

Title 35 U.S.C., Chapter 18. This Act has a long and involved history, which is why there are so many legal nuances to this subpart. A brief history of the distinction that the Act makes between small businesses/nonprofit organization and large for-profit business will put this in perspective. Initially, the Act was only made applicable to small business firms and nonprofit organizations. This was changed when President Reagan issued a Presidential memorandum and, later, an Executive order that made the Act applicable to all entities regardless of size. However, Congress later amended the Act to make only several of its sections applicable to large for-profit businesses. Accordingly, there is an inherent statutory distinction between small business/nonprofits and large for-profits. While this proposed rule maintains this distinction, many of the sections were retitled and alternate words were used to help clarify some of the misinterpretations of this subpart that have occurred in the past.

It should be emphasized that the Act makes the Department of Commerce responsible for issuing regulations concerning its implementation. Therefore, any changes to the FAR must conform to 37 CFR part 401.

Extraneous text at FAR 27.302(b)(1) was eliminated to simply state that pursuant to law, a contractor may elect to retain title to any subject invention. This is the main concept behind the Act; that is, to allow small businesses and nonprofits to commercialize subject inventions. Paragraphs (b)(2) through (b)(5) of FAR 27.302 were restructured in order to emphasize that the Government only acquires title to a subject invention in very limited circumstances.

FAR 27.303 was reorganized for clarity as follows:

- Language previously located at FAR 27.304–3, which was merely referenced in 27.303 pertaining to solicitations or contracts for construction work or architect-engineer services, was moved to 27.303(a)(2) for readability.

- The title of the clause at 52.227–11 was changed to provide a more accurate description of the clause content. Currently, the FAR clauses at 52.227–11 and 52.227–12 are titled “Short Form” and “Long Form,” respectively. While 52.227–11 may be a little shorter as it is currently written, it is still a sizable clause, so the distinction between short and long has never proved very helpful. Further, the term “Retention” was removed from the title of the clause at 52.227–11 and replaced with “Ownership”, which is a more common term. Additionally, since the Department of Defense is apparently the

only agency using the clause at 52.227–12, it was deleted from the FAR and will be moved to the Defense Federal Acquisition Regulation Supplement under a separate case.

- The clause prescriptive language throughout FAR 27.303(b) was amended to conform to FAR plain language convention.

- FAR 27.303(e)(1)(iv) was language taken in large part from 27.303(d).

- FAR 27.303(e)(2) was reorganized to more clearly describe the

implementation procedures of 37 CFR part 401 that pertain to the exceptions in a contract with a small business concern or a nonprofit organization.

- FAR 27.303(e)(3) was more appropriately moved to 27.304–1(b)(2) because it is not prescriptive language.

FAR 27.304 was similarly reorganized for clarity as follows:

- The procedures for a small business/nonprofit organization to appeal an agency’s exercise of the exceptions at FAR 27.303(c)(1)(i) through (c)(1)(iv) or of march-in rights were deleted in their entirety and replaced with a sentence referencing the Department of Commerce’s regulations on the subject. Since these procedures are copied verbatim from the Commerce regulations, they did not need to be repeated. Moreover, agencies rarely exercise these rights and, accordingly, it was further felt that these procedures did not have to be included in the FAR.

- The additional requirements delineated at FAR 27.304–1(e) were deleted because they duplicated existing language at 27.303(b)(2) and (c)(3). However, the language pertaining to the contractor’s responsibility for delivering confirmation of the right of the contracting officer to inspect and make copies of the patent application file at 27.304–1(e)(3) was retained and moved to 27.305.

In FAR 27.305, slightly different titles to the subsections were used to make them more accurately depict the subject matter. Also, 27.305–2 was deleted because it duplicated language already contained in the patent rights clause.

6. FAR Subpart 27.4 was changed to provide clarity and updated information as follows:

- In FAR 27.401, a definition of “Computer data base” was added to provide consistency throughout the rest of the part. As noted previously, a definition for “Commercial computer software” was added to FAR Part 2 because this term is used in Parts 12 and 27. The definition of “Computer software” was changed to provide a more meaningful and accurate definition of the term. The definition of this term is derived from the definition

of the same term in the Department of Energy Acquisition Regulation (DEAR) (see 48 CFR 927.409). Further, the definition of “Technical data” was rewritten to comply with the definition of “Technical data” in 41 U.S.C. 403.

FAR 27.404 was subdivided into several subsections for better readability. 27.404–2(c)(3) was redrafted to expressly state that computer databases must be treated as technical data and not computer software. This accurately reflects the law in this area.

- The most significant change made in FAR Subpart 27.4 was made to, what is now designated, 27.404–3. Currently, the coverage of copyrighted works in the FAR is premised on law that has long been changed. Since under existing law, an original work of authorship is copyrighted as soon as it is put in a tangible media (*e.g.*, writing something down). Therefore, the use of the term, “establish” is inappropriate. Instead, the term “assert” was substituted to accurately reflect that a contractor already has a copyright in any data first produced under a contract. The use of the term “assert,” however, gives the Government the opportunity to provide permission before the contractor can act on its rights in the copyright, as is the current practice. This section was also redrafted to reflect the current practice of normally allowing contractors to assert their copyrights in data first produced under a contract. The information previously contained in paragraphs 27.404(f)(2)(ii) and (iii) was rewritten to reflect current law on notice/publication requirements for copyrights.

- The clause prescriptive language pertinent to use of the clause at 52.227–17, Rights in Data—Special Works, which was previously located within the text material at 52.405–1(c), (d), and (e), has been moved to 27.409.

- Section 27.405(c) was deleted. This language duplicates language in the clause.

7. FAR Subpart 27.6 was redesignated as 27.5, Foreign License and Technical Assistance Agreements, and was reduced to a single sentence. The remainder of the coverage of this part was addressed in the other parts.

8. FAR 52.227 clauses and provisions were largely redrafted to reflect “plain language” changes that may substantially improve clarity as follows:

- 52.227–11 and 52.227–13 will be addressed together because most of the changes were of a similar nature. The changes to the titles have already been discussed. The clause at FAR 52.227–11 was restructured to make the distinction between the rights and obligations of the contractor and the Government clearer.