NAVIGATING FEDERAL CONTRACTING RULES ON INVENTIONS, SOFTWARE AND DATA
A GUIDE FOR TECHNOLOGY AND SOFTWARE COMPANIES

by

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INTRODUCTION

U.S. Government spending on technology is massive. In the budget for fiscal year 2016, President Barack Obama proposed spending over $86 billion on Information Technology.[1] Indeed, the budget for Federal IT spending in 2014 and 2015 exceeded $80 billion, and that scale of spending on technology likely will not change dramatically any time soon. Consequently, technology companies, engineering firms and computer services companies that are not participating in, or have not considered participating in, the federal IT market may be passing up on significant revenue opportunities. Moreover, small businesses that qualify may find unique opportunities to have the development of commercially viable technology publicly funded through contracts awarded under the federal government's Small Business Innovative Research program or the Small Business Technology Transfer program.

Technology and IT companies that wish to pursue opportunities in federal government contracting, however, should become familiar with the unique and sometimes complex rules that on the new technology developed, or existing technology delivered to the Government, during the performance of a Government contract. Indeed, because those rules allocate the rights of the Government and a Government contractor to technical data and computer software created or delivered under a Government contract – including the rights to use, display, reproduce, and copy the data and software, and to allow others to do the same – companies that become active in the Government technology market should anticipate those rules when they enter into agreements with collaborators in the development and commercialization of this technical data and computer software.

This paper, thus, provides an overview of the federal acquisition rules under the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) that apply to the rights of United States agencies and departments (collectively, the "Government") and government contractors under solicitations and contracts involving technology acquisitions. In particular, this paper will review the rules applicable to the Government's rights in inventions, data, and computer software.

While not intended to review each and every provision under FAR and DFARS, this paper addresses the rules that may be most relevant as government contractors manage their businesses and relationships with employees and business partners in anticipation of a procurement. This paper also does not address the particular rules that apply to acquisitions under the "GSA Schedules" (also known as Multiple Award Schedules) or Federal Supply Schedules.

I. THE GOVERNMENT'S POLICY ON TECHNOLOGY ACQUISITIONS

In general, the Government's approach to technology incorporated by a contractor into contract deliverables is intended to be unobtrusive and to preserve the contractor's business objectives. For example, the Government's stated policy is to use inventions "in a matter to promote free competition and enterprise without unduly encumbering future research and discovery," to "[e]ncourage maximum participation of industry in federally supported research and development efforts," and to promote "the commercialization and public availability of inventions made in the United States."[2]

The Government also recognizes that contractors have a proprietary interest in "data" – which, as explained further below, includes computer software – that is produced or used during the performance of a contract. Consequently, agencies are required to protect proprietary data from unauthorized use and disclosure.[3]

Indeed, the Government generally tries to limit its demand for data that was developed at private expense (i.e., in which the development was not funded with Government funds under a Government contract) to begin with, and when such data is required to be delivered under a Government contract, "the Government will acquire only those rights essential to its needs."[4] Likewise, with regard to inventions, the Government's policy is to only obtain "sufficient rights in federally supported inventions to meet the needs of the Government."[5]

Minimalist aspirations notwithstanding, the federal acquisition rules, nevertheless, are complex, at times expansive, and potentially impactful on valuable technology that companies develop during the course of a Government contract. Technology companies that do business with the federal government, therefore, should be familiar with the rules that establish the Government's rights in technical data, software and inventions.

II. SUBJECT INVENTIONS

Before 1980, the Government's policy was that new technology developed with Government funds should be available to the public. Consequently, the Government retained title to inventions and licensed them nonexclusively. Over time, federal agencies began to use Institutional Patent Agreements that permitted companies and institutions to retain rights over new inventions made with Government funds, but there was no consistent Government-wide policy on the use of these agreements. In 1980, that changed when Congress enacted the Bayh-Dole Act, which allowed small businesses and non-profit organizations to elect to retain title over new inventions that were publicly funded, while leaving for the Government a nonexclusive, irrevocable, paid-up license in the invention. In 1983, a presidential memorandum extended these rules to contracts with large businesses and for-profit companies. These allocations of rights were then implemented in FAR.

A. WHERE THE RULES ARE

The federal acquisition rules allocate patent rights in "subject inventions" – inventions made in the performance of work under a Government contract[6] – between the Government and contractors. The patent rights rules on contracts with Department of Defense agencies, which will be referred to collectively in this paper as "DoD," and non-DoD federal departments and agencies, which will be referred to collectively in this paper as "civilian agencies" are found mainly in FAR and agency supplements to FAR,[7] as well as contract clauses under FAR that address patent rights.

Contracting officers, in fact, *must* insert FAR patent rights clauses in all solicitations and contracts in which patent issues are most likely to arise – namely, solicitations and contract for experimental, developmental, or research work.[8] This generally includes solicitations or contracts for construction work or architect-engineer services that include —

(1) Experimental, developmental, or research work;

(2) Test and evaluation studies; or

(3) The design of a Government facility that may involve novel structures, machines, products, materials, processes, or equipment (including construction equipment.[9]

As to which patent rights clause may be inserted in a contract or solicitation, unless an agency supplement requires another clause, generally in circumstances in which ownership of a subject invention may be required to be assigned to the Government (as explained in Section C.1 below), contracting officers may insert the patent rights clause found at FAR 52.227-13, Patent Rights - Ownership by the Government.[10] This clause, which will be referred to as the "Government-Owner Patent Clause," does not, however, have to be inserted into a contract when the Government receives title to a subject invention because a contractor fails to file a patent or make a timely disclosure of the invention, or decides not to retain title (see Section C.2 below).

With two exceptions, the Government's contracting officers must insert the FAR clause at 52.227-11, Patent Rights, Ownership by Contractor, which will be referred to as the "Standard Patent Clause," in all other circumstances in which the Government-Owner Patent Clause does not apply – i.e., in circumstances in which a contractor retains title to an invention. The two exceptions to this requirement are when (i) the solicitation or contract is being placed by one Government agency on behalf of another Government agency, or (ii) the solicitation or contract is for DoD, DOE, or NASA, and the contractor is neither a small business nor a nonprofit organization (i.e., the contractor is a large for-profit company).[11] In DoD contracts with large for-profit companies, contracting officers are required to insert the clause at DFARS 252.227-7038, Patent Rights – Ownership by the Contractor (Larger Business), referred to in this paper as the "Large DoD Contractor Patent Clause," instead of the Standard Contractor-Owner Clause.[12]

B. WHEN THE CONTRACTOR GETS TO KEEP IT

A contractor that invents new technology during contract performance does not automatically acquire title to its invention. Rather, *the contractor must "elect" to retain title over the subject invention, but only after it has made certain disclosures to the Government* that are required under the patent right clause of its contract, as explained below.[13]

1. Contractors Must First Disclose Inventions

a. Typical Disclosure Requirements

A contractor wishing to retain ownership of a subject invention must first disclose the subject invention in writing to the Government's contracting officer within two (2) months *after the contractor's inventor discloses it in writing* to the person within the contractor who is responsible for patent matters.[14] A large for-profit defense contractor is required, alternatively to disclose the invention to the contracting officer within six (6) months after it first becomes aware that the subject invention is made, if that awareness occurs earlier than any written notification by the inventor to contractor personnel.[15]

A contractor that is required to turn title of a subject invention over to the Government, likewise, must make written disclosures of a subject invention within two (2) months *after the inventor discloses it in writing* to the person within the contractor who is responsible for patent matters or, if earlier, within six (6) months after the contractor becomes aware that a subject invention has been made.[16] Under the Government-Owner Patent Clause, contractors must, in any event, disclose that a subject invention is made before any sale, public use, or publication of the subject invention.[17]

As for the content of the disclosures to contracting officers, contractors must include the identity of the inventor, the Government contract under which the subject invention was made, and sufficient technical detail to provide an understanding of the invention. In addition, the disclosures must identify information about any sale, offer for sale, or public use of the subject invention, or about any manuscript describing the subject invention that is submitted for publication**.**[18]

b. Modified or Supplemental Disclosure Requirements

Contracting officers may modify or supplement the Standard Patent Clause to require Government contractors to make the following additional disclosures if not already required under the contract:

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

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

(3) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or, upon request, copies of any patent application so identified;
(4) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor.[19]

c. Additional Disclosure Requirements for Defense Contractors

Defense contractors must satisfy additional disclosure requirements;[20] under contracts with DoD, they must also provide:

(1) Interim reports every twelve (12) months (or such longer period as specified by the contracting officer) from the date of the contract listing subject inventions during that period and stating that all subject inventions have been disclosed or that there are no such inventions;
(2) A final report, within three (3) months after completion of the contracted work, listing all subject inventions or stating that there were no such inventions;
(3) Upon request, the filing date, serial number and title, a copy of the patent application and patent number, and issue data for any subject invention for which the contractor has retained title; and
(4) Upon request, an irrevocable power to inspect and make copies of the patent application file.[21]

Defense contractors are permitted to use DD Form 882, "Report of Inventions and Subcontracts," to submit to DoD contracting officers interim and final invention reports, as well as notification of subcontracts for experimental, developmental, or research work.[22]

CONTRACTOR NOTE
Defense contractors should be careful to avoid an over-reliance on DD Form 882 in instances requiring additional disclosures to be made. DD Form 882 does not, for example, contain a separate field for patent application filing dates.

2. Upon Disclosures Contractors May Elect To Retain Title

Upon their disclosures, contractors may then elect to retain ownership of any subject invention. Large for-profit defense contractors must elect in writing whether or not to retain ownership of a subject invention by notifying the contracting officer at the time of its disclosure of the subject invention to the contracting officer, or within eight (8) months of the disclosure.[23] Other contractors must notify the contracting officer whether or not they retain ownership within two (2) years of the disclosure of the subject invention.[24] However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which a valid patent protection can be obtained in the United States, an agency may shorten the period of election of title to a date that is no more than sixty (60) days prior to the end of the statutory period.[25]

If the contractor elects not to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor.[26] Any retention of rights by an inventor, however, will be subject to certain conditions and rights retained by the Government that are set forth in the Standard Patents Clause, including the requirement to file timely patents and continue their prosecution (see Section D.4. below), the so-called "Made In America" requirements (see Section D.6. below), the Government's March-In rights (see Section D.7. below), and the requirement to submit utilization reports (see Section D.8. below).[27]

C. WHEN THE GOVERNMENT GETS TO OWN IT

1. Mandatory Assignment of Title by Contractor

In certain limited circumstances, a contracting officer is permitted to insert into a contract the Government-Owner Patent Clause requiring a contractor to assign title of a subject invention to the Government:

(1) When the contractor is not located in the U.S., does not have a place of business located in the U.S., or is subject to the control of a foreign government;
(2) In exceptional circumstances, when an agency determines that restriction or elimination of the right to retain title in any subject invention will better promote the policy and objectives of the Bayh-Dole Act and the presidential memorandum extending the Bayh-Dole Act to large and for-profit businesses;
(3) When an agency authorized to conduct foreign intelligence or counterintelligence determines that a restriction or elimination of the right to retain title to a subject invention is necessary to protect the security of such activities;
(4) When the government contract involves the operation of a Department of Energy facility primarily dedicated to DOE's naval nuclear propulsion or weapons related programs and all funding agreement limitations under the Bayh-Dole Act for agreements with small businesses and nonprofit organizations are limited to inventions made under the two programs; or
(5) Pursuant to a statute or in accordance with agency regulations.[28]

Before inserting the Government-Owner Patent Clause in any contract on the basis of paragraph (2) above, a contracting officer must follow applicable procedures under the Bayh-Dole Act.[29] A contracting officer must do the same before inserting the clause for any of the enumerated reason described above into any contract with a small business or a nonprofit organization; moreover, small businesses and nonprofit organizations are entitled to administrative review of the decision.[30]

Whenever a contract requires a contractor to assign title of a subject invention to the Government, a contractor can nevertheless request that the Government grant it greater rights.[31] The contracting officer, in turn, may grant this request if he or she determines that the interest of the United States and the general public will be better served.[32]

