



October 30, 2020

Defense Acquisition Regulations System
Attn: Ms. Jennifer D. Johnson
OUSD(A-S) DPC/DARS, Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

Subject: Advance Notice of Proposed Rulemaking (ANPR) for DFARS Case 2019-D043: Small Business Innovation Research Program Data Rights

Dear Ms. Johnson:

On behalf of the Aerospace Industries Association of America (AIA), I am pleased to offer the enclosed comments in response to DFARS Case 2019-D043: Small Business Innovation Research Program Data Rights. For over 100 years, AIA has been the industry voice shaping the policies that matter most to our members, comprising over 320 of the nation's leading aerospace and defense manufacturers and suppliers of civil, military, and business aircraft, helicopters, unmanned aerial systems, space systems, aircraft engines, missiles, materiel, and related components, equipment, services, and information technology. AIA and its member companies welcome the opportunity to participate in the rulemaking process and appreciate the DAR Council's consideration of AIA's comments in drafting the proposed rule.

In the enclosed comments, we have identified significant concerns with the rulemaking process and aspects of the draft proposed regulatory changes that pertain to commercial items. As discussed in the enclosed comments, we urge the DAR Council to: (1) repeal and re-issue the ANPR, in order to move all content related to commercial items to a separate DFARS ANPR; and (2) host a virtual public meeting to discuss the substance of the ANPR.

Thank you for your consideration of our comments. Please direct any questions to Jason Timm, AIA's Assistant Vice President of National Security Policy, at (571) 229-0661 or jason.timm@aia-aerospace.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Luddy', is positioned above the printed name.

John Luddy
Vice President, National Security Policy

2 Enclosures:

1. AIA Comments to the ANPR for DFARS Case 2019-D043: Small Business Innovation Research Program Data Rights
2. AIA-Proposed Line-in/Line-Out Changes

AIA Comments to the ANPR for DFARS Case 2019-D043: Small Business Innovation Research Program Data Rights

Background:

DOD issued this ANPR to seek information that will assist in the development of a revision to the DFARS to implement the data rights portions of the final combined Small Business Innovation Research Program (SBIR) and Small Business Technology Transfer Program (STTR) Policy Directive which became effective on May 2, 2019.

Comments:

I. The DAR Council Should Host a Virtual Public Meeting to Discuss the Substance of this ANPR

The *Federal Register* notice for the ANPR states that DOD hosted a public meeting on December 20, 2019, “to obtain the views of interested parties in accordance with the notice published in the Federal Register on November 25, 2019, at 84 FR 64878.” However, the substance of this ANPR was not discussed during the public meeting on December 20, 2019. Rather, the content of that public meeting was specifically limited to the implementation of the statutory preference for Specially Negotiated Licenses via the associated ANPR for DFARS Case 2018–D071. Moreover, as discussed below, this ANPR includes content related to commercial items, which was not addressed during the public meeting on December 20, 2019.

II. The ANPR Contains Substantive Content related to Commercial Items that is Beyond the Scope of the SBIR/STTR Policy Directive

The summary in the *Federal Register* notice is oversimplified, stating that “DOD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the data rights portions of the Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directives.” In fact, in addition to changes to DFARS 252.227-7018, the ANPR contains significant changes related to the applicability of the noncommercial data rights clause (DFARS 252.227-7013) to commercial items sold by any contractor or subcontractor, at any tier, including small businesses.

AIA believes that the content related to commercial items should be removed from this ANPR and moved to a separate DFARS ANPR. We are concerned about the significant complexity, uncertainty and inefficiency associated with applying the noncommercial ‘follow-the-funds’ test to commercial items. This complexity is most acute for any small business that might generate technical data pertaining to a commercial item under a SBIR/STTR contract. In accordance with the DAR Council’s proposed revisions, such a scenario might result in the applicability of three data rights clauses (i.e., DFARS 252.227-7013, -7015 and -7018) to data delivered by small businesses. In cases where all three clauses apply, a small business would be forced to ‘portion-mark’ various deliverables to separately identify the data that is subject to each clause. Instead, neither the clause at DFARS 252.227-7018 nor DFARS 252.227-7013 should apply to any commercial items, regardless of development funding.

These proposed revisions are consistent with AIA’s forthcoming comments to the Proposed Rule for DFARS Case 2018-D069: Validation of Proprietary and Technical Data. In that case,

AIA will recommend changes to better align the DFARS data rights regime with commercial item acquisition policy and the Federal Acquisition Streamlining Act of 1994 (“FASA”) (P. L. 103-355), such as by restoring 10 U.S.C. 2320 and 10 U.S.C. 2321 to the DFARS 212.504 listing of laws which are inapplicable to subcontracts for the acquisition of commercial items.

In a future rulemaking, the Department should consider applying solutions proposed by the joint industry-Government recommendations in Paper 9, Commercial vs. Noncommercial Items, of the 2018 Report Government-Industry Advisory Panel On Technical Data Rights (November 13, 2018) referred to in the ANPR:

- Revise DFARS 252.227-7015, or create an “Alternate” version of the clause, and associated prescription and flow-down language, as appropriate to recognize the funding contribution of the Government and contractors, and allocate rights accordingly to avoid having multiple clauses govern rights in commercial technical data.
- Incorporate a clarification in DFARS 252.227-7015, which positively states that the license under DFARS 252.227-7015(b)(1) or (2) does not divest the Government of prior rights acquired under DFARS 252.227-7013 or DFARS 252.227-7018 when a non-commercial item is later reclassified as a commercial item.

