

have failed to achieve practical application in that country. See the procedures at 27.304-1(e).

(j) *Confidentiality of inventions.* The publication of information disclosing an invention by any party before the filing of a patent application may create a bar to a valid patent. Accordingly, 35 U.S.C. 205 and 37 CFR part 40 provide that Federal agencies are authorized to withhold from disclosure to the public information disclosing any invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license) for a reasonable time in order for a patent application to be filed. Furthermore, Federal agencies shall not be required to release copies of any document which is part of an application for patent filed with the United States Patent and Trademark Office or with any foreign patent office. The Presidential Memorandum on Government Patent Policy specifies that agencies should protect the confidentiality of invention disclosures and patent applications required in performance or in consequence of awards to the extent permitted by 35 U.S.C. 205 or other applicable laws.

[49 FR 12974, Mar. 30, 1984, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2665, Jan. 17, 1986; 54 FR 25063, June 12, 1989 and 55 FR 25525, June 21, 1990; 62 FR 40237, July 25, 1997]

27.303 Contract clauses.

In contracts (and solicitations therefor) for experimental, developmental, or research work (but see 27.304-3 regarding contracts for construction work or architect-engineer services), a patent rights clause shall be inserted as follows:

(a)(1) The contracting officer shall insert the clause at 52.227-11, Patent Rights—Retention by the Contractor (Short Form), if all the following conditions apply:

(i) The contractor is a small business concern or nonprofit organization as defined in 27.301 or, except for contracts of the Department of Defense (DOD), the Department of Energy (DOE), or the National Aeronautics and Space Administration (NASA), any other type of contractor.

(ii) No alternative patent rights clause is used in accordance with paragraph (c) or (d) of this section or 27.304-2.

(2) To the extent the information is not required elsewhere in the contract, and unless otherwise specified by agency supplemental regulations, the contracting officer may modify 52.227-11(f) to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide, upon request, the filing date, serial number and title, a copy of the patent application, and patent number and issue date for any subject invention in any country in which the contractor has applied for patents.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Federal Government employee is a coinventor.

(3) If the acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement, or if the agency head or a designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement, the contracting officer shall use the clause at 52.227-11, with its Alternate I. If other rights are necessary to effectuate the treaty or agreement, Alternate I may be appropriately modified. In long term contracts, Alternate II shall be added if necessary to effectuate treaties or agreements to be entered into.

(4) If the contracting officer includes the clause at 52.227-11, Patent Rights—Retention by the Contractor (Short Form), in a contract with a nonprofit organization for the operation of a Government-owned facility, the contracting officer will include Alternate III in lieu of subparagraph (k)(3) of the clause.

(5) If the contract is for the operation of a Government-owned facility, the contracting officer may include Alternate IV with the clause at 52.227-11.

(b)(1) The contracting officer shall insert the clause at 52.227-12, Patent Rights—Retention by the Contractor (Long Form), if all the following conditions apply:

(i) The contractor is other than a small business firm or nonprofit organization.

(ii) No alternative clause is used in accordance with paragraph (c) or (d) of this section or 27.304-2.

(iii) The contracting agency is one of those excepted under subdivision (a)(1)(i) of this section.

(2) If the acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement or if the agency head or a designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement, the contracting officer shall use the clause at 52.227-12, with its Alternate I. If other rights are necessary to effectuate the treaty or agreement, Alternate I may be appropriately modified. In long term contracts, Alternate II shall be added if necessary to effectuate treaties or agreements to be entered into.

(c)(1) The contracting officer shall insert the clause at 52.227-13, Patent Rights—Acquisition by the Government, if any of the following conditions apply:

(i) No alternative clause is used in accordance with subparagraphs (c) (2) and (4) or paragraph (d) of this section or 27.304-2.

(ii) The work is to be performed outside the United States, its possessions, and Puerto Rico by contractors that are not small business firms, nonprofit organizations as defined in 27.301, or domestic firms. For purposes of this subparagraph, the contracting officer may presume that a contractor is not a domestic firm unless it is known that the firm is not foreign owned, controlled, or influenced. (See 27.304-4(a) regarding subcontracts with U.S. firms.)