In addition, when a contract with a small business or a nonprofit organization requires a contractor to assign title of a subject invention to the Government for the reasons described in paragraphs (2) and (3) above, the contract must still provide the contractor with the right to elect ownership to any subject invention that is not classified or is not limited from dissemination by DOE within six (6) months of the date the subject invention is reported to the agency.[33]

2. Voluntary and Involuntary Transfers of Title

The Government also has a right to receive title to a subject invention in other limited circumstances:

(1) *If the contractor has not disclosed the invention within the time specified in the patents right clause*; or

(2) When the contractor —

(A) does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the patent rights clause;

(B) *has not filed a patent* or plant variety protection application *within the time specified in the patent rights clause*;

(C) decides not to continue prosecution of a patent or plant variety protection application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or

(D) no longer desires to retain title.[34]

In the case of a contractor that has failed to make a timely disclosure of a subject invention or a timely election to retain ownership of a subject invention, a federal agency has only sixty (60) days after learning of the contractor's disclosure or election failure to request title.[35]

D. RIGHTS AND OBLIGATIONS

1. A Contractor's Minimum License Rights

Whenever the Government acquires title over a subject invention, a contractor normally retains a revocable, nonexclusive, paid-up license to the subject invention throughout the world, *unless the contractor fails to disclose the invention within the times specified in the patent rights clause*.[36]

A contractor cannot transfer this license without the contracting officer's approval, unless the transfer is to a successor of contractor.[37]

2. The Government's Minimum License Rights

Likewise, when a contractor elects to retain title over a subject invention, the Government nevertheless acquires minimum license rights to the technology developed with

Government funds. Specifically, the Government acquires a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world.[38]

3. When a Government Employee Is Co-Inventor Under A Small Business Contract

If a Government employee is a co-inventor of a subject invention under a contract with a small business or nonprofit organization, the employing agency may license or assign any rights it acquires from the employee to the contractor, subject to conditions under the Bayh-Dole Act.[39]

4. Contractors Must File Patents or Notify the Government of Decision Not To

If a contractor has elected to retain title of a subject invention, the contractor *must file either a provisional or nonprovisional patent application* or a Plant Variety Protection Application *on an elected subject invention within one (1) year after the election to retain ownership*.[40] If, however, a publication, on sale, or public use has initiated the 1-year statutory period for obtaining patent protection in the U.S., the contractor must file the patent application before the end of the statutory period. In the case of a provisional application, a contractor must file a nonprovisional patent application within ten (10) months of the filing of the provisional application.[41] Lastly, foreign patent applications must be filed within ten (10) months of the first filed provisional or nonprovisional patent application, or where a patent application is prohibited by a Secrecy order, within six (6) months from the date permission is granted by the Commissioner of Patents to file foreign patent applications.[42]

Any nonprovisional patent application and any subsequent patents that cover a subject invention *must include this statement*: "This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in this invention."[43]

A contractor that decides not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, must notify the contracting officer of the decision not less than thirty (30) days before the expiration of the response or filing period required by the relevant patent office.[44]

5. Contractors Must Enter Into Employee Agreements Disclosing Inventions

Contractors electing to retain ownership also must enter into agreements with their employees – other than clerical or nontechnical employees – requiring them to disclose each subject invention promptly in writing to personnel responsible for administering patent matters and in the contractor's format.[45] This is so that the contractor can comply with its own disclosure requirements under applicable patent clauses, execute all papers necessary to file patent applications on subject inventions, and establish the Government's rights in the subject

inventions.[46] An employee's disclosures to the contractor should, at a minimum, contain the same information typically required to be made by the contractor to the Government under patent rights clauses (see Section B.1.a. above).[47] Contractors must also instruct their employees, through employee agreements or suitable educational programs, on the importance of reporting inventions in sufficient time to permit timely filing of patent applications.[48]

6. "Made In America" Requirements

Contractors must also be mindful of certain "Made In America" requirements over subject inventions. Any contractor that receives title to a subject invention is prohibited from entering into an exclusive license agreement to use or sell the subject invention in the U.S. unless the person granted the exclusive license agrees that the product embodying the subject invention will be manufactured substantially in the United States.[49]

In specific instances, however, this requirement can be waived by an agency if the contractor or assignee shows that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States, or that under the circumstances domestic manufacture is not commercially feasible.[50]

7. March-In Rights

The Government has certain "March-In" rights under which a contractor, assignee or exclusive licensor of a subject invention must grant a nonexclusive, partially exclusive, or exclusive license to a responsible applicant upon under reasonable terms. These March-In rights can only be exercised if the Government determines it is necessary:

> (1) Because the contractor or assignee has not taken steps to achieve practical application of the subject invention if the field of use;
> (2) To alleviate health or safety needs not reasonably satisfied by the contractor or assignee;
> (3) To meet any public use requirements under federal regulations that have not been satisfied; or
> (4) Because a "Made in America" agreement (see Section D.6 above) has not been obtained or has been breached.[51]

Before exercising March-In rights, the Government must provide a contractor a reasonable time to demonstrate why the agency should not take action.[52]

8. Utilization Reports

The Government may request periodic reports on how any subject invention is being used by contractors, or their licensees or assignees.[53] There is a danger in tipping off industry competitors to new ideas or innovations under development. The federal acquisition rules

recognize this, and therefore, prohibit agencies from disclosing the utilization reports without a contractor's permission.[54] Nevertheless, contractors are also advised to "mark as confidential/proprietary any utilization report to help prevent inadvertent release outside the Government."[55]

9. Impact on Subcontracts

All of FAR's patent rights rules and procedures are applicable to subcontracts *at all tiers*.[56] If, however, a subcontractor or prime contractor believes the inclusion of a particular clause is inappropriate or a subcontractor refuses to accept a clause, the contracting officer in consultation with counsel must resolve the matter.[57]

The federal acquisition rules also protect subcontractors against aggressive attempts by prime contractors to acquire their patent rights. Specifically, *contractors are prohibited from using their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions* that result from the subcontracts.[58]

CONTRACTOR NOTE
Subcontractors should carefully scrutinize agreements with their prime contractors to determine if they are obligated to transfer any interest in their inventions to the prime contractor, and if so, whether they are entitled to any consideration other than participation in the Government subcontract.

10. Confidentiality of Subject Inventions

Since publication or use of a previously unknown invention before a patent application is filed can be a bar to a valid patent, the federal acquisition rules permit agencies to withhold from the public any information that discloses an invention in which the Government owns or may own a right, title, or interest (including a nonexclusive license).[59] Agencies, however, may only withhold information concerning the inventions for a reasonable time in order for a patent application to be filed.[60] This includes any data delivered pursuant to contract requirements, as long as the contractor notifies the agency of the identity of the data and the subject invention it relates to at the time of delivery of the data.[61] This notification must be provided to both the contracting officer and to any patent representative to which the invention is reported, if other than the contracting officer.[62]

Once filed in any patent office, agencies are not required to release copies of any document that is a part of a patent application for those subject inventions.[63]

III. PRE-EXISTING INVENTIONS

A. THE GOVERNMENT'S UNAUTHORIZED USE OF PATENTED OR COPYRIGHTED MATERIAL

1. Limited Remedy for Unauthorized Use by the Government and Its Contractors

In contrast to the Government's rights to inventions made with Government funds, the Government does not inherit an explicit license with respect to patented inventions or copyrighted works created before, or not in connection with, the contractor's performance under a Government contract. However, under federal statutes, whenever the Government uses or manufactures an invention covered by a U.S. patent or a copyrighted work without either a license or permission from the patent or copyright owner, the owner's only remedy is an action to recover reasonable costs and compensation from the use or manufacture by the Government.[64]

As explained in the federal acquisition rules, "[t]here is no injunctive relief available."[65] Therefore, owners cannot stop the Government's unauthorized and potentially continued use, but instead must content themselves with money damages that might be awarded by a court.[66]

Federal statutes also provide a form of immunity to contractors and subcontractors that use another company's patented or copyrighted technology in the performance of a Government contract. Specifically, the law states that the use or manufacture of a patented invention or a copyrighted work by a contractor or subcontractor with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.[67] The federal acquisition rules, again, explain the implications of this provision:

> [T]here is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (e.g., while performing a contract).[68]

Thus, a company's only remedy for infringement by a Government contractor that has obtained the Government's authorization and consent is again, a suit against the Government for money damages.

2. The Government's Authorization and Consent

This immunity from suit arguably frees up technology contractors to devise creative solutions that meet contract requirements without the need to worry about whether those solutions inadvertently infringe on existing patents or copyrights. However, as stated, this immunity only applies if the contractor's use or manufacture occurs "with the authorization or consent of the Government."[69] This authorization and consent is contained in the clause found at FAR 52.227-1, in which the "Government authorizes and consents to all use and

manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent."[70]

CONTRACTOR NOTE
FAR clause 52.227-1 is routinely inserted in Government contracts, more often through incorporation by reference. Nevertheless, contractors developing technology under Government contracts should make sure the clause is inserted in their contracts to minimize risks of inadvertent infringements.

If this authorization and consent clause is found in a contract, a *contractor will be required to "flow down" the clause in all subcontracts* that exceed the simplified acquisition threshold.[71] Given that the Government, rather than the Government contractor, is the potential liable party in a claim that the contractor infringed on a patent or copyright during contract performance, whenever the authorization and consent clause is inserted into a contract, a contracting officer must also insert FAR clause 52-227-2, which requires contractors to alert the Government of any notice or claim of patent infringement arising from contract performance.[72] *That clause also is required to "flow down" to subcontracts* exceeding the simplified acquisition threshold.[73]

Notwithstanding the foregoing, the Government may nevertheless insert provisions requiring a contractor to reimburse it for liability for any patent infringement arising from certain commercial contracts.[74]

B. THE GOVERNMENT'S AUTHORIZED USE OF PATENTED OR COPYRIGHTED MATERIAL

Limited remedies against it aside, the Government's policy is to "honor[] rights in patents, data, and copyrights, and compl[y] with the stipulations of law in using or acquiring such rights."[75] Indeed, the Government requires contractors to obtain permission from copyright owners before including privately-owned copyrighted works in data required to be delivered under Government contracts.[76] Moreover, as further explained below, the federal acquisition rules enable the Government to anticipate when royalties are required to be paid on technology incorporated into Government deliverables and to pay those royalties when they are reasonable.