III. Remove the Definition of “Data” and Clarify the Definition of “SBIR/STTR Data”

AIA opposes the addition of the new term “data” and recommends changes to clarify the definition of “SBIR/STTR Data.” The SBIR/STTR Policy Directive defines the term “data” consistent with the FAR definition in 52.227-14, to include both technical data and computer software. In contrast, since 1995, the DFARS has drawn a clear distinction between technical data and computer software, with policies, definitions and clauses that separately apply to noncommercial technical data or noncommercial computer software.

While the DFARS SBIR/STTR clause applies to both technical data and computer software, there are key DFARS definitions used in the clause which apply only to technical data. For example, current terms such as “form, fit or function **data**,” “**data** necessary for operation, maintenance, installation or training” and “technical **data**” do not apply to computer software. However, the proposed generic term “data” would apply to both technical data and computer software, thus creating confusion and questions about whether these longstanding technical data terms apply to computer software. Since there is no requirement to create such a term, adding a new (and potentially confusing) term into a long-standing clause presents an unnecessary risk to all contractors and subcontractors, and particularly small businesses. (These proposed changes are consistent with the AIA’s comment letter dated March 16, 2020, in response to DFARS Case 2018-D018, “Noncommercial Computer Software.”). In addition, the proposed definition of “data” and the DFARS definition of “technical data” differ in how they exclude types of information; whereas the proposed definition of “data” excludes “information incidental to contract administration, such as financial, administrative, cost or pricing, or management information,” the DFARS definition of “technical data” excludes “computer software or data incidental to contract administration, such as financial and/or management information.” In the case of DOD contracts, both the FAR and DFARS make clear that the DFARS data rights clauses supersede the FAR. Accordingly, the DAR Council must consider the unique or nuanced differences between the FAR and DFARS data rights regimes in implementing the Policy Directive.

The proposed definition of “data” would create ambiguity regarding the type of information covered by the SBIR/STTR data rights clause. The proposed definition states that the term

“data” includes technical data and computer software, thus creating a question as to whether the term is limited to technical data and computer software, or whether it also includes other types of non-technical information, such as data captured by facial recognition technology or other data analytics. There are privacy implications and other unique considerations for such data that make it inappropriate to subject it to the existing DFARS data rights regime, which is currently applicable to only technical data and computer software. If the DAR Council intends for the new definition of “data” to sweep in other types of information into the data rights regime, then it should clearly communicate this intent in the ANPR and any subsequent rulemaking.

We recommend corresponding changes to the definition of “SBIR/STTR Data” to make clear that the term means “all noncommercial technical data and computer software developed or generated in the performance of this or another SBIR/STTR contract.”

IV. Clause Section Re-Ordering

The new applicability provisions in proposed DFARS 252.227-7013 and 252.227-7018 would require a complete re-ordering of each subsequent section in the clauses since the proposed applicability language would be added in new section (b). This would force multiple revisions to section numbering. Section (b) has been the license grant section for decades and is often specifically cited in other licenses (such as Specially Negotiated Licenses). To reduce the number of changes and as a matter of convenience, AIA proposes that the new section be added as the last unused letter.

AIA-Proposed Line-In/Line-Out Changes

**DFARS Case 2019-D043
Small Business Innovation Research Data Rights
Advance Notice of Proposed Rulemaking**

PART 227—PATENTS, DATA, AND COPYRIGHTS

SUBPART 227.71—RIGHTS IN TECHNICAL DATA

**227.7104 Contracts under the Small Business Innovation Research (SBIR)
[Program and Small Business Technology Transfer (STTR)] Program.**

[227.7104-1 Rights in SBIR or STTR data.]

~~(a) Use the clause at 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, when technical data or computer software will be generated during performance of contracts under the SBIR program.~~

([a]b) Under the clause at 252.227-7018, [Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program,] the Government obtains [the following standard license rights:

(1) Unlimited rights in the technical data and computer software listed in paragraph (c)(1) of the clause.

(2) [SBIR/[STTR] data rights in [all other]technical data and computer software generated under the contract and [appropriately]marked with the SBIR/[STTR] data rights legend. SBIR/[STTR] data rights provide the Government limited rights in such technical data and restricted rights in such computer software during the SBIR/[STTR] data protection period commencing [on the date of]with contract award and ending five[20] years after [that date unless, subsequent to the award, the agency and the contractor negotiate for some other protection period for the SBIR/STTR data]completion of the project under which the data were generated. Upon expiration of the [SBIR/STTR data protection period]five-year restrictive license, the Government has [Government purpose]unlimited rights in the SBIR/[STTR data] technical data and computer software. [These Government purpose rights do not expire.]

([b]e) During the SBIR/[STTR] data protection period, the Government may not release or disclose SBIR technical data or computer software [that is subject to SBIR/STTR data rights]to any person except as authorized for limited rights technical data or restricted rights computer software, respectively.

[(c) Before award of a contract for STTR only, the provision at 252.227-70XX, Additional Preaward Requirements for Small Business Technology Transfer (STTR) Program, requires offerors to submit, as part of the proposal,

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a written agreement between the offeror and a partnering research institution that allocates any rights in intellectual property. The contracting officer shall review the agreement to ensure it does not conflict with the provisions of the solicitation or any right to carry out follow-on research. If those conflicts cannot be resolved, the submitted proposal is not eligible for award.

(d)¹ The Small Business Administration's SBIR and STTR Program Policy Directive (effective May 2, 2019) provides for special considerations regarding the handling (e.g., disclosure, reverse engineering) of prototypes generated under SBIR and STTR awards, to avoid effects that may appear to be inconsistent with the SBIR and STTR program objectives to allow the SBIR/STTR awardee to retain rights in SBIR/STTR technical data and computer software~~data~~ during the SBIR/STTR protection period.

227.7104-2 Solicitation provisions and contract clauses.

(a) Use the clause at [252.227-7018](#), Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program, when technical data or computer software will be generated during any portion of contract performance governed by any phase of the SBIR or STTR program.

