	1,528,040
Cost per hour ⁴	<u>x \$30.00</u>
Total annual cost	\$45,841,200

Notes: 1. All estimates reflect rounding error. The estimates track directly back to the subelements in a through c. All cost estimates are rounded to the nearest dollar.

2. Determined by dividing total annual responses by number of respondents.

3. Determined by dividing total estimated hours by number of respondents.

4. Based on equivalent 2010 OPM GS-09, step 5 salary of \$22.57 per hour, plus 33 percent burden, rounded to the nearest dollar.

e. *DFARS Part 227 imposes one recordkeeping requirement.* The clauses at DFARS 252.227-7019, Validation of Asserted Restrictions—Computer Software, and 252.227-7037, Validation of Restrictive Markings on Technical Data, require contractors and subcontractors to maintain adequate records and procedures to justify any asserted restrictions. This is a statutory requirement. We estimate that contractors will assert restricted data rights on every contract awarded for acquisition of technical data or computer software; contractors will require one hour annually per instance to maintain records supporting their assertions in addition to the records that the contractor keeps in accordance with its customary business practices. The estimated recordkeeping burden for this requirement is:

Number of assertions of restricted rights ¹	97,000
Avg. hours per assertion	<u> x 1</u>
Estimated hours	97,000
Cost per hour ²	<u> x \$30.00</u>
Total annual cost	\$ 2,910,000

Notes: 1. There were approximately 97,000 contracts of \$25,000 or more awarded during fiscal year 2008 involving acquisition of technical data or computer software.

2. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

3. All cost estimates are rounded to the nearest dollar.

13. There is no estimated annual cost other than shown in item 12.

14. *Annualized cost to the Government* (see TAB C). We need approximately four hours, on average, to evaluate information requirements in DFARS Part 227. Our estimate considers the time required to receive, review, and analyze information submitted by contractors and offerors. We estimated the Government burden as follows:

a. Nondisclosure agreements where the Government has not obtained unlimited rights (DFARS 252.227-7013, 252.227-7014, and 252.227-7018):

Number of submissions (see a.1.)	110,000
Avg. hours per submission	<u> x .5</u>
Estimated hours	55,000

b. Identification and assertion of limited rights in data (DFARS 252.227-7017):

Number of assertions (see a.2)	81,000
Avg. hours per assertion	<u> x 1</u>
Subtotal	81,000

Number of negative responses (see a.2)	139,000
Avg. hours per negative response	<u> x .1</u>
Subtotal	13,900
Total estimated hours	94,900

c. Identification of previously delivered data (DFARS 252.227-7028):

Number of submissions (see a.3)	32,400
Avg. hours per submission	<u>x .2</u>
Estimated hours	6,480

d. Requirement for nondisclosure agreement for release of restricted Government-furnished information (DFARS 252.227-7025):

Number of nondisclosure agreements (b.)	19,856
Avg. hours per agreement	<u>x .25</u>
Estimated hours	4,965

e. Marking Requirement (DFARS 252.227-7013, 252.227-7014, and 252.227-7018):

Number of data submissions with restriction (see c.1.)	18,040
Avg. hours per submission	<u>x 1</u>
Estimated hours	18,040

f. Response to challenges (DFARS 252.227-7019 and 252.227-7037):

Number of data submissions with restriction (see c.2.)	122,750
Avg. hours per submission	<u>x 10</u>
Estimated hours	1,227,500

g. Postaward notice of restrictions (DFARS 252.227-7013, 252.227-7014, and 252.227-7018):

Number of postaward notices of restrictions	3,585
Avg. hours per submission	<u>x 1</u>
Estimated hours	3,585

h. Total of the burdens in a through g ¹:

Number of responses	526,630
Avg. hours per response	<u>x 2.7</u>

Estimated hours	1,421,901
Cost per hour ³	<u>x \$30.00</u>
Total annual Government cost	\$ 42,657,030

Notes: 1. All estimates reflect rounding error. The estimates track directly back to the subelements in a through h. All cost estimates are rounded to the nearest dollar.

2. Based on equivalent 2010 OPM GS-09 step 5 salary of \$22.57 per hour plus 33 percent burden, rounded to the nearest whole dollar.

3. All cost estimates are rounded to the nearest dollar.

15. Burden reduction due to decrease in respondents.

16. We will not publish results of this information collection.

17. We do not seek approval not to display the expiration date for OMB approval of the information collection.

18. There are no exceptions to the certification accompanying this Paperwork Reduction Act submission.

We will provide the information required by 50 CFR 1320.8(b) (3) in a separate Federal Register notice announcing OMB approval of this information collection.

B. Collections of Information Employing Statistical Methods.

We will not tabulate the results. We will not use statistical methods.