1. Disclosure of Royalties to Be Paid During Contract Performance

When a Government contracting officer is aware that an existing invention that is subject to a license agreement with the Government will be applicable to a prospective contract, the contracting officer must provide information about that license in the solicitation to offerors, including the number of the patent and the royalty rate.[77]

By the same token, contracting officers may require offerors to disclose in their solicitation responses if they are patent holders or licensees of a patent that the Government is required to pay a royalty on under an existing license agreement. This enables the Government

to evaluate the offeror's price in light of royalties already required to be paid to the offeror by the Government. Indeed, the Government may attempt to negotiate a price reduction if the offeror itself is a licensee that pays a lower royalty rate.[78]

In order for the Government to determine if the anticipated royalties to be paid are excessive or improper, solicitation provisions require contractors to provide royalty information.[79] Specifically, when a contractor's response to a solicitation indicates that the royalty amounts expected to be paid under a Government contract exceed $250, the contractor generally will be required to include in its response the following information for each royalty or license fee:

(1) Name and address of licensor.
(2) Date of license agreement.
(3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.
(4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.
(5) Percentage or dollar rate of royalty per unit.
(6) Unit price of contract item.
(7) Number of units.
(8) Total dollar amount of royalties.[80]

If requested by the contracting officer, the contractor may also be required to provide the actual license agreement and to identify any patent claims.[81] Before awarding a contract, the contracting officer will forward the information to the office within the federal contracting agency familiar with patent matters related to the contract, and that office will advise the contracting officer.[82]

Similarly, when a contracting officer is required to approve a subcontract and the prime contract requires disclosure of royalty information, the contractor will be required to provide the royalty information to the contracting officer who will forward it to the agency office familiar with patent matters. The contractor is not required to delay consent to the subcontract while waiting for advice from the advising agency office.[83]

Lastly, if at any time the contracting officer believes royalties under a prime contract or subcontract are improper or excessive, he or she may report the information to the contracting agency's office familiar with patent matters related to the contract and, thereafter, may take action to prevent payment of royalties, negotiate a reduction of royalties, and/or demand a refund.[84]

2. Patent Applications Containing Classified Information

Contractors have to be careful to ensure their patents or patent applications do not reveal classified information, since unauthorized disclosures may violate laws against espionage and be contrary to the interests of national security.[85]

Indeed, all classified solicitations and classified contracts, as well as solicitations and contracts under which work may reasonably result in a patent application containing classified materials, are required to include a FAR clause that mandates disclosure of a patent application that may contain classified material.[86]

Before filing a patent application that contains material classified as "Confidential," "Secret," or higher, a contractor is required to first transmit the patent application to a contracting officer.[87] Thereafter, the Government will determine the proper security classification of the patent application and whether, for reasons of national security, the application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed.[88] If the application contains any classified subject matter, the contracting officer will inform the contractor on how to transmit the application to the U.S. Patent Office in accordance with procedures provided by legal counsel.[89] If the material is classified "Secret" or higher, the contracting officer must make every effort to notify the contractor within thirty (30) days of the Government's determination.[90] Although the contractor must follow any instructions of the contracting officer regarding the manner of delivery of the patent application to the United States Patent Office, the contractor cannot be denied the right to file the application.[91] If the contracting officer fails to give any such instructions within thirty (30) days from the date of mailing or other transmittal of the proposed application, the contractor can go ahead and file the application.[92]

In filing a patent application with classified information, the contractor must also follow any applicable security regulations covering the transmission of classified subject matter.[93] In addition, when transmitting the patent application to the United States Patent Office, the contractor must, by separate letter, identify by agency and number the Government contract that requires security classification markings to be placed on the application.[94] Once the application is filed with the United States Patent Office, the contractor must then promptly provide to the contracting officer the serial number, filing date, and name of the country of the patent application.[95]

With regard to foreign patents, if the subject matter of a contract is classified for security reasons, the contractor cannot file an application or registration for a patent containing *any of the subject matter of the contract* in any country other than in the United States without first obtaining written approval of the contracting officer.[96]

Lastly, contractors should also be mindful that if their contract contains the FAR clause mandating disclosure of patent applications that may contain classified material, *they are required to include the substance of that clause in all subcontracts that cover or are likely to cover classified subject matter.*[97]

IV. SOFTWARE, DATA AND OTHER RECORDED INFORMATION

A. WHERE DEFENSE AND CIVILIAN CONTRACT RULES DIVERGE

Besides inventions, federal the acquisition regulations also set out the Government's rights over "data" - written and recorded information that includes computer software. However, while the rules on patent rights are mostly found in the FAR (and FAR clauses), the rules on data and software rights are found in both FAR and DFARS (and their clauses).[98] The DFAR rules applicable to contracts with DoD in many instances are nearly the identical to the rules under FAR applicable to contracts with civilian agencies. The differences that do arise, however, often are significant. Consequently, for ease of use, this paper will often explain the rules applicable to DoD and civilian agency contracts separately (and at times, perhaps, redundantly).

Lastly, civilian and defense contractors that are awarded contracts under the Government's Small Business Innovative Research program or the Small Business Technology Transfer program, which collectively will be referred to as "SBIR Contracts," are bound to yet a third iteration of rules under FAR and DFARS.[99] To be more precise, the rules on data and software rights under SBIR Contracts are set forth in data rights clauses in FAR and DFARS that are required to be inserted into contracts in lieu of standard data rights clauses.[100] Although the rules applicable to civilian or defense SBIR Contracts largely mirror the rules in FAR or DFARS that apply to non-SBIR contracts, where they differ, this paper will also discuss them separately.

B. TECHNICAL DATA AND OTHER DATA

The scope what constitutes "data" under FAR is expansive. "Data" comprises all "recorded information, regardless of form or the media on which it may be recorded" and *includes both technical data and computer software*. It does not, however, include information that is merely incidental to contract administration, like financial or cost information.[101]

In allocating rights between the Government and contractors, DFARS uses the term "technical data" instead of "data." Like the term "data" under FAR, "technical data" under DFARS includes "recorded information, regardless of form or method of recording, of a scientific or technical nature (including computer software documentation," and does not include information incidental to contract administration such as financial and/or management information.[102]

Importantly, however, unlike the term "data" under FARS, "technical data" under DFARS "*does not include computer software."*[103] Consequently, the rules applicable to DoD contracts that cover computer software and technical data are set forth in two separate subparts in DFARS.

CONTRACTOR NOTE
A fuller exploration of the distinction between patentable inventions and data is beyond the scope of this paper. There may, in fact, be instances in which a particular form of technology can be both an invention and data. At the risk of over-simplifying, however, the distinction can be framed as the difference between an idea or physical hardware that puts that idea to work and a writing (including a written software code) or recording (including audio and video).

1. Contract Must Identify Data Deliverables

a. Contracts with Civilian Agencies

The Government's stated policy with regard to procurements by civilian agencies is to determine, when feasible, its data requirements in time to include them in its solicitations. At times, those requirements may be revised during contract negotiations.[104] Whether they have been negotiated in advance or not, the contracting officer must specify in the contract all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data.[105] Moreover, when the contract involves a major system acquisition, the contracting officer must set out data requirements as separate contract line items.[106]

b. Contracts with DoD

Similarly, solicitations from, and contracts with, DoD must specify the type, quantity format, and form of media of technical data to be delivered under a contract and the delivery schedules for the technical data.[107] They also must require offerors to identify, before delivery when practicable, technical data that will be furnished with restrictions on the Government's rights.[108]

2. Additional Data May Be Ordered By Civilian Agencies

Under some procurements, such as experimental, developmental, research, or demonstration contracts, it may not be possible to anticipate all of a contracting agency's data requirements at the time a contract is awarded or even during contract performance. Consequently, contracting officers may insert the clause found at FAR 52.227-16 into the contract that enables them to subsequently order additional data as the contracting agency's actual requirements become known. Under that clause, in addition to the data that is specified in the contract to be delivered, a contracting officer may order *any data first produced or specifically used in the performance of the contract* at any time during contract performance or three (3) years after all items to be delivered under the contract have been accepted.[109] Contractors must be compensated for converting, reproducing, and delivering the additional data that is ordered.[110]

To minimize data retention storage costs, a contracting officer can relieve a contractor of the retention requirements for specific data items at any time during the retention period.[111]

In addition, a contracting officer may permit a contractor to identify and specify in the contract data that cannot be ordered for delivery if that data is not necessary to meet the Government's requirements. Lastly, a contracting officer may eliminate from the scope of the inserted FAR clause data that is "specifically used" if the data is not necessary to meet the Government's requirements.[112] Thus, striking the term from the inserted FAR clause would shield from subsequent orders data that, although not created during contract performance, simply was used in the performance of a contract. Any additional data that is ordered by the contracting officer will be subject to the data rights clause under the contract.[113]

CONTRACTOR NOTE
The insertion of FAR Clause 52.227-16, unless modified, necessarily requires contractors to store all data that is first produced or specifically used during a contract for several years, since all such data is subject to a subsequent contract order. Contractors may wish to negotiate with contracting officers to narrow the scope of data that can be subsequently ordered to data created under the contract rather than all data used by the contractor. In any event, if the clause is inserted into their contracts, contractors should take reasonable steps to preserve the data that may be subsequently ordered by the contracting officer.

3. The Government's Data and Software Rights Need to Be Identified

If a contract with a civilian agency requires data to be created, used or delivered, it must also specify the various rights of the contractor and the Government over that data:

> All contracts that require data to be produced, furnished, acquired, or used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that data. *Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract shall specify the data to be delivered.*[114]

The rules applicable to contracts with DoD also call for early identification of the Government's rights in noncommercial data and software. In particular, DFARS requires offerors to identify in their solicitation responses any technical data, software, and software documentation over which the contractor will assert restrictions, other than the contractor's copyright, on the Government's rights.[115]

The quoted FAR provision above explicitly draws an important distinction between data that is required to be delivered under a contract and data that is used, developed or created during contract performance but not a contract deliverable. As explained below, that distinction also exists in contracts with DoD as well, and is one that Government contractors must not quickly lose sight of. The mere fact that a contract contains data rights clauses that identify the government's rights are over certain kinds of data, does not make the data a contract deliverable or require all of that kind of data to actually be delivered. Implied also in

the FAR provision above is another notion that is made more explicit in other data rights provisions under FAR and DFARS: the Government's rights extend even to data and software that is not delivered or required to be delivered.

CONTRACTOR NOTE
Contractors should, in light of the scope of data and software that potentially is subject to Government rights, carefully examine agreements, such as nondisclosure agreements, technology transfer agreements, license agreements, and joint venture agreements with other non-Government parties if those agreements involve the data or software that may be generated, used, or delivered to the Government during contract performance. If the agreements do, contractors should scrutinize provisions in the agreements that could be construed to interfere with any anticipated Government rights.

4. The Government Rights May Depend on Timing and Funding

As explained in more detail below, the extent of the Government rights in data and software that are enumerated in Government contracts, and the ability of a contractor to assert restrictions on those rights often will depend on (1) when the data or software was developed or created – i.e., whether creation or development occurred during contract performance; and/or (2) whether development or creation was privately financed or financed by the Government – i.e., whether the source of funding can be traced to Government contract payments or reimbursements.

In contracts with civilian agencies, this distinction between Government financed and privately financed development or creation is found more specifically in FAR data rights clauses, which impose greater restrictions on the Government's rights in data and software that are "developed at private expense." Similarly, in contracts with DoD, the distinction is found in DFARS clauses that give the Government greater rights in data and software "developed exclusively with government funds" and narrower rights in data and software "developed exclusively at private expense."

Although FAR does not define the term "developed at private expense," the definitions of "developed exclusively at private expense" and "developed exclusively with government funds," under DFARS are instructive:

> "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.

"Developed exclusively with government funds" means development was not accomplished exclusively or partially at private expense.[116]

CONTRACTOR NOTE
To preserve every opportunity to protect software and data, contractors should have in place systems to track when new software and data is created or developed, who created or developed the new software and data, and the source of the funds used to develop or create the software and data, including by using segregated accounts to pay for development costs and expenses.

5. The Government May Not Insist On Greater Rights as a Contract Condition

To prevent Government overreaching, the rules under DFARS and FAR prohibit contracting officers from requiring contractors, as a condition of a procurement, to relinquish greater rights in software or data than the Government is entitled to.[117]

C. THE GOVERNMENT'S UNLIMITED RIGHTS IN DATA AND SOFTWARE

The rules that apply to contracts with civilian agencies and with DoD, including SBIR Contracts, each establish "unlimited rights" in data and software and, as explained below, define those rights nearly identically: generally, the rules permit the Government to use, copy and distribute the data in any manner and to allow others to do the same.

The kind of unlimited rights data and unlimited rights software subject to these expansive rights, however, differs depending on which type of contract the contractor is performing work under.