(1) When only a portion of contract performance is governed by the SBIR or STTR program (e.g., performance of one or more subcontracts qualifies as a Phase III SBIR or STTR award), the clause at [252.227-7018](#) will govern the technical data and computer software~~data~~ that is governed by the SBIR or STTR program.

(2) The remainder of the technical data and computer software~~data~~ will be governed by the applicable clauses at [252.227-7013](#), [252.227-7014](#), or [252.227-7015](#), in accordance with the prescriptions for those clauses.]

(d[b]) Use the clause at [252.227-7018](#) with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(1) In the interest of the Government; and

(2) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(e[c]) Use the following provision and clauses in ~~SBIR~~ solicitations and contracts that include the clause at [252.227-7018](#):

(1) [252.227-7016](#), Rights in Bid or Proposal Information;

(2) [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions;

¹ DFARS case 2018-D071 contains a paragraph that addresses negotiation of special licenses under the SBIR Program. When the final rules for 2018-D071 and 2019-D043 are published, the paragraph will be inserted as a new paragraph (d) in this section.

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(3) [252.227-7019](#), Validation of Asserted Restrictions—Computer Software;

(4) [252.227-7030](#), Technical Data—Withholding of Payment; and

(5) [252.227-7037](#), Validation of Restrictive Markings on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

(~~f~~**d**) Use the following clauses and provision in SBIR[and STTR] solicitations and contracts in accordance with the guidance at [227.7103-6](#)(c) and (d):

(1) [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

(2) [252.227-7028](#), Technical Data or Computer Software Previously Delivered to the Government.

[(e) Use the following provision and clause in STTR solicitations and contracts:

(1) 252.227-70XX, Additional Preaward Requirements for Small Business Technology Transfer (STTR).

(2) 252.227-70YY, Additional Postaward Requirements for Small Business Technology Transfer (STTR).]

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBPART 252.2—TEXT OF PROVISIONS AND CLAUSES

252.227-7013 Rights in Technical Data—Noncommercial Items.

As prescribed in 227.7103-6(a), use the following clause:

RIGHTS IN TECHNICAL DATA—NONCOMMERCIAL ITEMS (~~FEB 2014~~[DATE]**)**

(a) *Definitions.* As used in this clause—

[(15) “SBIR/STTR data” means all noncommercial technical data and computer software developed or generated in the performance of a SBIR/STTR contract.]

[[16]-15) “Technical data” means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

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([17]46) “Unlimited rights” means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) Applicability. ~~(1) Except as provided in paragraph (b)(2) of this clause, this clause will govern all technical data pertaining to noncommercial items or to any portion of a commercial item that was developed in any part at Government expense, and the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7015, Technical Data—Commercial Items, will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense. This clause governs all noncommercial technical data, except that the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program, will govern any technical data that is SBIR/STTR data.]~~

~~(2) The clause at DFARS 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program [and Small Business Technology Transfer (STTR) Program, will govern technical data that is SBIR/STTR data.]~~

~~(c) Rights in technical data. * * *~~

~~(d) Contractor rights in technical data. * * *~~

~~(e) Third party copyrighted data. * * *~~

~~(f) Identification and delivery of data to be furnished with restrictions on use, release, or disclosure.~~

* * * * *

***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR/[STTR] technical data and computer software data generated under another contract, limited or government purpose rights under this or a prior contract, or specifically negotiated licenses).

* * * * *

~~(g) Marking requirements. * * *~~

~~(h) Contractor procedures and records. * * *~~

~~(i) Removal of unjustified and nonconforming markings. * * *~~

~~(j) Relation to patents. * * *~~

~~(k) Limitation on charges for rights in technical data. * * *~~

~~(l) Applicability to s [S]ubcontractors or suppliers.~~

Commented [A1]: This section has been modified to reflect the language in the 1995 clause, modified to add the SBIR language.

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(1) The Contractor shall ensure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, the data rights portions of 15 U.S.C. 638, and the identification, assertion, and delivery processes of paragraph (f) of this clause are recognized and protected.

(2) (i) Except as provided in paragraph (ii), whenever any technical data for noncommercial items is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same- clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties.

(ii) Use the clause at [DFARS] 252.227-7018 to govern technical data that is SBIR/STTR data.

(3) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.

(4) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(5) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.

(6) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data as an excuse for failing to satisfy its contractual obligation to the Government.

~~_____ (1) The Contractor shall ensure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, [the data rights portions of 15 U.S.C. 638,]and the identification, assertion, and delivery processes of paragraph (f) of this clause are recognized and protected.~~

~~_____ (2) Whenever any technical data for noncommercial items, or for commercial items developed in any part at Government expense, is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use [the following]this same clause[(s)] in the subcontract or other contractual instrument, including subcontracts or other contractual instruments for commercial items, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties.[:~~

~~_____ (i)(A) Except as provided in paragraph (i)(2)(ii) of this clause, use this] This clause [to]will govern the technical data pertaining to noncommercial items~~

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or to any portion of a commercial item that was developed in any part at Government expense and

~~_____ [(B) Use] the clause at [DFARS] 252.227-7015 [to] will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense.]~~

~~_____ (ii) Use the clause at [DFARS] 252.227-7018 to govern technical data that is SBIR/STTR data.~~

~~_____ (3) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.~~

~~_____ (3[4]) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government, rather than through a higher tier contractor, subcontractor, or supplier.~~

~~_____ (4[5]) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.~~

~~_____ (5[6]) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data as an excuse for failing to satisfy its contractual obligation to the Government.~~

(End of clause)

* * * * *

252.227-7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

As prescribed in 227.7203-6(a)(1), use the following clause:

RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND
NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION (~~FEB~~
2014[DATE])

(a) *Definitions.* As used in this clause—

* * * * *

[(16) “SBIR/STTR data” means all noncommercial technical data and computer software data developed or generated in the performance of a SBIR/STTR contract.]

