

ALERT

Proposed Rule Implements Section 815 of the Fiscal Year 2012 National Defense Authorization Act

June 17, 2016

On June 16, 2016, the Department of Defense (DOD) published a proposed rule (81 Fed. Reg. 39482) that would amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the Fiscal Year 2012 National Defense Authorization Act (NDAA) (Pub. L. No. 112-81). Section 815 amended 10 U.S.C. § 2320 and 2321 in numerous ways. The following are some of the more significant changes set forth in the proposed rule:

- *Disclosure of Limited Rights Technical Data for "Segregation" and "Reintegration" Purposes.* Section 815 amended 10 U.S.C. § 2320 to permit the disclosure of limited rights technical data outside the Government when "necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes[.]" The proposed rule would implement this additional exception to the prohibition on the Government's disclosure of limited rights technical data. The proposed rule defines "segregation or reintegration data" as something between form, fit, and function data on the one hand ("form, fit, and function data" also receives a new definition) and detailed manufacturing and process data on the other hand. More specifically, the content of "segregation or reintegration data" is judged according to an objective standard, requiring the "level of technical detail . . . for persons reasonably skilled in the art to perform such segregation or reintegration activities."

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Practice Areas

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- *Implementation of Mandatory Deferred Ordering Clause.* Section 815 amended 10 U.S.C. § 2320 in a way that would make the deferred ordering clause (currently at DFARS 252.227-7027) near-mandatory. Under the proposed rule, a new deferred ordering clause (DFARS 252.227-7029) would replace the current clause and would be required “in all contracts except those in which it would be per se impracticable to meet the statutory criteria[,]” including “all solicitations and contracts using other than FAR part 12 procedures and in those using FAR part 12 procedures for the acquisition of commercial items for use in “major systems/subsystems and weapon systems/subsystems. The proposed rule also contains a definition of “generated or utilized in the performance of this contract or any subcontract hereunder” in order “to provide clarity and predictability in interpreting whether” certain data is susceptible to deferred ordering.
- *Extension of Time to Challenge Contractor Restrictive Assertions.* 10 U.S.C. § 2321 allows the Government to challenge and validate a contractor’s restrictive assertions. The proposed rule would implement the expanded statutory period of six years from final payment on the contract for the Government to bring the challenge. The current DFARS clauses require challenges to be brought within three years from final payment on the contract.

The changes in the proposed rule affect both technical data and computer software and both non-commercial and commercial procurements. For example, the proposed rule contains analogous “segregation or reintegration” provisions for both commercial item technical data (amending DFARS 252.227-7015(b)(2)) and non-commercial computer software (amending DFARS 252.227-7014).

Comments must be submitted by September 14, 2016, to be considered.

Wiley Rein will continue to monitor developments in this area. For more information in the meantime, please contact Scott A. Felder at 202.719.7029 or sfelder@wiley.law.