1. Contracts with Civilian Agencies

a. What Kind of Data and Software?

i. Non-SBIR Contracts

In contracts with civilian agencies that are not SBIR Contracts, the Government has unlimited rights in data (including *computer software*) that is *not a copyrighted work* and falls within either of three specific categories of data delivered or produced under a contract or within a fourth "catch-all" category of data delivered under a contract:

(1) data *first produced in the performance of a contract* (except if it constitutes minor modifications to limited rights data or restricted computer software);
(2) form, fit, and function[118] data *delivered* under the contract;
(3) data (except if included with restrictive software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes *delivered* or *furnished* for use under a contract; and

(4) all other data *delivered* under a contract other than limited rights data or restricted computer software.[119]

The term "first produced" in the first category described above is not defined in FAR. However, the last catchall category already covers data that is *delivered* in the performance of a contract. Moreover, the same term is when describing a contracting officer's right to order – in addition to data specified in a contract to be delivered, and after all contract deliverables have been accepted – data that was "first produced" or used during contract performance (see Section B.2. above). Thus, "first produced" under FAR seems intended to mean first created or developed but not necessarily delivered.

ii. SBIR Contracts

As for SBIR Contracts with civilian agencies, the Government's unlimited rights apply also to three specific categories and one "catch-all" category of uncopyrighted data:

(1) data specifically identified in the contract *as data to be delivered without restriction*;
(2) form, fit, and function[120] data *delivered* under the contract;
(3) data *delivered* under the contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes *delivered* or *furnished* for use under this contract; or
(4) all other data *delivered* under the contract other than SBIR Data (see Section F.1. below), limited rights data, or restricted computer software. [121]

Thus, SBIR Contracts with civilian agencies do not expose all uncopyrighted data that is *first produced* during contract performance to the Government's unlimited rights. Instead, unlimited rights under an SBIR Contract apply to a narrower category of data produced – data that is not only specifically identified in the contract to be delivered, but that is specifically required to be delivered without any restrictions.

CONTRACTOR NOTE
As a result, for example, new data or software created during the performance of a contract with a civilian agency that is not identified as a contract deliverable and not delivered to the Government would, nevertheless, be subject to the Government's unlimited rights under a non-SBIR contract but not under an SBIR Contract.

b. What Kind of Rights?

The scope of the Government's unlimited rights under contracts with civilian agencies, including SBIR Contracts, includes the rights to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.[122]

2. Contracts with DoD

a. What Kind of Data and Software?

i. Non-SBIR Contracts

In contracts with DoD, other than SBIR Contracts, the Government acquires unlimited rights in:

(1) Computer software *developed exclusively with Government funds*, and technical data pertaining to an item, component, or process which has been or will be *developed exclusively with Government funds*;

(2) Technical data that comprises studies, analyses, test data, or similar data *produced in the performance of a contract* when the study, analysis, test, or similar work was specified as an element of performance;

(3) Technical data that is *created exclusively with Government funds* in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(4) Technical data that is form, fit, and function data;

(5) Technical data that is necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(6) Corrections or changes to computer software or technical data *furnished* to the contractor by the Government;

(7) Computer software, computer software documentation, or technical data that is publicly available or has been released or disclosed by the contractor or 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 software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(8) Computer software, computer software documentation, or technical data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations;

(9) Computer software documentation *required to be delivered* under the contract;

(10) Computer software, software documentation or technical data *furnished to the Government* under any Government contract or subcontract thereunder, with—

(a) Restricted rights in computer software, government purpose license rights, limited rights in technical data, government purpose license rights, and the restrictive condition(s) has/have expired; or

(b) Government purpose rights and the contractor's exclusive right to use such computer software, software documentation, or data for commercial purposes has expired.[123]

ii. SBIR Contracts

In contracts with DoD that are SBIR Contracts, the Government acquires unlimited rights in a narrower subset of data, software and software documentation than under non-SBIR contracts. Specifically, the Government's unlimited rights extend only to technical data, including computer software documentation, or computer software *generated under the SBIR Contract* that are —

(1) Form, fit, and function data;
(2) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);
(3) Corrections or changes to Government-furnished technical data or computer software;
(4) Otherwise publicly available or has 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;
(5) Data or software in which the Government has acquired previously unlimited rights under another Government contract or through a specific license; and
(6) SBIR Data upon expiration of the SBIR data rights period.[124]

b. What Kind of Rights?

The rules applicable to contracts with DoD, including SBIR Contracts, define "unlimited rights" as expansively as under FAR to include the right to use, modify, reproduce, perform, display, release, or disclose, in whole or in part, in any manner, and for any purpose whatsoever, *and to have or authorize others to do so*.[125]

D. THE GOVERNMENT'S LIMITED RIGHTS IN DATA DEVELOPED AT PRIVATE EXPENSE

In some instances, a Government contract may either explicitly or implicitly require a contractor to use, deliver, or incorporate into deliverables software or data sometimes referred to by contractors as "background IP," "background technology," "background data," or "background data"– i.e., pre-existing data or software developed before, or not in connection with, a Government contract.

When the development of this background data or software is financed at private expense rather than with Government funds under a Government contract, the data or software under DoD and civilian government contracts, whether they are SBIR Contracts or not, are exposed to a narrower set of Government rights than the unlimited rights described above: data will generally be subject to the "limited rights," while computer software will generally be subject to "restricted rights."

1. Contracts with Civilian Agencies

a. What Kind of Data?

In contracts with civilian agencies, including SBIR Contracts, "limited rights data" is data, *other than computer software, developed at private expense* that has been treated with some level of secrecy or confidentiality.

i. Non-SBIR Contracts

Specifically, except as explained in the next paragraph, in contracts with civilian agencies "limited rights data" is data, *other than computer software*, that

(1) pertain to an item, component or process *developed at private expense*, and
(2) embody trade secrets, or are commercial or financial and confidential or privileged.[126]

ii. SBIR Contracts

In the case of a civilian agency SBIR Contract, or a *contract that does not require the development, use, or delivery of items, components, or processes* that are intended to be acquired by or for the Government, limited rights data is defined more simply as *data*, *other than computer software*, *developed at private expense* that embody trade secrets or are commercial or financial and confidential or privileged.[127]

b. What Kind of Rights?

i. SBIR Contracts with Civilian Agencies

Under SBIR Contracts with civilian agencies, a contractor may withhold limited rights data from delivery as long as that data does not fall within any of the three specific categories of unlimited rights data under the SBIR data rights rules – i.e., the data is not (i) uncopyrighted data specifically identified as a contract deliverable without restrictions; (ii) form, fit, and function data delivered under the contract; or (iii) data that constitutes manuals or instructional and training materials for items delivered to the Government (see Section C.1.a.ii. above).[128] A contractor, instead, must identify the limited rights data withheld and provide form, fit, and function data instead.[129]

ii. Non-SBIR Contracts With Civilian Agencies

Under a contract with a civilian agency that is not an SBIR contract, limited rights data will be subject to one of two kinds of limited rights depending on whether the contracting officer modifies the standard data rights clause typically inserted into a civilian agency contract.[130]

(A) Right to Withhold Limited Rights Data

Under the standard data rights clause for civilian agency contracts, a contractor is allowed to withhold limited rights data from delivery as long as that data does not fall within any of the three specific categories of unlimited rights data – i.e., the data is not (i) first produced during contract performance; (ii) form, fit, and function data delivered under the contract; or (iii) data that constitutes manuals or instructional and training materials for items delivered to the Government (see Section C.1.a.i. above).[131] A contractor may identify the data withheld and deliver form, fit and function data instead.[132]

(B) Mandatory Delivery of Limited Rights Data

If the contracting officer determines that it is necessary to obtain limited rights data, the contracting officer may modify the standard data rights clause and insert an alternate provision that requires delivery of the data.[133]

To obtain delivery of the data, the contract may specify the data to be delivered or the contracting officer may later, during contract performance, request in writing the limited rights data that has been withheld or identified to be withheld.[134]

Once delivered, the limited rights data may be reproduced and used by the Government, but will not, without written permission of the contractor, be used for purposes of manufacture nor disclosed outside the Government, unless the contracting officer has specified exceptions to this disclosure prohibition and conditions the Government's disclosure on a prohibition against further use and disclosure by any non-Government recipient.[135]

To determine whether to insert a clause requiring delivery of limited rights data in a contract in the first place, contracting officers are permitted to include in their solicitations a clause requesting that offerors state whether limited rights data is likely to be delivered.[136]

2. Contracts with DoD

a. What Kind of Data?

Unlike under civilian agency contracts, there is no requirement in contracts with DoD that technical data be treated with some level of secrecy or confidentiality to be deemed limited rights data.

i. Non-SBIR Contracts

As under FAR, limited rights data under contracts with DoD does not include computer software, since computer software falls outside DFARS' definition of technical data to begin with. In DoD contracts that are not SBIR Contracts, the Government obtains limited rights in technical data:

(1) That pertain to items, components, or processes *developed exclusively at private expense*, except when the technical data qualifies as unlimited rights data under one of the unlimited rights data categories that can apply to technical data developed *exclusively at private expense*; or
(2) Created *exclusively at private expense* in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.[137]

ii. SBIR Contracts

Under DoD SBIR Contracts, the Government has limited rights in technical data that is (1) *not generated* under the SBIR contract, (2) pertains to items, components or processes *developed exclusively at private expense*, and – to underscore the importance of marking data – (3) marked, in accordance with the required marking instructions and with the required legend.[138]

b. What Kind of Rights?

i. Non-SBIR and SBIR Contracts

Unlike limited rights data under FAR, limited rights technical data under contracts with DoD, whether they are SBIR Contracts or not, is not confined to trade secrets or confidential data. It is, therefore, not surprising that the rules do not permit the contractor to withhold limited rights technical rights data, but only limit what the Government can do with the limited rights technical data when it receives it.

More specifically, the Government's "limited rights" only include use and disclosure of the technical data *within the Government*. The limited rights data may not be used, released, or disclosed outside the Government without the permission of the contractor, unless the use, release or disclosure is:

(1) Necessary for emergency repair and overhaul;
(2) To a covered Government support contractor; or
(3) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or informational purposes;[139] or
(4) 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.[140]

The contractor or subcontractor asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data.[141] The rules applicable to DoD contracts that are not SBIR contracts, however, do not require prior notification of an intended release, disclosure, or use in the cases of an *emergency repair or overhaul*, but instead require notification as soon as practicable.[142]

The recipient of the technical data under DoD SBIR Contracts and non-SBIR contracts must be subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data.[143]

E. THE GOVERNMENT'S RESTRICTED RIGHTS IN SOFTWARE DEVELOPED AT PRIVATE EXPENSE

As stated, the rules applicable to DoD and civilian agency contracts defining the scope of "limited rights data" carve out computer software. Computer software that otherwise might qualify as limited rights data is dealt with separately as "restricted computer software" that is subject to "restricted rights."

1. Contracts with Civilian Agencies

a. What Kind of Software?

i. Non-SBIR and SBIR Contracts

In a contract with a civilian agency, including an SBIR contract, "restricted computer software" is computer software that is *developed at private expense* and that is (i) a trade secret, (ii) commercial or financial and confidential or privileged, or (iii) is copyrighted computer software."[144]

b. What Kind of Rights?

i. SBIR Contracts

Under SBIR contracts with civilian agencies, the Government's restricted rights enable a contractor to withhold restricted computer software from delivery as long as that software does not fall within any of the three specific categories of unlimited rights data under the SBIR data rights rules – i.e., the data is not (i) uncopyrighted data specifically identified as a contract deliverable without restrictions; (ii) form, fit, and function data delivered under the contract; or (iii) data that constitutes manuals or instructional and training materials for items delivered to the Government (see Section C.1.a.ii. above).[145] A contractor, instead, must identify the computer software withheld and provide form, fit, and function data instead.[146]

ii. Non-SBIR Contracts

As, with limited rights data, a civilian agency contract that is not an SBIR Contract, will be subject to one of two kinds of restricted rights depending on whether the contracting officer modifies that standard data rights clause that is inserted into the contract.