(1[7]6) “Unlimited rights” means rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

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[(b) Applicability. This clause governs all noncommercial computer software or computer software documentation, except that the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program, will govern any computer software or computer software documentation that is SBIR/STTR data.]

[(c) Rights in computer software or computer software documentation. * * *

[(d) Rights in derivative computer software or computer software documentation. * * *

[(e) Third party copyrighted computer software or computer software documentation. * * *

[(f) Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure.

* * * * *

***Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR/STTR software generated under another contract, or specifically negotiated licenses).

* * * * *

[(g) Marking requirements. * * *

[(h) Contractor procedures and records. * * *

[(i) Removal of unjustified and nonconforming markings. * * *

[(j) Relation to patents. * * *

[(k) Limitation on charges for rights in computer software or computer software documentation. * * *

[(l) Applicability to s[S]ubcontractors or suppliers.

(1) **[(i) Except as provided in paragraph (l)(1)(ii) of this clause,** whenever any noncommercial computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this ~~same~~ clause in its subcontracts or other contractual instruments, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties.

[(ii) The Contractor shall use the clause at DFARS 252.227-7018 to govern computer software or computer software documentation that is SBIR/STTR data.

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(iii) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) The Contractor shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (f) of this clause.

(4) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the Government.

252.227-7015 Technical Data—Commercial Items.
As prescribed in 227.7102-4(a)(1), use the following clause:

TECHNICAL DATA—COMMERCIAL ITEMS (FEB 2014[DATE])

~~(b) Applicability. This clause will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense. If the commercial item was developed in any part at Government expense—~~

~~(1) The clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program will govern technical data that is generated during any portion of performance that is covered under the SBIR or STTR program; and~~

~~(2) The clause at DFARS 252.227-7013, Rights in Technical Data—Noncommercial Items, will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense and is not covered under the SBIR or STTR program.]~~

~~(e)b) License. * * *~~

~~(e)c) Additional license rights. * * *~~

~~(e)d) Release from liability. * * *~~

~~(f) Applicability to subcontractors or suppliers.~~

~~(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320[,] and 10 U.S.C. 2321[,] and the data rights portions of 15 U.S.C. 638].~~

Commented [A2]: Striking this section to return to the original clause, which did not mandate flowdown. This is consistent with the validation paper.

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~~_____ (2) Whenever any technical data related to commercial items developed in any part at private expense will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, including subcontracts and other contractual instruments for commercial items, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense, and the [Contractor shall use the following] clause [(s) to] at 252.227-7013 will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense.~~

~~_____ (i) Use the clause at 252.227-7018 to govern technical data that is generated during any portion of performance that is covered under the SBIR or STTR program; and~~

~~_____ (ii) Use the clause at 252.227-7013 to govern any technical data that is not generated during any portion of performance that is covered under the SBIR or STTR program].
(End of clause)~~

252.227-7016 Rights in Bid or Proposal Information.

As prescribed in 227.7103-6(e)(1), 227.7104-2(c)(e)(1), or 227.7203-6(b), use the following clause:

RIGHTS IN BID OR PROPOSAL INFORMATION (~~JAN 2014~~**[DATE]**)

(a) *Definitions.*

(1) For contracts that require the delivery of technical data, the terms “technical data” and “computer software” are defined in the Rights in Technical Data--Noncommercial Item clause of this contract or, if this is a contract awarded under the Small Business Innovation Research Program[**or Small Business Technology Transfer Program**], the Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR)[**Program and Small Business Technology Transfer (STTR)**] Program clause of this contract.

(2) For contracts that do not require the delivery of technical data, the term “computer software” is defined in the Rights in Noncommercial Computer[**Software**] and Noncommercial Computer Software Documentation clause of this contract or, if this is a contract awarded under the Small Business Innovation Research Program[**or Small Business Technology Transfer Program**], the Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR)[**Program and Small Business Technology Transfer (STTR) Program**] clause of this contract.

(c) *Government rights subsequent to contract award.* The Contractor agrees—

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(1) Except as provided in paragraphs (c)(2), (d), and (e) of this clause, the Government shall have the rights to use, modify, reproduce, release, perform, display, or disclose information contained in the Contractor's bid or proposal within the Government. The Government shall not release, perform, display, or disclose such information outside the Government without the Contractor's written permission.

(2) The Government's right to use, modify, reproduce, release, perform, display, or disclose information that is technical data or computer software required to be delivered under this contract are determined by the Rights in Technical Data—Noncommercial Items, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, or Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) **[Program and Small Business Technology Transfer (STTR)]** Program clause(s) of this contract.

252.227-7017 Identification and Assertion of Use, Release, or Disclosure Restrictions.

As prescribed in [227.7103-3\(b\)](#), [227.7104\[-2\(c\)\]\(e\)\(2\)](#), or [227.7203-3\(a\)](#), use the following provision:

IDENTIFICATION AND ASSERTION OF USE, RELEASE, OR DISCLOSURE RESTRICTIONS (JAN 2011[DATE])

(a) The terms used in this provision are defined in following clause or clauses contained in this solicitation—

(1) If a successful offeror will be required to deliver technical data, the Rights in Technical Data--Noncommercial Items clause, or, if this solicitation contemplates a contract under the Small Business Innovation Research Program **[or Small Business Technology Transfer Program]**, the Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) **[Program and Small Business Technology Transfer (STTR)]** Program clause.

