

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 19, 27, 52****[FAR Case 1999–402]****RIN 9000–AJ64****Federal Acquisition Regulation; FAR
Part 27 Rewrite in Plain Language**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify, streamline, and update guidance and clauses on patents, data, and copyrights to provide a more logical presentation of this complex material.

DATES: Interested parties should submit comments in writing on or before July 28, 2003 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—farcase.1999-402@gsa.gov.

Please submit comments only and cite FAR case 1999–402 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAR case 1999–402.

SUPPLEMENTARY INFORMATION:**A. Background**

The rule constitutes a rewrite of FAR Part 27 and its associated clauses in Part 52. Part 27 implements a number of statutes and executive orders pertaining to patents, data, and copyrights. The effort to rewrite FAR Part 27 was undertaken to make the various policies and procedures that implement these statutes and executive orders more succinct and understandable to the reader. In addition to numerous

editorial and structural changes, some existing policies and procedures were clarified to eliminate potential confusion among responsible parties and make clearer the distinction between the rights and obligations of the contractor and the Government. While this FAR case was designed primarily to make the contents of FAR Part 27 easier to understand, as opposed to changing underlying policies, some substantive changes have also been made to reflect changes to the various laws covering the subject matter in FAR Part 27. A discussion of the proposed substantive changes and the associated rationale for these changes are provided below along with a description of the “plain language” changes that have been made.

The following more specifically summarizes the proposed changes:

1. *General.* We have identified and moved the prescriptive language for the solicitation provisions and contract clauses into discrete subsections. Additionally, an effort has been made to eliminate language in the text that duplicates existing clause language.

2. *Definitions.* A definition of “commercial computer software” was added to FAR Part 2 because this term is referenced in both Parts 12 and 27. A consistent definition for “commercial computer software” is needed to distinguish “commercial computer software” from “restricted computer software,” the distinction being that commercial computer software must have been sold commercially and restricted computer software may have not been so sold, leased, or licensed. The clause at 52.227–19 helps contracting officers because FAR 12.212 does not provide much guidance with respect to what is and what is not permissible in Government contracts. In particular, FAR Part 12 does not provide much guidance to contracting officers with respect to that which is consistent with Federal law and that which would normally satisfy Government needs. The clause at 52.227–19, if a contracting officer decides to insert it, ensures that the customary commercial license is consistent with Federal law and normally covers all the rights that the Government needs in commercial computer software.

A definition of “United States,” unique to part 27, was added at FAR 27.001.

3. FAR subpart 27.1 was rewritten to make it more succinct and to eliminate extraneous text. FAR 27.103, Policy, was deleted in its entirety because it merely stated the policies concerning patents, copyrights, and data that were in Part 27. An obsolete description of commercial items was removed from

FAR 27.102 and replaced with the term “commercial item,” which is defined in Part 2.

4. FAR Subpart 27.2 was rewritten to better explain the purpose behind the use of the authorization and consent clause and its alternatives, the notification and assistance clause, the patent indemnity clause and its alternatives, and the patent royalty clause. Related sections were grouped together under section headings to more accurately reflect the specific subject matter and guidance presented to the contracting officer (e.g., “27.201, Patent and copyright infringement liability,” currently under current sections 27.201 through 27.203).

Much of the general explanation of the Authorization and Consent clause in FAR 27.201 was extraneous and unnecessarily complicated given that the clause is required in the vast majority of contracts and the exceptions to the use of the clause are very clear. New clear and succinct guidance points out that the notice and assistance clause is to be used when the authorization and consent clause is used. This eliminated the need to repeat when the authorization and consent clause is used in the prescriptive language for the notice and assistance clause. The lengthy descriptions for use of the patent indemnity clause and its alternates have been eliminated. The text was amended by using the term, “commercial item,” and referencing the simplified acquisition procedures as an exclusion to the clause’s use. This was done because the FAR clause at 52.212–4 has a patent indemnity provision in it and it greatly simplified the prescriptive language using common reference terms with which contracting officers are familiar.

In the new FAR section 27.202, Royalties, the coverage on refund of royalties was consolidated to one sentence to eliminate confusion resulting from mixing prescriptive language and explanatory text.

The new FAR section 27.203 replaces 27.207, and the title is changed from “Classified contracts” to “Security requirements for patent applications containing classified subject matter.” The new title more accurately addresses any patent application that may include classified subject matter, regardless of the classification of the contract.

5. FAR Subpart 27.3 is one of the more legally complex subparts in the FAR. Therefore, it was difficult to edit any portion of this subpart without substantively changing the meaning of the prescriptive language and/or procedures. This subpart primarily implements the Bayh-Dole Act (Act),