(A) Right to Withhold Restricted Computer Software

Under the standard data rights clause applicable to civilian agency contracts, a contractor is allowed to withhold restricted computer software from delivery as long as that data does not fall within any of the three specific categories of unlimited rights data – i.e., the data is not (i) first produced during contract performance; (ii) form, fit, and function delivered under the contract; or (iii) data that constitutes manuals or instructional and training materials for items delivered to the Government (see Section C.1.a.i. above).[147] A contractor may identify the computer software withheld and deliver form, fit and function data instead.[148]

(B) Mandatory Delivery of Limited Rights Data

Alternatively, if the contracting officer determines that it is necessary to obtain restricted rights computer software, the contracting officer may modify the standard data rights clause and insert an alternate provision that requires delivery of the software.[149] In order to obtain delivery of the restricted computer software, the Government must either specify in the contract the restricted computer software to be delivered or submit a written request during contract performance requesting the delivery of restricted computer software that was identified and withheld by the contractor.[150]

When restricted computer software is required to be delivered, the contract must state that the software will not be used or reproduced by the Government, or disclosed outside the Government, except the contract may permit the computer software to be—

(1) Used or copied for use with the computers for which it was acquired, including use at any Government installation to which the computers may be transferred;
(2) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;
(3) Reproduced for safekeeping (archives) or backup purposes;
(4) Modified, adapted, or combined with other computer software, provided that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;
(5) Disclosed to and reproduced for use by support service contractors or their subcontractors, in accordance with paragraphs (1) through (4); and
(6) Used or copied for use with a replacement computer.[151]

A contracting officer may otherwise specify different rights in the contract that are consistent with the Government's purpose for and need to acquire the software.[152] For example, the contracting officer may consider an agency's networking needs and need to use software from remote terminals, and may apply a different scope of restricted rights to accompanying software documentation.[153]

As with limited rights data, to help contracting officers anticipate the need to insert the alternate clause requiring delivery of restricted computer software into their contracts, FAR permits contracting officers to include in their solicitations a request that an offeror state whether restricted computer software is likely to be delivered.[154]

2. Contracts with DoD

a. What Kind of Software?

i. Non-SBIR Contracts

In defense contracts, restricted rights computer software is noncommercial computer software that is required to be delivered or otherwise provided to the Government under the contract with DoD and that is *developed exclusively at private expense*.[155]

ii. SBIR Contracts

SBIR defense contracts also extend restricted rights to noncommercial computer software that is *developed exclusively at private expense* and that is required to be delivered or provided to the Government under the contract. However, the SBIR rules impose one additional condition for restricted rights to apply – the computer software must not be generated (i.e., first created) under the SBIR Contract.[156] Indeed, software generated under an SBIR Contract that does not fall within one of the narrow categories of unlimited rights data under that type of contract (see Section C.2.a.ii above) are subject to SBIR Data Rights (see Section F.2 below).

b. What Kind of Rights?

i. Non-SBIR and SBIR Contracts

The Government's restricted rights under contracts with DoD, including SBIR Contracts, in *noncommercial computer software* includes rights to –

(1) Use a computer program with one computer at one time, and accessed from no more than one termination or CPU unless otherwise allowed under the SBIR Contract;
(2) Transfer a computer program to another Government agency if the transferor destroys all copies of the program and related computer software documentation in and notifies the licensor of the transfer;
(3) Make the minimum number of copies required for safekeeping (archive), backup, or modification purposes;
(4) Modify the computer software provided that the Government may—
    (A) Use the modified software only as permitted in paragraphs (1) and (3);
    (B) Not release or disclose the modified software except as permitted in paragraphs (2), (5), and (6);

(5) Permit other contractors or subcontractors performing service contracts in support of the defense contract or a related contract to use the software to diagnose and correct deficiencies in a computer program, to modify 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 defense contractor that a release or disclosure to other contractors or subcontractors was made;

(B) Such other contractors or subcontractors are subject to a use and non-disclosure agreement under DFARS or are Government contractors receiving access to the software for performance of a Government contract that contains a DFARS clause limiting further use and disclosure;

(C) The Government does not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government, for any other purpose; and

(D) The use is subject to the limitations in paragraphs (1) through (3);

(6) Permit other contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under the Government contract 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 use and non-disclosure agreement specified under DFARS or is a Government contractor receiving access to the software for performance of a Government contract that contains a DFARS clause limiting further use and disclosure;

(B) The Government does not allow the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government for any other purpose; and

(C) Such use is subject to the limitations in paragraphs (1) through (3); and

(7) Permit covered Government support contractors in the performance of covered Government support contracts that contain a DFARS clause limiting further use and disclosure, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

(A) The Government does 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 for any other purpose; and

(B) Such use is subject to the limitations in paragraphs (1) through (4).[157]

F. THE GOVERNMENT'S SBIR DATA RIGHTS IN DATA AND SOFTWARE

A detailed review of the SBIR and STTR programs is outside the scope of this paper. Briefly, however, the SBIR and STTR programs are unique, competitive programs that encourage small businesses to develop new technologies with a potential for

commercialization. Under the SBIR program, competitive awards are made by participating federal agencies to small businesses that respond to solicitations aimed at procuring solutions for the Government's technology needs. The STTR program expands these opportunities to small businesses that collaborate with research institutions.

Under both programs, the Government is required to substitute standard data rights clauses with SBIR data rights clauses that restrict the Government's rights over software and data generated under those SBIR Contracts in three ways. First, as explained, the scope of the data and software generated during contract performance that is exposed to the Government's unlimited rights is much more narrowly confined than in non-SBIR contracts (see Sections C.1.a.ii. and C.2.a.ii. above). Second, as indicated (see Sections D.1.b. and E.1.b. above) the SBIR data rights clauses that are substituted for standard clauses in civilian contracts do not provide for the Government to require delivery of restricted rights software or limited rights data. Third, as explained below, the software and data generated under SBIR Contracts with DoD and civilian agencies are subject to a protection period in which there are restrictions over the Government's use, disclosure and reproduction.

1. SBIR Contracts with Civilian Agencies

a. What Kind of Data and Software?

In SBIR Contracts with civilian agencies, SBIR Data is data that is: (i) *first produced* by a small business contractor *in the performance of an SBIR Contract*; (ii) not generally known or made available to others by the contractor; and (iii) not already available to the Government.[158] In other words, in an SBIR Contract with a civilian agency, SBIR Data is comprised of the data that in many instances would otherwise be subject to the Government's unlimited rights in a contract that is not an SBIR Contract.

b. What Kind of Rights?

The "SBIR rights" that the Government acquires over SBIR Data in a contract with a civilian agency permits the Government to use the SBIR Data only for Government purposes for a period of four (4) years after all items to be delivered under a contract have been accepted.[159] During that protection period, the SBIR Data cannot be disclosed outside the Government (including disclosure for procurement purposes) without permission of the contractor, except that the SBIR Data can be disclosed to support contractors.[160]

After the four (4) year (or longer if extended) protection period expires, the Government has a paid-up license to use, and to authorize others to use on its behalf, the data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of the data by third parties.[161]

2. SBIR Contracts with DoD

a. What Kind of Data and Software?

In an SBIR Contract with DoD, SBIR Data is all technical data or computer software that the Government does not have unlimited rights to under the SBIR Contract with DoD, and that is generated under the SBIR contract during the period beginning from the time of the contract award and ending five (5) years after completion of the SBIR project.[162]

b. What Kind of Rights?

During the protection period, technical data and software that are SBIR Data are treated as though they were developed *exclusively at private expense*. More precisely, technical data is subject to the Government's limited rights (see Section D.2.b.i.) under the contract and computer software is subject to the Government's restricted rights (see Section E.2.b.i.) under the contract.[163]

After the SBIR Data protection period expires, the Government's rights revert to the type of rights normally granted to the Government over software and technical data generated during contract performance. Specifically, the Government thereafter retains unlimited rights in the software and data (see Section C.2.a.ii.).[164]

G. GOVERNMENT PURPOSE AND OTHER LESSER RIGHTS

1. Contracts with Civilian Agencies Involving Cosponsored Activities

a. When Funding Contributions Are Not Segregable

The rules applicable to contracts with civilian agencies, including SBIR Contacts, allow a contracting officer to limit the acquisition of, or acquire less than unlimited rights in, *data developed and delivered* under a contract involving certain *cosponsored activity*. Specifically, acquisitions or data rights can be limited when a contract involves cosponsored research and development that require the contractor to make substantial contributions of funds or resources, and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable.[165]

The rules do not specify the level of shared contributions that will trigger the limitations on the Government's rights. However, as guidance, the rules indicate that it may be appropriate for a contract to limit the Government's rights when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately fifty (50) percent of the total cost of the contract.[166]

Although the rules do not prescribe a certain clause to be used, they advise that the constricted rights must, at a minimum, assure use of the data for agreed-to Governmental purposes and address any disclosure limitations or restrictions to be imposed on the data.[167]

b. When Funding Contributions Are Segregable

When funding contributions to a cosponsored activity are specified by a contract and readily segregable, resulting data can be treated as limited rights data or restricted computer software in accordance with the rules that apply when limited rights data and restricted computer software are required to be delivered. Alternatively, if this treatment is inconsistent with the purpose of the contract, rights to the data may be treated in a manner consistent with the circumstances in which the contributions are not segregable (see Section G.1.a. above), if the contractor and the agency agree to these terms and they are incorporated into the contract.[168]

2. Contracts with DoD Involving Mixed Funding

The rules applicable to DoD contracts similarly permit contracting officers to apply more limited restrictions to the Government's rights over data and software "developed with mixed funding."

a. What Kind of Software and Data?

> The Government obtains "Government purpose rights" in technical data —
> (1) That pertains to items, components, or processes *developed with mixed funding* except when the Government is entitled to unlimited rights; or
> (2) *Created with mixed funding* in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.[169]

With regard to computer software, except if the software is subject to unlimited rights, the Government obtains Government purpose rights in computer software *developed with mixed funding*.[170]

"Developed with mixed funding" is defined under DFARS to mean the development was funded 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.[171]

b. What Kind of Rights?

For a period beginning from the time the Government contract is executed and five (5) years after, the Government may not use for commercial purposes, or authorize other persons to use for commercial purposes, any technical data or computer software with Government

purpose rights markings. The Government also cannot not release or disclose data or software in which it has government purpose rights to any person, or authorize others to do so, unless—

(1) Before the release or disclosure, the intended recipient is subject to a use and disclosure agreement specified under DFARS; or

(2) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains a specified DFARS clause limiting use and further disclosure.[172]

Although the default clause under DFARS provides a five (5) year period during which the Government purpose rights are in effect, the parties are free to negotiate a longer or shorter period.[173] Once the Government purpose rights protection period expires, the technical data and software become subject to the Government's unlimited rights, including the right to authorize others to use the data and software for commercial purposes.[174]

H. SPECIFICALLY NEGOTIATED RIGHTS UNDER CONTRACTS WITH DOD

The Government and the contractor may negotiate specific licenses in contracts with DoD if they agree to modify the standard license rights granted to the Government or if the Government wants to obtain rights in computer software or technical data in which it does not rights.[175]

1. Negotiating Rights to Technical Data

When the Government's has unlimited rights or Government purpose rights in technical data *the Government may accept lesser rights* but the negotiated rights may not be less than limited rights.[176] Any negotiated license rights must cover the rights of the Government to release or disclose data to other persons or authorized users.[177] If, on the other hand, the Government needs additional rights in data acquired with Government purpose or limited rights the contracting officer must negotiate with the contractor to determine whether there are acceptable terms for transferring such rights.[178] Generally, these negotiations should be conducted only when there is a need to disclose the data outside the Government or if the additional rights are required for a competitive reprocurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights.[179] Any negotiated rights in a license agreement must be made part of the contract.[180]

2. Negotiating Rights to Computer Software

When negotiating to obtain, relinquish, or increase the Government's rights in computer software, the contracting officer must consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors which may have relevance for a particular procurement.[181] If negotiating to relinquish rights in computer software documentation, the contracting officer must consider the administrative burden associated with protecting documentation subject to restrictions from unauthorized release or

disclosure.[182] Any negotiated license rights must cover the Government's right to use, modify, reproduce, release, perform, display, or disclose the software or documentation and the extent to which the Government may authorize others to do so. Any negotiated rights in a license agreement must be made part of the contract.[183]

CONTRACTOR NOTE
Contractors should seriously consider negotiating for less than unlimited rights, particularly in instances in which a modification to the Government's rights will not impact the contractor's ability to meet requirements under the contract with DoD. One such instance may be when computer software is developed exclusively with Government funds but is not actually required to be delivered.