(2) If a successful offeror will not be required to deliver technical data, the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause, or, if this solicitation contemplates a contract under the Small Business Innovation Research Program **[or Small Business Technology Transfer Program]**, the Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) **[Program and Small Business Technology Transfer (STTR)]** Program clause.

(b) The identification and assertion requirements in this provision apply only to technical data, including computer software documentation, or computer software to be delivered with other than unlimited rights. For contracts to be awarded under the Small Business Innovation Research Program **[SBIR or STTR Program]**, the **[se] notification and identification requirements do not apply to technical [SBIR/STTR] technical data and computer software data or computer software that will be generated under the resulting contract [and will be delivered with SBIR/STTR data rights, and to any other data that will be delivered with other than unlimited rights].** Notification and identification is not required for restrictions based solely on copyright.

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***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR/[STTR] technical data and computer software data generated under [this or]another contract, limited, restricted, or government purpose rights under this or a prior contract, or specially negotiated licenses).

252.227-7018 Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program[and Small Business Technology Transfer (STTR) Program].

As prescribed in 227.7104[-2](a), use the following clause:

RIGHTS IN NONCOMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE--SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM [AND SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAM] (FEB 2014[DATE])

(a) *Definitions.* As used in this clause—

(1) “Commercial computer software” means software developed or regularly used for nongovernmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(iv) Satisfies a criterion expressed in paragraph (a)(1)(i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this contract.

(2) “Computer database” means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) “Computer program” means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) “Computer software” means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) “Computer software documentation” means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

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(6) “Covered Government support contractor” means a contractor (other than a litigation support contractor covered by **[Defense Federal Acquisition Regulation Supplement (DFARS)] 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation**) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS [252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends](#).

~~— (7) “Data” means recorded information, regardless of form or method of the recording. 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.]~~

~~(8) “Detailed manufacturing or process data” means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.~~

~~(9) “Developed” means—~~

~~(i) (Applicable to technical data other than computer software documentation.) An item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered “developed,” the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code;~~

~~(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;~~

~~(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or~~

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(iv) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(~~10~~9) “Developed exclusively at private expense” means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(~~11~~0) “Developed exclusively with government funds” means development was not accomplished exclusively or partially at private expense.

(~~12~~1) “Developed with mixed funding” means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(~~13~~2) “Form, fit, and function data” means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(~~14~~3) “Generated” means technical data or computer software first created in the performance of this contract.

(~~15~~4) “Government purpose” means any activity in which the United States Government is a party, including cooperative agreements with international or multinational defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

[(16) “Government purpose rights” means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States Government purposes.]

(~~17~~5) “Limited rights” means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government.

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The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(i) The production, release, disclosure, or use is—

(A) Necessary for emergency repair and overhaul; or

(B) A release or disclosure to—

(1) A covered Government support contractor in performance of its covered Government support contracts for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(2) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(ii) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(iii) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(1[8]6) “Minor modification” means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type customarily provided in the commercial marketplace.

(1[9]7) “Noncommercial computer software” means software that does not qualify as commercial computer software under paragraph (a)(1) of this clause.

([20]18) “Restricted rights” apply only to noncommercial computer software and mean the Government’s rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

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(A) Use the modified software only as provided in paragraphs (a)(~~[20]18~~)(i) and (iii) of this clause; and

(B) Not release or disclose the modified software except as provided in paragraphs (a)(~~[20]18~~)(ii), (v), (vi), and (vii) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the non-disclosure agreement at [\[DFARS\] 227.7103-7](#) of the Defense Federal Acquisition Regulation Supplement or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at [\[DFARS\] 252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(~~[20]18~~)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitations in paragraphs (a)(~~[20]18~~)(i) through (iii) of this clause;

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the non-disclosure agreement at [\[DFARS\] 227.7103-7](#) or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at [\[DFARS\] 252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(~~[20]18~~)(iv) of this clause, for any other purpose; and

(C) Such use is subject to the limitations in paragraphs (a)(~~[20]18~~)(i) through (iii) of this clause; and

(vii) Permit covered Government support contractors in the performance of Government contracts that contain the clause at [\[DFARS\] 252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose

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the computer software to a person authorized to receive restricted rights computer software, provided that—

(A) The Government shall not permit the covered Government support contractor to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to the paragraph (a)(~~20~~)(iv) of this clause, for any other purpose; and

(B) Such use is subject to the limitations in paragraphs (a)(~~20~~)(i) through (iv) of this clause.

[(21) “SBIR/STTR data” means all noncommercial technical data and computer software developed or generated in the performance of this or another SBIR/STTR contract.

(22) “SBIR/STTR data protection period” means the period of time during which the Government is obligated to protect SBIR/STTR data against unauthorized use and disclosure in accordance with SBIR/STTR data rights. The SBIR/STTR protection period begins on the date of award of the contract under which the SBIR/STTR data is developed or generated and ends 20 years after that date unless, subsequent to the award, the agency and the Contractor negotiate for some other protection period for the SBIR/STTR data. This protection period is not extended by any subsequent SBIR/STTR contracts under which any portion of that SBIR/STTR data are used or delivered. The SBIR/STTR data protection period of any such subsequent SBIR/STTR contract applies only to the SBIR/STTR data that are developed or generated under that subsequent contract.]

(~~23~~)(19) “SBIR/STTR] data rights” means the Government’s rights[, during the SBIR/STTR data protection period, in SBIR/STTR data covered by paragraph (c)(5) of this clause.] during the SBIR data protection period (specified in paragraph (b)(4) of this clause) to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated under a SBIR award as follows:

- (i) Limited rights in such SBIR/STTR] technical data; and
- (ii) Restricted rights in such SBIR/STTR] computer software.

(~~24~~)(9) “Technical data” means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or information] data incidental to contract administration, such as financial ~~and~~ or management information.