(2) Pursuant to their statutory requirements, DOE and NASA may specify in their supplemental regulations use of a modified version of the clause at 52.227-13 in contracts with other than small business concerns or nonprofit organizations.

(3) If the acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement or if the agency head or a designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement, the contracting officer shall use the clause with its Alternate I. If other rights are necessary to effectuate the treaty or agreement, Alternate I may be appropriately modified. In long term contracts, Alternate II shall be added if necessary to effectuate treaties or agreements to be entered into.

(4) Section 401 of title 37 of the Code of Federal Regulations provides that in contracts with small business firms and nonprofit organizations, when an agency exercises the exceptions at 27.302(b) (2) or (3) it shall use the clause at 52.227-11, with such modifications as are necessary to address the exceptional circumstances or concerns which led to the use of the exception. The greater rights determinations provision of 52.227-13(b)(2) shall be included in the modified clause.

(d)(1) If one of the following applies, the contracting officer may insert the clause prescribed in paragraph (a) or (b) of this section as otherwise applicable, agency supplemental regulations may provide another clause and specify its use, or the contracting officer shall insert the clause prescribed in paragraph (c) of this section:

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.

(ii) There are exceptional circumstances and the agency head determines that restriction or elimination of the right to retain title to any subject invention will better promote the

policy and objectives of chapter 18 of title 35 of the United States Code.

(iii) It is determined by a Government authority which is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities.

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of the Department of Energy primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) Before using any of the exceptions under subparagraph (d)(1) of this section in a contract with a small business firm or a nonprofit organization and before using the exception of subdivision (d)(1)(ii) of this section for any contractor, the agency shall prepare a written determination, including a statement of facts supporting the determination, that the conditions identified in the exception exist. A separate statement of facts shall be prepared for each exceptional circumstances determination, except that in appropriate cases a single determination may apply to both a contract and any subcontract issued under it, or to any contract to which an exception is applicable. In cases when subdivision (d)(1)(ii) of this section is used, the determination shall also include an analysis justifying the determination. This analysis should address, with specificity, how the alternate provisions will better achieve the objectives set forth in 35 U.S.C. 200. For contracts with small business firms and nonprofit organizations, a copy of each determination, statement of facts, and, if applicable, analysis shall be promptly provided to the contractor or offeror along with a notification of its appeal rights under 35 U.S.C. 202(b)(4) in accordance with 27.304-1(a). In the case of small business and nonprofit contractors, except for determination under subdivision (d)(1)(iii) of this section, the agency shall, within 30 days after award of a contract, also provide copies of each determination, statement of fact, and analysis to the Secretary of Commerce. These shall be sent within 30 days after the award of the contract to which they pertain. In

the case of contracts with small business concerns, copies will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

(e) For those agencies excepted under paragraph (a)(1)(i) of this section, only small business firms or nonprofit organizations qualify for the clause at 52.227-11. If one of these agencies has reason to question the status of the prospective contractor, the agency may file a protest in accordance with 13 CFR 121.3-5 if small business firm status is questioned, or require the prospective contractor to furnish evidence of its status as a nonprofit organization.

(f) Alternates I and II to the clauses at 52.227-11, 52.227-12, and 52-227-13, as applicable, may be modified to make clear that the rights granted to the foreign government or international organization may be for additional rights beyond a license or sublicense if so required by the applicable treaty or international agreement. For example, in some cases exclusive licenses or even assignment of title in the foreign country involved might be required. In addition, an Alternate may be modified to provide for direct licensing by the contractor of the foreign government or international organization.

[54 FR 25065, June 12, 1989 and 55 FR 25525, June 21, 1990; 62 FR 236, Jan. 2, 1997]

27.304 Procedures.

27.304-1 General.

(a) *Contractor appeals of exceptions.* (1) In accordance with 35 U.S.C. 202(b)(4), a small business firm or nonprofit organization contractor has the right to an administrative review of a determination to use one of the exceptions at 27.303(d)(1)(i)-(iv) if the contractor believes that a determination is either (i) contrary to the policies and objectives of this subsection or (ii) constitutes an abuse of discretion by the agency. Subparagraphs (a) (2) thru (7) of this subsection specify the procedures to be followed by contractors and agencies in such cases. The assertion of such a claim by the contractor shall not be used as a basis for withholding or delaying the award of a contract or for suspending performance under an