I. THE GOVERNMENT'S RIGHTS IN COPYRIGHTED DATA

1. Contracts with Civilian Agencies

a. Data Produced During Contract Performance

As stated, in contracts with civilian agencies the Government generally obtains unlimited rights in data (including software) first produced or delivered to the Government during contract performance that is not a copyrighted work. As explained below, a government contractor cannot, however, completely shield new data created under a Government contract simply by asserting a copyright over it.

i. Permission Generally Required Before Asserting A Copyright

To begin with, contractors must generally obtain permission of the contracting officer before asserting a right in any copyrighted work that contains data first produced during the performance of a Government contract.[184] However, contractors can assert a copyright, without prior approval, in technical or scientific articles based on or containing data that is published in academic, technical or professional journals, symposia proceedings and similar works.[185]

Any request for permission to assert a copyright must be in writing and must identify the data or furnish copies of the data, as well as a statement of the intended publication or dissemination media or other purpose for which permission is requested.[186]

A contracting officer should grant the request when copyright protection will enhance the appropriate dissemination or use of the data unless the —

(1) Data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;
(2) Data is intended primarily for internal use by the Government;
(3) Data is of the type that the agency itself distributes to the public under an agency program;

(4) Government determines that limitation on distribution of the data is in the national interest; or
(5) Government determines that the data should be disseminated without restriction.[187]

A contractor that asserts a copyright in data first produced during contract performance must place an applicable copyright notice (found in 17 U.S.C. § 401 or § 402) on the data, along with an acknowledgment of the Government's sponsorship.[188] *The failure to do so could result in the data being treated as unlimited rights data.*[189]

ii. When Permission Is Not Required Before Asserting A Copyright

A contracting officer's permission is not required before a contractor asserts a copyright in works produced during contract performance if the contract is for *basic or applied research to be performed solely by colleges and universities,* unless: (1) the contract involves management or operation of Government facilities; (2) the contract and subcontract is in support of programs conducted at Government facilities; (3) international agreements require otherwise; or (4) the purpose of the contract is for development of software to be distributed to the public by or on behalf of the Government.[190] In addition, a contracting officer's prior permission may not be required if an agency determines it is not necessary.

iii. The Government's Rights in Copyrighted Material

Notwithstanding any copyright assertions, contractors are still required to grant the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, with respect to all data (*other than computer software*) first produced in the performance of a contract.[191] As for *computer software* first produced under a Government contract, the scope of the Government's copyright license includes all of the rights applicable to data except the right to distribute to the public.

A civilian agency may obtain a copyright license of a different scope if the contracting officer determines, after consulting with legal counsel, that such a license will substantially enhance the dissemination of any data first produced under the contract, or if such a license is required to comply with international agreements.[192] If an agency obtains a different license, the contractor must clearly state the scope of that license in a conspicuous place on the medium on which the data is recorded.[193]

Lastly, as noted above, under a civilian agency contract, copyrighted computer software that is *developed at private expense* is subject to the Government's restricted rights (see Section E.1.a.i.).

CONTRACTOR NOTE
The Government's copyright license differs from its unlimited rights in at least one important respect: the Government's unlimited rights permit the Government to freely give third parties the same rights that the Government acquires, but the Government's copyright license does not. Consequently, contractors should consider asserting copyrights over data and software that may be used or delivered, and become subject to unlimited rights, under a Government contract.

b. Data Not Produced During Contract Performance

With respect to data that is not first produced during contract performance, contractors cannot deliver the data without either acquiring for or granting to the Government a copyright license for the data (the scope of which is described below) or obtaining permission from the contracting officer to do otherwise.[194] The copyright license that the Government obtains will normally be the same as the license granted with respect to data first produced during contract performance, as described above. A contracting agency may obtain a license of a different scope if the agency determines, after consultation with its legal counsel, that a different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government.[195]

If a contractor delivers copyrighted computer software not first produced under the contract, the contractor must grant to Government a license that gives the Government the same rights as those that apply when restricted computer software is required to be delivered to the Government (see Section E.1.b.ii above).[196] This license must be set forth in the contract.[197]

2. Contracts with DoD

a. Data Produced During Contract Performance

Unlike contracts with civilian agencies, contracts with DoD do not exclude copyrighted technical data or software from the category of data and software that may be exposed to the Government's unlimited rights. Contractors are, therefore, required to grant or obtain for the Government license rights which permit the Government to exercise its unlimited rights under the contract's data rights provisions – i.e., to reproduce data, computer software, or software documentation, to distribute copies of the data, software or documentation, to publicly perform or display the data, software or documentation, and through the right to modify the data, software or documentation, to prepare derivative works.[198]

If a defense contractor or defense agency wishes to negotiate copyright license rights that are different than unlimited rights, the extent of the copyright license must negotiated at the same time as any negotiations over the standard data rights license.[199] Moreover, the negotiated copyright license in computer software that is granted to the Government must not be less than restricted rights, and the negotiated copyright license in technical data or

computer software documentation that is granted to the Government must not be less than limited rights in technical data.[200]

b. Data Produced by Third Parties

Defense contractors are not permitted to incorporate a third party's copyrighted data or computer software into a technical data or software deliverable item unless they have obtained an appropriate license in favor of the Government or others acting on the Government's behalf, or have obtained the contracting officer's written approval to do so in the absence of a copyright license in favor of the Government.[201] Contracting officers must grant approval to use third party copyrighted data or software in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a copyright license.[202]

J. THE GOVERNMENT'S RIGHTS IN TECHNICAL DATA SUBMITTED IN PROPOSALS

1. Contracts with Civilian Agencies

The Government does not automatically inherit unlimited rights in technical data contained in a proposal, even when a proposal is incorporated by reference in a contract.[203] Rather, the Government can only acquire unlimited rights in technical data previously submitted to it in a successful proposal if the contracting officer inserts a FAR clause found at FAR 52.227-23 in the contract the parties enter into.[204] If a proposal is incorporated by reference in a contract, a contracting officer is, in fact, required to insert that FAR clause into the awarded contract.[205]

Under the FAR clause, a contractor may identify pages in the proposal containing technical data that is to be excluded from the grant of unlimited rights. While this exclusion is not dispositive of the protective status of the excluded technical data, the data and any commercial or financial information in the proposal will remain subject to FAR's policies on proposal information – namely, they will only be used for evaluation purposes.[206] If the Government should need to acquire rights in the excluded data during contract performance, the Government is mandated to give consideration to acquiring the data with limited rights, if the data qualifies.[207]

2. Contracts with DoD

In DoD contracts and solicitations, a contracting officer is required to insert a clause under which offerors agree that by submission of their offers, the Government may reproduce the bid or proposal, or any portions thereof, to the extent necessary to evaluate the offer.[208]

Under the DFARS clause, the offerors agree that, except with regard to data that came from the Government itself, the Government shall use information contained in the bid or proposal only for evaluational purposes and shall not disclose, directly or indirectly, the

information to any person including potential evaluators, unless that person has been authorized by the head of the agency, his or her designee, or the contracting officer to receive the information.[209] After a contract has been awarded, the Government has, except as provided below, the right to use, modify, reproduce, release, perform, display, or disclose information contained in the contractor's bid or proposal within the Government. The Government cannot release, perform, display, or disclose the information outside the Government without the contractor's written permission.[210]

a. Exceptions to Restrictions on Government's Use of Proposal Information

The Government's rights with respect to technical data or software contained in a bid or proposal *provided to the contractor by the Government itself* are subject only to restrictions on use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by a developer or licensor of data or software.[211]

In addition, the Government's rights to use, modify, reproduce, release, perform, display, or, disclose information contained in a bid or proposal, including technical data or computer software, and to permit others to do so, shall not be restricted in any manner if the information has been released or disclosed to the Government or to other persons without restrictions, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the information to another party or the sale or transfer of some or all of a business entity or its assets to another party.[212]

b. Contractors Must Flow Down Government's Rights

A contractor is required to include the DFARS clause under which it agrees to the Government's use and reproduction of bid or proposal technical data in all subcontracts or similar contractual instruments and to require its subcontractors or suppliers also to do so.[213]

K. THE GOVERNMENT'S RIGHTS IN COMMERCIAL SOFTWARE AND DATA

1. Contracts with Civilian Agencies

In contracts with civilian agencies, the Government acquires limited rights in confidential or privileged commercial data *developed at private expense* and restricted rights in confidential or privileged commercial software *developed at private expense.* FAR sets forth additional rules that apply to contracts for the acquisition of other commercial computer software.

a. Commercial Computer Software

Whenever a contract, other than under the GSA's Multiple Award Schedule (i.e., a "GSA Schedule") is for the acquisition of commercial computer software, although *no specific FAR*

clause has to be used, the contract must specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software.[214]

As for the scope of rights the Government acquires, generally, commercial computer software or commercial computer software documentation must be acquired under a license customarily provided to the public, as long as the license is consistent with Federal law and satisfies the Government's needs.[215] If there is any confusion about whether the Government's needs are satisfied or the standard commercial software license is consistent with Federal law, a contracting officer can insert into a contract a special clause, found at FAR 52.227-19.[216] That clause states that notwithstanding contrary provisions in a standard commercial license, the Government will have certain rights to use, duplicate or disclose commercial computer software; the clause then enumerates the specific rights that the Government acquires over use, disclosure, modification and reproduction.[217]

A contracting officer may, nevertheless, negotiate additional or lesser rights than under the clause, for example when necessary for computer networking purposes, but the negotiated rights must be set forth in the contract.[218] In addition, if the computer software is to be acquired with unlimited rights, the contract must indicate that; a contract must also adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.[219]

If the contract incorporates, refers to, or uses a standard commercial lease, license, or purchase agreement, the contracting officer must make sure that the agreement is consistent with the preceding paragraph.[220] Indeed, FAR advises contracting officers to exercise caution in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts.[221] Any inconsistencies in a vendor's standard commercial agreement must be addressed in the government contract and the contract terms must take precedence over the vendor's standard commercial agreement. If the FAR clause mentioned above is used, inconsistencies in the standard commercial agreement regarding the Government's right to use, reproduce or disclose the computer software will be reconciled by that clause.[222]

Lastly, if a contractor acquires *restricted computer software* from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted computer software in a collateral agreement incorporated in and made part of the contract.[223]

2. Contracts with DoD

a. Commercial Data

When DoD acquires a commercial item or process, it can only acquire the technical data related to the item or process that is customarily provided to the public, except technical data that:

(1) Is form, fit, or function data;
(2) Is required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand-alone unit or as a part of a military system, when the data is not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or
(3) Describes the modifications made at Government expense to a commercial item or process in order to meet the requirements of a Government solicitation.[224]

Indeed, in order to encourage contractors to use commercial products to meet DoD's requirements, the DoD contracting rules provide that, except for the technical data described in the preceding paragraph above, offerors and contractors cannot be required to—

(1) Furnish technical information related to commercial items or processes that is not customarily provided to the public; or
(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data pertaining to commercial items or processes, except if there is a transfer of rights that is mutually agreed upon.[225]

As for the scope of DoD's rights in technical data relating to commercial items or processes, DoD is permitted to use, modify, reproduce, release, perform, display, or disclose the technical data only within the Government. The technical data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul, and for use by covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor's written permission. Those restrictions do not apply to the three categories of technical data that do not have to be of the kind customarily provided to the public (mentioned above).[226] If any additional rights are needed, the contracting agency must negotiate with the contractor to determine if there are acceptable terms for transferring the rights, and any additional rights must be identified in a license agreement that is part of the contract.[227]

b. Commercial Software

As with technical data related to commercial items, DoD can generally only acquire commercial computer software or commercial computer software documentation under licenses that are customarily provided to the public. The exceptions to this requirement are if the commercial licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.[228] Moreover, commercial computer software and commercial computer software documentation must be obtained competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under pricing schedules.[229]