(~~25~~)(4) “Unlimited rights” means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

[(b) *Applicability.* This clause will govern all SBIR/STTR data. For any technical data or computer software that is not SBIR/STTR data—

(1) The clause at DFARS 252.227-7013, Rights in Technical Data–Noncommercial Items, will govern the technical data pertaining to noncommercial items ~~or to any portion of a commercial item that was~~

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~~developed in any part at Government expense, and the clause at DFARS 252.227-7015, Technical Data—Commercial Items, will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense;~~

(2) The clause at DFARS 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, will govern noncommercial computer software and computer software documentation; and

(3) A license consistent with DFARS 227.7102 will govern commercial technical data and a license consistent with DFARS 227.7202 will govern commercial computer software and commercial computer software documentation.]

~~(c)~~ *Rights in technical data and computer software.* The Contractor grants or shall obtain for the Government the following royalty-free, world-wide, nonexclusive, irrevocable license rights in technical data or noncommercial computer software. All rights not granted to the Government are retained by the Contractor.

(1) *Unlimited rights.* The Government shall have unlimited rights in technical data, ~~including computer software documentation,~~ or computer software, **including such technical data or computer software data** generated under this contract[,] that are—

(i) Form, fit, and function data;

(ii) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to Government-furnished technical data or computer software;

(iv) Otherwise publicly available or have been released or disclosed by the Contractor or a subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) ~~Technical data or computer software or software~~ in which the Government has acquired previously unlimited rights under another Government contract or ~~through a specific license~~ **as a result of negotiations;**

(vi) Data furnished to the Government, under this or any other Government contract or subcontract thereunder, with—

(A) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(B) Government purpose rights and the Contractor's exclusive right to use such data for commercial purposes has expired]; and

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(vi[i]) ~~[Computer software documentation generated or required to be delivered under this contract] SBIR data upon expiration of the SBIR data rights period.~~

[(2) *Government purpose rights.*

(i) The Government shall have government purpose rights for the period specified in paragraph (c)(2)(ii) of this clause in technical data and computer software data that are—

(A) Not SBIR/STTR data, and are—

(1) Technical data pertaining to items, components, or processes developed with mixed funding, or are computer software developed with mixed funding, except when the Government is entitled to unlimited rights in such data as provided in paragraph (c)(1) of this clause;

(2) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or productions of items, components, or processes; or

(B) SBIR/STTR data, upon expiration of the SBIR/STTR data protection period.

(ii) (A) For the non-SBIR/STTR data described in paragraph (c)(2)(i)(A) of this clause, the Government shall have Government purpose rights for a period of 5 years, or such other period as may be negotiated. This period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), or contract modification (including a modification to exercise an option) that required development of the items, components, or processes, or creation of the data described in paragraph (c)(2)(i)(A)(2) of this clause. Upon expiration of the 5-year or other negotiated period, the Government shall have unlimited rights in the data.

(B) For the SBIR/STTR data described in paragraph (c)(2)(i)(B) of this clause, the Government shall have Government purpose rights perpetually, or for such other period as may be negotiated. This period commences upon the expiration of the SBIR data protection period. Upon expiration of any such negotiated period, the Government shall have unlimited rights in the data.

(iii) The Government shall not release or disclose data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the nondisclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement (DFARS); or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

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(iv) **The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (g)(2) of this clause.]**

(3)2) *Limited rights.* The Government shall have limited rights in technical data, that were not generated under this contract, pertain to items, components or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (g)1) of this clause, with the legend prescribed in paragraph (g)2) of this clause.

(4)3) *Restricted rights in computer software.* The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise furnished to the Government under this contract that were developed exclusively at private expense and were not generated under this contract.

(5)4) *SBIR/STTR data rights.* Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (c)1) of this clause, the Government shall have SBIR/STTR data rights, **during the SBIR/STTR data protection period of this contract,** in all SBIR/STTR technical data or computer software or computer software generated under this contract ~~during the period commencing with contract award and ending upon the date five years after completion of the project from which such data were generated.~~

(6)5) *Specifically negotiated license rights.* The standard license rights granted to the Government under paragraphs (c)1) through (c)5) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in paragraph (a)1) of this clause or lesser rights in computer software than are enumerated in paragraph (a)18) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.²

(7)6) *Prior government rights.* Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

- (i) The parties have agreed otherwise; or
- (ii) Any restrictions on the Government's rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

² DFARS case 2018-D071 will revise this paragraph to specify that negotiation of a special license will happen after contract award, in accordance with the SBIR/STTR Program Policy Directive. This paragraph will also state that the contractor's asserted restrictions that form the basis for the special license shall remain subject to challenge pursuant to 252.227-7019 and 252.227-7037, as applicable.

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~~([8]7)~~ *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of technical data, computer software, or computer software documentation made in accordance with paragraph (a)(1)~~[5]4~~, (a)(1)~~[9]7~~, or ~~([c]b)([5]4)~~ of this clause, or in accordance with the terms of a license negotiated under paragraph ~~([c]b)([6]5)~~ of this clause, or by others to whom the recipient has released or disclosed the data, software, or documentation and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data or software marked with restrictive legends.

~~([9]8)~~ *Covered Government support contractors.* The Contractor acknowledges that—

(i) Limited rights technical data and restricted rights computer software are authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions as identified in a restrictive legend) regarding the covered Government support contractor's use of such data or software, or alternatively that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement; and

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data or software as set forth in the clause at **[DFARS] 252.227-7025**, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The non-disclosure agreement shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement.

~~([d]e)~~ *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the Contractor uses to prepare, or includes in, derivative software or documentation.

