On May 7, 2010 the DAR Council published several proposed DFARS rules in the Federal Register. We're going to discuss two of them: (1) DFARS Case 2008-D027 ("Cost and Software Data Reporting System"), and (2) DFARS Case 2007-D003 ("Presumption of Development at Private Expense").

Cost and Software Data Reporting System

The first proposed rule, found **here**, set forth DOD's "**Cost and Software Data Reporting system** requirements for major defense acquisition programs and major automated

information system programs." The proposed rule referenced two documents: (1) DOD's CDSR Manual (**DoD 5000.04-M-1**), and (2) the contract CDSR Plan found on **DD Form 2794** . That's not all. Other DOD Forms were discussed, including **DD Form 1921-3** ("Contractor Business Data Report"). The proposed rule would add one solicitation provision to establish proposal requirements for offerors, and one contract clause to establish post-award requirements for successful contractors Whew.

Let's summarize. You can find the details at the link above.

The solicitation provision required offerors to:

- Describe the standard Cost and Software Data Reporting (CSDR) process they intend to use to satisfy the requirements of the CSDR Manual, and the Government-approved contract CSDR plan, and the related Resource Distribution Table (RDT), in proposals in response to solicitations for Major Defense Acquisition Programs and Major Automated Information System programs.

- Submit with their pricing proposal: the DD Form 1921, Cost Data Summary Report; DD Form 1921-1, Functional Cost-Hour Report; and, DD Form 1921-2, Progress Curve Report.

The contract clause required successful awardees to:

- Utilize a documented standard Cost and Software Data Reporting (CSDR) process that satisfies the guidelines contained in the CSDR Manual DoD

5000.04-M-1.

- Use management procedures that provide for generation of timely and reliable information for the Contractor Cost Data Reports, and Software Resources Data Reports.

- Use the Government-approved contract CSDR plan, DD Form 2794, Cost and Software Data Reporting Plan with the related Resource Distribution Table, and DD Form 1921-3, Contractor Business Data Report, as the basis for reporting.

- Require subcontractors, or subcontracted effort if subcontractors have not been selected, to comply with the Cost and Software Data Reporting requirements.

Presumption of Development at Private Expense

The second rule, found **here** , proposed to implement § **802(b)** of the FY 2007 National Defense Authorization Act (Pub. Law 109-364) and § **815(a)(2)** of the FY 2008 NDAA (Pub. Law 110-181) to implement "special requirements and procedures related to the validation of a contractor's or subcontractor's asserted restrictions on technical data and computer software."

According to the rule's background, the first Public Law "modified **10 U.S.C. 2321(f)** with regard to the presumption of development at private expense for major systems" while the second Public Law "revised 10 U.S.C. 2321(f)(2) to exempt commercially available off-the-shelf items from the requirements" of the first Public Law.

Previously, the “Commercial Rule” required a Contracting Officer “presume that a commercial item has been developed entirely at private expense, unless shown otherwise in accordance with the procedures at 10 U.S.C. 2321(f). The detailed procedures at 10 U.S.C. 2321(f)(1) require the contracting officer to presume that the asserted restrictions have been justified (on the basis that the item was developed exclusively at private expense), whether or not the contractor or subcontractor submits a justification in response to the challenge notice issued by the contracting officer. The contracting officer's challenge may be sustained only if information provided by DoD demonstrates that the item was not developed exclusively at private expense.”

The proposed rule would closely follow the “two-pronged statutory scheme” established by the two Public Laws, as follows:

- Under the “Major Systems Rule” a Contracting Officer’s “challenge to asserted restrictions on technical data relating to a major system shall be sustained unless the contractor or subcontractor submits information demonstrating that the item was developed exclusively at private expense.
”

This rule
would apply

to all acquisitions of all commercial items, as well.

- However, the second Public Law "altered the relationship between these two special rules" where they overlapped—i.e., in the case of Commercial-Off-the-Shelf (COTS) acquisitions. COTS acquisitions were exempted from the Major Systems Rule, and thus "Since COTS items are a subtype of commercial items, this change results in COTS items being governed by the Commercial Rule in all cases, regardless of whether the COTS items are included in a major system."

There is a bit of potential confusion with respect to flowdown of the proposed DFARS rules to subcontractors. As the promulgating comments note—

It is well established policy and practice in Federal and DoD acquisitions that the treatment of intellectual property rights creates a special, direct, relationship between the Government and subcontractors (at any tier). For example, the Government's license rights may be granted directly from the subcontractor to

the Government, and the Government and subcontractor are allowed to transact business directly with one another on issues related to the subcontractor's intellectual property (such as delivery of technical data directly to the Government, and regarding the validation of asserted restrictions).

Accordingly, “this proposed rule revises section 212.504 to eliminate 10 U.S.C. 2320 and 2321 from the list of statutes that are inapplicable to subcontracts for commercial items, and makes corresponding changes to the flowdown requirements at 227.7102-4, and to the associated clauses at 252.227-7013(k)(2), -7015(e), and -7037(l).” In other words, the proposed rule would flow down clause language from prime contractors to subcontractors when applied to acquisitions of commercial items.

In addition, although the Public Laws impose requirements only with respect to technical data rights, the proposed rule would also address computer software. The promulgating comments state—

Although 10 U.S.C. 2320 and 2321 apply only to technical data and not to computer software (which is expressly excluded from the definition of technical data), it is longstanding Federal and DoD policy and practice to apply the same or analogous requirements to computer software, whenever appropriate. Many issues are common to both technical data and computer software, and in such cases, conformity of coverage between technical data and computer software is desirable.

… This applicability model is used to guide the implementation of revisions analogous to those discussed previously for technical data (i.e., analogous revisions are made to the validation procedures only for noncommercial technologies).

Accordingly, it is only the new Major Systems Rule that is applicable to, and implemented for, the validation procedures for noncommercial computer software. These new procedures are added at proposed 227.7203-13(d) and the associated clause at 252.227-7019(f). In each case, the paragraph numbers in the affected coverage are revised to incorporate the new paragraph. In addition, a conforming amendment is also made at 252.227-7019(g)(5) to state positively that the contracting officer's final decision will adhere to the new requirements.

As always, public comments may be submitted to the DAR Council via http://www.regulations.gov. Each of the proposed rules has detailed instructions for submitting comments.