Also as with commercial technical data, offerors and contractors cannot be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public, except for information documenting the specific modifications made at Government expense to meet the requirements of a solicitation; or
(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation, except if there is a transfer of rights that is mutually agreed upon.[230]

DoD's rights are those specified in the commercial computer software license or documentation license, which as stated, must generally also be customarily provided to the public.[231] If the Government needs rights not conveyed under a license customarily provided to the public, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. Any additional or different rights agreed to must be enumerated in the contract license agreement or an addendum.[232]

V. MARKING DATA AND SOFTWARE

Although, as DFARS confirms, a contractor's restrictive rights assertions are not conclusive and the Government has the right to review, challenge and validate restrictive markings[233] the importance of making timely data rights assertions cannot be overstated. In civilian and defense contracts, if any data, technical data, computer software or software documentation is delivered without restrictive rights markings or notices, the data, technical data, computer software or software documentation *will be presumed to have been delivered with unlimited rights*.[234] Indeed, under FAR, the Government assumes no liability for any disclosure, use, or reproduction of unmarked data, and under DFARS, unmarked technical data and software can be released further by the Government without restriction.[235]

A. WHERE TO FIND THE CORRECT MARKINGS AND NOTICES

The marking and notice requirements are found in the data rights clauses of the Government contract. Specifically, the limited rights notice and the restricted rights notice that contractors must affix to any limited rights data and restricted computer software that is required to be delivered to the Government are found in alternate paragraphs inserted into a contract's data rights clauses. The data rights notice required for SBIR Data delivered to the Government is in the SBIR Data Rights clause itself. However, often data rights clauses are incorporated into a contract by reference. Contractors, therefore, can find the full text of the data rights clauses, as well as the alternate paragraphs containing the required markings and notices at the U.S. Government's Publishing Office's website – www.ecfr.gov – and the links below:

Noncommercial data rights – civilian contracts	FAR 52.227-14
SBIR data rights - civilian contracts	FAR 52.227-20
Noncommercial technical data rights – DoD contracts	DFARS 252.227-7013
Noncommercial software rights – DoD contracts	DFARS 252.227-7014
SBIR data rights – DoD contracts	DFARS 252.227-7018

B. FIXING OMISSIONS

1. Contracts with Civilian Agencies

Contractors may in certain circumstances cure their omissions and mistakes or have their omissions and mistakes cured. With respect to *missing notices*, if the data has not been disclosed without restriction outside the Government, the contractor may, within six (6) months (or longer if approved by the contracting officer after good cause is shown), request permission from the contracting officer to place the omitted limited rights or restricted rights notice on the qualifying data at its own expense.[236] The contracting officer may permit the contractor to add the notice(s) if the contractor:

(1) Identifies the data for which a notice is to be added;

(2) Demonstrates that the omission of the proposed notice was inadvertent;

(3) Establishes that use of the proposed notice is authorized; and

(4) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.[237]

2. Contracts with DoD

A contractor may request permission to have appropriate legends placed on unmarked technical data, computer software or computer software documentation at its expense.[238] If a contractor makes such a request to correct an inadvertent omission, a contracting officer will, when practicable, not release or disclose the technical data, software or software documentation pending evaluation of the request.[239] A contractor's request must be received by the contracting officer within six (6) months after the furnishing or delivery of the data, software or software documentation or within any extension of that time approved by the contracting officer.[240] The contractor making the request must:

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

(2) 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, software or software documentation contained in the technical data and computer software rights clauses; and

(3) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data, software or software documentation made prior to the addition of the marking or resulting from the omission of the marking.[241]

A contracting officer should grant permission to mark only if the technical data, software, or software documentation were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.[242]

C. FIXING INCORRECT, UNAUTHORIZED, OR UNJUSTIFIED MARKINGS

1. Contracts with Civilian Agencies

With respect to notice errors, a contracting officer may correct an incorrect notice on his or her own, or may permit a contractor to correct, at its own expense any incorrect notices if the contractor identifies the data for which a notice correction is to be made and shows that the corrected notice is authorized.[243]

If data is delivered to the Government with unauthorized markings – i.e., a contractor affixes a limited rights notice to data and/or a restricted rights notice to software, but the notices are not authorized, or there are other restrictive markings on the data or software that are not authorized – the Government has two options on how to deal with the data and software.[244] First, it can simply return the data containing the unauthorized markings. Second, it can cancel or ignore the markings.[245]

Before an agency cancels or ignores a marking, however, it must first make a written inquiry of the contractor and give the contractor at least sixty (60) days to provide a written justification substantiating the propriety of the markings.[246] If the contractor does not respond or provide a timely written justification, the Government can cancel or ignore the markings.[247] If the contractor provides an explanation, the contracting officer will consider any written explanation and will notify the contractor in writing of the officer's determination. A contracting officer's determination that the markings are not authorized must have the concurrence of the head of the contracting activity and becomes the final agency decision; thereafter, the markings will be cancelled or ignored and the data will no longer be subject to disclosure prohibitions, unless the contractor files suit within ninety (90) days. The markings will not be cancelled or ignored until a final resolution of the matter, either by the contracting officer's determination as a final agency decision or by final disposition of a court.[248]

2. Contracts with DoD

The only "authorized" markings under DFAR for technical data, computer software and computer software documentation are those identified in the applicable technical data rights and computer software rights clauses. Any other marking, including an authorized marking that does not meet marking requirements, is considered a "nonconforming" marking.[249]

An "unjustified" marking under DFARS, is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data. For example, a limited rights legend placed on technical data, software or software documentation relating to items,

processes, or software developed under a Government contract either exclusively at Government expense or with mixed funding (i.e., situations in which the Government acquires unlimited rights or government purpose rights) is an unjustified marking.[250] Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the contractor that has asserted a restrictive marking may agree that the restrictive marking is not justified.[251]

Upon such an agreement, or with respect to a nonconforming marking if practicable, the contracting officer may return technical data, computer software or computer software documentation with nonconforming or unjustified markings to the contractor to provide the contractor an opportunity to strike or correct the nonconforming or unjustified markings at the contractor's expense.[252]

If the contractor fails to correct the unjustified markings or return the corrected data, software or documentation within sixty (60) days following receipt of the data, software or documentation, the contracting officer must correct or strike the unjustified markings at the contractor's expense.[253] In the case of a nonconformity, if the contractor fails to correct the nonconforming markings or return the corrected data, software or documentation within sixty (60) days, the contracting officer may correct or strike the nonconformity at the contractor's expense.[254] When it is impracticable to return technical data, computer software or computer software documentation with nonconforming markings for correction, a contracting officer may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the data, software or documentation may be used in accordance with a proper restrictive marking.[255]

ENDNOTES

[1] https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_17_it.pdf
[2] FAR 27.302(a)(2), (3) and (4); *See also* FAR 27.102(a) (stating that "[t]he Government encourages the maximum practical commercial use of inventions made under Government contracts.").
[3] FAR 27.402(b).
[4] FAR 27.102(d); *See also* DFARS 227.7103-1(a)(DoD shall acquire only noncommercial technical data and rights in that data that are necessary to satisfy agency needs).
[5] FARS 27.302(a)(5).
[6] FAR 27.301.
[7] As stated, agency supplements other than DFARS are outside the scope of this *paper*.
[8] FAR 27.303(a)(1).
[9] FAR 27.303(a)(2).
[10] FAR 27.303(e)(1); FAR 52.227-13. Contrasting FAR's rules permitting contracting officers to insert the Government-Owner Patent Clause into a contract with the rules permitting a contract to require assignment to the Government, contracting officers are required to insert the Government-Owner Patent Clause when the contract involved a DOE facility primarily dedicated to a naval nuclear program, regardless of any funding agreement limitations. Compare FAR 27.302(b)(2)(iv) with FAR 27.303(e)(1(iv).
[11] FAR 27.303(b)(1).
[12] DFARS 227.303(2)(i).
[13] FAR 27.302(b)(1).
[14] FAR 52.227-11 (c)(1); DFARS 252.227-7038(c)(1).
[15] DFARS 252.227-7038(c)(1).
[16] FAR 52.227-13(e)(2).
[17] FAR 52.227-13(e)(2).
[18] FAR 52.277-11(c)(1); FAR 52.227-13(e)(2); DFARS 252.227-7038(c)(1).
[19] FAR 27.303(b)(2).
[20] DFARS 227.303(1).
[21] DFARS 252.227-7039.
[22] DFARS 227.304-1.
[23] DFARS 252.227-7038 (c)(2).
[24] FAR 52.227-11 (c)(2).
[25] FAR 52.227-11 (c)(2); DFARS 252.227-7038 (c)(2).
[26] FAR 27.304-1(d).
[27] FAR 27.304-1(d).
[28] FAR 27.302(b)(2).
[29] FAR 27.304-1(b)(1).
[30] FAR 27.304-1(b)(1), (2).
[31] FAR 27.302 (b)(3); FAR 27.304-1(c).
[32] FAR 27.304-1(c). The contracting officer will make this determination taking into account at least the following objectives: (1) promoting the utilization of inventions arising from federally

supported research and development; (2) ensuring that inventions are used in a manner to promote full and open competition and free enterprise without unduly encumbering future research and discovery, (3) promoting public availability of inventions made in the United States by United States industry and labor; (4) ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions. FAR 27.304-1(c).

[33] FAR 27.302(b)(4).

[34] FAR 27.302(d)(1).

[35] FAR 52.227-11 (d)(1)(i); DFARS 252.227-7038 (d)(1)(ii).

[36] FAR 27.302(i)(1); FAR 52.227-11(b)(2); FAR 52.227-13(d)(1); DFARS 252.227-7038(b)(2)(i).

[37] FAR 27.302(i)(1).

[38] FAR 27.302(c); FAR 52.227-11(d)(1); FAR 52.227-13(c)(1)(i); DFARS 252.227-7038(d)(2).

[39] FAR 27.304-1(e).

[40] FAR 52.227-11(c)(3); DFARS 252.227-7038(c)(3).

[41] FAR 52.227-11(c)(3); DFARS 252.227-7038(c)(3).

[42] FAR 52.227-11(c)(3); DFARS 252.227-7038(c)(3).

[43] FAR 52.227-11(e)(4); DFARS 252.227-7038(e)(4).

[44] FAR 52.227-11(e)(3); DFARS 252.227-7038(e)(3).

[45] FAR 52.227-11(e)(2); FAR 52.227-13(e)(4); DFARS 252.227-7038(e)(2).

[46] FAR 52.227-11(e)(2); FAR 52.227-13(e)(4); DFARS 252.227-7038(e)(2).

[47] FAR 52.227-11(e)(2); FAR 52.227-13(e)(4); DFARS 252.227-7038(e)(2).

[48] FAR 52.227-11(e)(2); FAR 52.227-13(e)(4); DFARS 252.227-7038(e)(2).

[49] FAR 27.302(g).

[50] FAR 27.302(g).

[51] FAR 27.302(f)(1).

[52] FAR 27.302(f)(2).

[53] FAR 27.302(e).

[54] FAR 27.302(e).

[55] FAR 27.302(e).

[56] FAR 27.304-3(a).

[57] FAR 27.304-3(b).

[58] FAR 27-304-3(c).

[59] FAR 27.302(j); FAR 27.305-4(a).

[60] FAR 27.302(j); FAR 27.305-4(a).

[61] FAR 27.305-4(b).

[62] FAR 27.305-4(b).

[63] FAR 27.302(j).

[64] 28 U.S.C. § 1498; FAR 27.201-1(a).

[65] FAR 27.201-1(a).

[66] FAR 27.201-1(a).

[67] 28 U.S.C. § 1498.

[68] FAR 27.201-1(a).

[69] FAR 27.201-1(a).

[70] FAR 27.201-1(b); FAR 52.227-1(a).