~~([e]d)~~ *Third party copyrighted technical data and computer software.* The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted technical data, including computer software documentation, or computer software in the data or software to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data or software of the appropriate scope set forth in paragraph ~~([c]b)~~ of this clause and, prior to delivery of such—

(1) Technical data, has affixed to the transmittal document a statement of the license rights obtained; or

(2) Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer.

~~([f]e)~~ *Identification and delivery of technical data or computer software to be furnished with restrictions on use, release, or disclosure.*

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(1) This paragraph does not apply to technical data or computer software that were or will be generated under this contract or to restrictions based solely on copyright.

(2) Except as provided in paragraph (f)(3) of this clause, technical data or computer software that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the technical data or computer software, in the following format, and signed by an official authorized to contractually obligate the Contractor:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

*If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., limited rights, restricted rights, government purpose rights, or government purpose license rights from a prior contract, SBIR/STTR] data rights under [this or]another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date _____
 Printed Name and Title _____
 Signature _____

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(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertions, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software and/or Validation of Restrictive Markings on Technical Data clauses of this contract.

(g) Marking requirements. The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software to be delivered under this contract by marking the deliverable data or software subject to restriction. Except as provided in paragraph (g)(7) of this clause, only the following markings are authorized under this contract: the limited rights legend at paragraph (g)(3) of this clause; the restricted rights legend at paragraph (g)(4) of this clause, the SBIR/STTR data rights legend at paragraph (g)(5) of this clause, or the special license rights legend at paragraph (g)(6) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) **General marking instructions.** The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend to all technical data and computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of technical data, computer software, or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) Omitted Markings. Technical data, computer software, or computer software documentation delivered or otherwise provided under this contract without restrictive markings shall be presumed to have been delivered with unlimited rights. To the extent practicable, if the Contractor has requested permission (see paragraph (c)(2) of this subsection) to correct an inadvertent omission of markings, the Contracting Officer will not release or disclose the technical data, software, or documentation pending evaluation of the request.

(i) The Contractor may request permission to have appropriate legends placed on unmarked technical data, computer software, or computer software documentation at its expense. The request must be received by the Contracting Officer within 6 months following the furnishing or delivery of

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such technical data, software, or documentation, or any extension of that time approved by the Contracting Officer. The Contractor shall—

(A) Identify the technical data, software, or documentation that should have been marked;

(B) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data, computer software, or computer software documentation contained in the applicable clause at DFARS [252.227-7013](#) or [252.227-7014](#); and

(C) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data, software, or documentation made prior to the addition of the marking or resulting from the omission of the marking.

(ii) The Contracting Officer should grant permission to mark only if the technical data, software, or documentation were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure that are consistent with the proposed restrictive marking.

(3) *Government purpose rights markings.* Data delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____
Expiration Date _____

The Government’s rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by paragraph (c)(2) of the Rights in Noncommercial Technical Data and Computer Software —Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(4)](2) *Limited rights markings.* Technical data not generated under this contract that pertain to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights shall be marked with the following legend:

LIMITED RIGHTS

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Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (c)(3) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program **and Small Business Technology Transfer (STTR) Program** clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (c)(4) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program **and Small Business Technology Transfer (STTR) Program** clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(6) *SBIR/STTR data rights markings.* Except for technical data or computer software in which the Government has acquired unlimited rights under paragraph (c)(1) of this clause, or negotiated special license rights as provided in paragraph (c)(6) of this clause, technical data or computer software generated under this contract shall be marked with the following legend. The Contractor shall enter the expiration date for the SBIR/STTR data rights **protection** period on the legend:

SBIR/STTR DATA RIGHTS

Contract No. _____

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Contractor Name _____

Contractor Address _____

Expiration of SBIR/[STTR] Data
Rights/[Protection] Period _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (c)(4) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program **and Small Business Technology Transfer (STTR) Program** clause contained in the above identified contract. ~~No restrictions apply after the expiration date shown above,~~ **the Government has perpetual government purpose rights as provided in paragraph (c)(4) of that clause**. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

~~(7)(5)~~ *Special license rights markings.*

(i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract No. ____ (Insert contract number) ____, License No. ____ (Insert license identifier) ____. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (c)(4) of this clause).

~~(8)(6)~~ *Pre-existing data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the Contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The marking procedures in paragraph (g)(1) of this clause shall be followed.

~~(h)(g)~~ *Contractor procedures and records.* Throughout performance of this contract, the Contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

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(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i)h *Removal of unjustified and nonconforming markings.*

(1) *Unjustified markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software furnished or to be furnished under this contract are contained in the Validation of Restrictive Markings on Technical Data and the Validation of Asserted Restrictions—Computer Software clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming markings.* A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Restrictive Markings on Technical Data or the Validation of Asserted Restrictions—Computer Software clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(j)i *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k)j *Limitation on charges for rights in technical data or computer software.*

(1) The Contractor shall not charge to this contract any cost, including but not limited to, license fees, royalties, or similar charges, for rights in technical data or computer software to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data or software; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph **(k)j**(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier technical data or computer software, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data or computer software will be delivered.

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(II)(k) ~~Applicability to s[S]ubcontractors or suppliers.~~

(1) The Contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, **[the data rights portions of 15 U.S.C. 638,]** and the identification, assertion, and delivery processes required by paragraph (f) of this clause are recognized and protected.

(2) Whenever any ~~noncommercial~~ technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use **[the following]** ~~this same clause[(s)]~~ in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties:

(i) **Except as provided in paragraph (ii), use this clause to govern SBIR/STTR data.**

(ii) For ~~data~~ **technical data or computer software that is not SBIR/STTR data—**

(A) **Use the clause at DFARS 252.227-7013 to govern the technical data pertaining to noncommercial items** ~~or to any portion of a commercial item that was developed in any part at Government expense, and use the clause at DFARS 252.227-7015 to govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense;~~

(B) **Use the clause at DFARS 252.227-7014 to govern noncommercial computer software and computer software documentation; and**

(C) **Use a license consistent with DFARS 227.7102 for commercial technical data and the license under which the data commercial computer software and commercial computer software documentation are customarily provided to the public, in accordance with DFARS 227.7202,** ~~for commercial computer software and commercial computer software documentation.~~

(iii) ~~The Contractor shall use the Technical Data—Commercial Items clause of this contract to obtain technical data pertaining to commercial items, components, or processes. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.~~

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher tier contractor, subcontractor, or supplier.

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(4) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

ALTERNATE I (~~JUN 1995~~**[DATE]**)

As prescribed in [227.7104-2\(b\)](#)~~(e)~~, add the following paragraph (l) to the basic clause:

(l) *Publication for sale.*

(1) This paragraph applies only to technical data or computer software delivered to the Government with SBIR/[STTR] data rights.

(2) Upon expiration of the SBIR/[STTR] data rights period, the Government will not exercise its right to publish or authorize others to publish an item of technical data or computer software identified in this contract as being subject to paragraph (l) of this clause if the Contractor, prior to the expiration of the SBIR/[STTR] data rights period, or within ~~two~~ **[2]** years following delivery of the data or software item, or within ~~twenty-four~~ **[24]** months following the removal of any national security or export control restrictions, whichever is later, publishes such data or software item(s) and promptly notifies the Contracting Officer of such publication(s). Any such publication(s) shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the technical data or computer software are reasonably available to the public for purchase.

[252.227-70XX Additional Preaward Requirements for Small Business Technology Transfer (STTR) Program.

As prescribed in [227.7104-2](#)(e)(1), use the following provision:

ADDITIONAL PREAWARD REQUIREMENTS FOR SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAM (DATE)

(a) **Definitions.** The terms used in this provision have the same meaning as defined in the clause 252.227-70YY contained in this solicitation.

(b) Offers submitted in response to this solicitation shall include the following:

(1) The written agreement between the Offeror and a partnering research institution, which shall contain—

(i) A specific allocation of ownership, rights, and responsibilities for intellectual property (including inventions, patents, technical data, and computer software) resulting from the STTR award;

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(ii) Identification of which party to the written agreement may obtain United States or foreign patents or otherwise protect any inventions that result from a STTR award; and

(iii) No provisions that conflict with the requirements of this solicitation, including the rights of the United States and the Offeror regarding intellectual property, and regarding any right to carry out follow-on research.

(2) The Offeror's written representation that—

(i) The Offeror is satisfied with its written agreement with the partnering research institution; and

(ii) The written agreement does not conflict with the requirements of this solicitation.

(c) The Offeror's written representation required by paragraph (a)(2) of this provision shall be submitted as an attachment to its offer, dated and signed by an official authorized to contractually obligate the Offeror.

(d) The Offeror's failure to submit the written agreement or written representation required by paragraph (a) of this provision with its offer may render the offer ineligible for award.

(e) If the Offeror is awarded a contract, the written agreement and written representation required by paragraph (a) of this provision shall be included in an attachment to that contract.

(End of provision)

252.227-70YY Additional Postaward Requirements for Small Business Technology Transfer (STTR) Program.

As prescribed in [227.7104-2](#)(e)(2), use the following clause:

ADDITIONAL POSTAWARD REQUIREMENTS FOR SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAM (DATE)

(a) *Definitions.* As used in this clause—

“Research institution” means an institution or entity that—

(1) Has a place of business located in the United States,

(2) Operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor, and

(3) Is either:

(i) A nonprofit institution that is owned and operated exclusively for scientific or educational purposes, no part of the net earnings

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of which inures to the benefit of any private shareholder or individual (section 4(3) of the Stevenson-Wydler Technology Innovation Act of 1980); or

(ii) A Federally-funded research or research and development center as identified by the National Science Foundation (<https://www.nsf.gov/statistics/ffrdclist/>) in accordance with the FAR.

“United States” means the 50 states and the District of Columbia, the territories and possessions of the Government, the Commonwealth of Puerto Rico, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(b) *Preaward submissions.* Attached to this contract are the following documents, submitted by the Contractor pursuant to the Defense Federal Acquisition Regulation Supplement solicitation provision 252.227-70XX, Additional Preaward Requirements for Small Business Technology Transfer (STTR) Program:

(1) The written agreement between the Contractor and a partnering research institution; and

(2) The Contractor’s written representation that it is satisfied with that written agreement, which does not conflict with the requirements of this contract.

(c) *Postaward updates.* After award, the Contractor shall not allow any modification to its written agreement with the partnering research institution, unless the written agreement, as modified, contains—

(1) A specific allocation of ownership, rights, and responsibilities for intellectual property (including inventions, patents, technical data, and computer software) resulting from performance of this contract;

(2) Identification of which party to the written agreement may obtain United States or foreign patents or otherwise protect any inventions that result from a STTR award;

(3) The Contractor’s written, dated, and signed representation that—

(i) The Contractor is satisfied with its written agreement with the partnering research institution, as modified; and

(ii) The written agreement, as modified, does not conflict with the requirements of this contract; and

(4) No provisions that conflict with the requirements of this contract, including the rights of the United States and the Contractor regarding intellectual property, and regarding any right to carry out follow-on research.

(d) *Submission of updated agreement.* Within 30 days of execution of the modified written agreement described in paragraph (b)(1) of this clause, the Contractor shall submit a copy of that updated written agreement, and the updated written representation required by paragraph (b)(2) of this clause, to the Contracting Officer for attachment to this contract.

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(End of clause)]