[71] FAR 52.227-1(b).
[72] FAR 27.201-1(c).
[73] FAR 27.201-1(c).
[74] FAR 27.201-1(d); FAR 52.227-3.
[75] FAR 27.104(g).
[76] FAR 27.104(h).
[77] FAR 27-202-2(a); FAR 27-202-5(b); FAR 52.227-7.
[78] FAR 27.202-2(b); FAR 52.227-7.
[79] FAR 27.202-1(a); 52.227-6(a).
[80] FAR 52.227-6(a).
[81] FAR 52.227-6(b).
[82] FAR 27.202-2(b).
[83] FAR 27.202-1(c).
[84] FAR 27.202-3(a), (b), (c).
[85] FAR 27.203-1(a).
[86] FAR 27.203-2; FAR 52.227-10.
[87] FAR 27.203-1(b); FAR 52.227-10(a), (b).
[88] FAR 27.203-1(b); FAR 52.227-10(a), (b).
[89] FAR 27.203-1(b).
[90] FAR 27.203-1(b).
[91] FAR 52.227-10(a).
[92] FAR 52.227-10(a).
[93] FAR 52.227-10(d).
[94] FAR 52.227-10(d).
[95] FAR 52.227-10(d).
[96] FAR 52.227-10(c).
[97] FAR 52.227-10(e).
[98] DFARS 227.400 (stating that DoD activities shall use the guidance of Subparts 227.71 and 227.72 instead of the guidance in FAR Subpart 27.4); *see also* FAR 27.400 (indicating that only the policy statement in FAR 27.402 applies to all agencies and that the rest of subpart does not apply to DoD).
[99] FAR 27.409(h); DFARS 227.7104; DFARS 227.7204.
[100] FAR 27.409(h); DFARS 227.7104; DFARS 227.7204.
[101] FAR 27.401.
[102] DFARS 227.7101 (stating that terms are defined in DFARS 252.227-7013); DFARS 252.227-7013(a)(15).
[103] DFARS 252.227-7013(a)(15).
[104] FAR 27.406-1(a).
[105] FAR 27.406-1(b).
[106] FAR 27.406-1(b).
[107] DFARS 227.7103-1(b)(1); DFARS 227.7103-2(c)(1).
[108] DFARS 227.7103-1(b)(4).
[109] FAR 27.406-2(a), (b); FAR 52.227-16(a).
[110] FAR 27.406-2(a), (b); FAR 52.227-16(b).

[111] FAR 27.406-2(b).
[112] FAR 27.406-2(b).
[113] FAR 27.406-2(b).
[114] FAR 27.403 (emphasis added).
[115] DFARS 227.7103-3(a); DFARS 227.7203-3(a).
[116] DFARS 252.227-7013(a)(8), (a)(9); DFARS 252.227-7014(a)(8), (a)(9); DFARS 252.227-7018 (a)(9), (a)(10).
[117] FAR 27.406-1(c); DFARS 227.7103-1(c); DFARS 227.7203-1(c).
[118] "Form, fit, and function data" means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software. FAR 27.401
[119] FAR 27.404-1; FAR 52.227-14(b)(1).
[120] "Form, fit, and function data" means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software. FAR 55.227-20(a)
[121] FAR 52.227-20(b)(1).
[122] FAR 27.401; FAR 52.227-20(a).
[123] DFARS 227.7103-5(a); DFARS 252.227-7013(b)(1); DFARS 227.7203-5(a); DFARS 252.227-7014(b)(1).
[124] DFARS 252.227-7018(b)(1).
[125] DFARS 252.227-7013(a)(16); DFARS 252.227-7014(a)(16); DFARS 252.227-7018(a)(21).
[126] FAR 27.401; FAR 52.227-14(a); FAR 52.227-20(a).
[127] FAR 27.401; FAR 27.404-2(b); FAR 52.227-14, Alternative I; FAR 57.227-20(a).
[128] FAR 52.227-20(b)(2)(iv); FAR 52.227-20(f).
[129] FAR 52.227-20(f).
[130] FAR 27.401; FAR 27.404-2(a), (b).
[131] FAR 27.404-2(a); FAR 52.227-14(b)(2)(iv); FAR 52.227-14(g)(1).
[132] FAR 27.404-2(a); FAR 52.227-14(g)(1).
[133] FAR 27.404-2(c)(1); FAR 27.409(b)(3).
[134] FAR 27.404-2(c)(1).
[135] FAR 27.404-2(c)(1); FAR 52.227-14, Alternative II, paragraph (g)(3).
[136] FAR 27.404-2(c)(2).
[137] DFARS 227.7103-5(c)(1); DFARS 252.227-7013(b)(3).
[138] DFARS 252.227-7018(b)(2).
[139] DFARS 227.7103-5(c)(2); DFARS 252.227-7018(a)(15).
[140] 10 U.S.C. § 2320(a)(2)(D)(i)(II).
[141] DFARS 227.7103-5(c)(3); DFARS 252.227-7018(a)(15)(ii).
[142] DFARS 227.7103-5(c)(3).

[143] DFARS 252.227-7013(a)(14)(ii); DFARS 252.227-7018(a)(15)(ii).
[144] FAR 27.401; FAR 52.227-14(a); FAR 52.227-20(a).
[145] FAR 52.227-20(b)(2)(iv); FAR 52.227-20(f).
[146] FAR 52.227-20(f).
[147] FAR 27.404-2(a); FAR 52.227-14(b)(2)(iv); FAR 52.227-14(g)(1).
[148] FAR 27.404-2(a); FAR 52.227-14(g)(1).
[149] FAR 27.404-2(d)(1); FAR 27.409(b)(4).
[150] FAR 27.404-2(d)(1).
[151] FAR 27.404-2(d)(3).
[152] FAR 27.404-2(d)(4).
[153] FAR 27.404-2(d)(4).
[154] FAR 27.404-2 (d)(5).
[155] DFARS 227.7203-5(c)(1); DFARS 252.227-7014(b)(3)(i).
[156] DFARS 252.227-7018(b)(3).
[157] DFARS 252.227-7014(a)(15); DFARS 252.227-7018(a)(18).
[158] FAR 52.227-20(a).
[159] FAR 52.227-20(d)(1).
[160] FAR 52.227-20(d)(1).
[161] FAR 52.227-20(d)(1).
[162] DFARS 252.227-7018(b)(4).
[163] DFARS 252.227-7018(a)(19).
[164] DFARS 252.227-7018(b)(1)(vi).
[165] FAR 27.408(a).
[166] FAR 27.408(a).
[167] FAR 27.408(a).
[168] FAR 27.408(b).
[169] DFARS 227.7103-5(b)(1); DFARS 252.227-7013(a)(10).
[170] DFARS 227.7203-5(b)(1); DFARS 252.227-7014(b)(2).
[171] DFARS 252.227-7013(a)(10); DFARS 252.227-7014(a)(10).
[172] DFARS 227.7103-5(b)(4); DFARS 227.7203-5(b)(4).
[173] DFARS 227.7103-5(b)(2); DFARS 227.7203-5(b)(2).
[174] DFARS 227.7103-5(b)(3); DFARS 227.7203-5(b)(3).
[175] DFARS 227.7103-5(d)(1); DFARS 227.7203-5(d).
[176] DFARS 227.7103-5(d)(1).
[177] DFARS 227.7103-5(d)(1).
[178] DFARS 227.7103-5(d)(2).
[179] DFARS 227.7103-5(d)(2).
[180] DFARS 227.7103-5(d)(1).
[181] DFARS 227.7203-5(d).
[182] DFARS 227.7203-5(d).
[183] DFARS 227.7203-5(d).
[184] FAR 27.404-3(a)(1).
[185] FAR 27.404-3(a)(1).
[186] FAR 27.404-3(a)(2).

[187] FAR 27.404-3(a)(2).
[188] FAR 27.404-3(a)(5).
[189] FAR 27.404-3(a)(5).
[190] FAR 27-404-3(a)(3).
[191] FAR 27-404-3(a)(4).
[192] FAR 27.404-3(a)(4).
[193] FAR 27.404-3(a)(4).
[194] FAR 27.404-3(b)(1).
[195] FAR 27.404-3(b)(2).
[196] FAR 27.404-3(b)(2).
[197] FAR 27.404-3(b)(2).
[198] DFARS 227.7103-9(a)(1); DFARS 227.7203-9(a)(1).
[199] DFARS 227.7103-9(a)(1); DFARS 227.7203-9(a)(1).
[200] DFARS 227.7103-9(a)(1); DFARS 227.7203-9(a)(1).
[201] DFARS 227.7103-9(a)(2); DFARS 227.7203-9(a)(2).
[202] DFARS 227.7103-9(a)(2); DFARS 227.7203-9(a)(2).
[203] FAR 27.409(l).
[204] FAR 27.407.
[205] FAR 27.409(l).
[206] FAR 27.407.
[207] FAR 27.407.
[208] DFARS 252.227-7016(b)(1).
[209] DFARS 252.227-7016(b)(2).
[210] DFARS 252.227-7016(c).
[211] DFARS 252.227-7016(d).
[212] DFARS 252.227-7016(e).
[213] DFARS 252.227-7016(f).
[214] FAR 27.405-3(a).
[215] FAR 12.212(a); FAR 27.405-3(a).
[216] FAR 27.405-3(a).
[217] FAR 52.227-19(a), (b).
[218] FAR 27.405-3(a).
[219] FAR 27.405-3(a).
[220] FAR 27.405-3(b).
[221] FAR 27.405-3(b).
[222] FAR 27.405-3(b).
[223] FAR 27.405-3(c).
[224] DFARS 227.7102-1(a).
[225] DFARS 227.7102-1(b).
[226] DFARS 227.7102-2(a).
[227] DFARS 227.7102-2(b).
[228] DFARS 227.7202-1(a).
[229] DFARS 227.7202-1(b).
[230] DFARS 227.7202-1(c).

[231] DFARS 227.7202-3(a).
[232] DFARS 227.7202-3(b).
[233] DFARS 227.7103-10(a)(4); DFARS 227.7203-10(a)(4).
[234] FAR 27.404-5(b)(1); DFARS 227.7103-10(c)(1); DFARS 227.7203-10(c)(1).
[235] FAR 27.404-5(b)(1); DFARS 227.7103-10(c)(1); DFARS 227.7203-10(c)(1).
[236] FAR 27.404-5(b)(1); FAR 52.227-14(f)(2); FAR 52.227-20(e)(2).
[237] FAR 27.404-5(b)(1); FAR 52.227-14(f)(2); FAR 52.227-20(e)(2).
[238] DFARS 227.7103-10(c)(2); DFARS 227.7203-10(c)(2).
[239] DFARS 227.7103-10(c)(1); DFARS 227.7203-10(c)(1).
[240] DFARS 227.7103-10(c)(2); DFARS 227.7203-10(c)(2).
[241] DFARS 227.7103-10(c)(2); DFARS 227.7203-10(c)(2).
[242] DFARS 227.7103-10(c)(3); DFARS 227.7203-10(c)(3).
[243] FAR 27.404-5(b)(2); FAR 52.227-14(f)(3); FAR 52.227-20(e)(3).
[244] FAR 27.404-5(a)(1); FAR 55.227-14(e)(1).
[245] FAR 27.404-5(a)(1); FAR 55.227-14(e)(1).
[246] FAR 27.404-5(a)(2); FAR 55.227-14(e)(1).
[247] FAR 27.404-5(a)(2)(i); FAR 55.227-14(e)(1)(ii).
[248] FAR 27.404-5(a)(2)(ii); FAR 52.227-14(e)(iii).
[249] DFARS 227.7103-12(a)(1); DFARS 227.7203-12(a)(1).
[250] DFARS 227.7103-12(b)(1); DFARS 227.7203-12(b)(1).
[251] DFARS 227.7103-12(b)(2); DFARS 227.7203-12(b)(2).
[252] DFARS 227.7103-12(a)(2), (b)(2); DFARS 227.7203-12(a)(2), (b)(2).
[253] DFARS 227.7103-12(b)(2); DFARS 227.7203-12(b)(2).
[254] DFARS 227.7103-12(a)(2); DFARS 227.7203-12(a)(2).
[255] DFARS 227.7103-12(a)(2); DFARS 227.7203-12(a)(2).