

# Data Rights In Federal Procurement

## FAR Subpart 27.400 Rights in Data and Copyrights

**The materials presented are informational only and do not constitute legal advice with respect to any particular situation. These materials are intended to help spot major issues, but these materials do not cover all issues or cover the issues mentioned in all aspects.**

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## FAR Subpart 27.400 Rights in Data and Copyrights

### 27.400 Scope of subpart.

This subpart sets forth policies and procedures regarding rights in data and copyrights, and acquisition of data. The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart applies to all executive agencies except the Department of Defense.

### 27.402 Policy

(a) The Government acquires data to

(1) foster competition among suppliers;

. . .

(5) meet specialized acquisition needs and ensure logistics support.

(b) Contractors may have proprietary interests in data. Agencies shall balance the Government's needs and the contractor's legitimate proprietary interests.

## Policy Matters

### 27.403 Data rights—General.

Data rights clauses do not identify the data to be delivered, but only specify the respective rights of the Government and the contractor.

The contract shall specify the data to be delivered.

### 27.406-1 General.

Efforts should be made to minimize data requirements.

The contract officer must specify all known data requirements in the contract [solicitation].

The Government should normally not require unlimited rights in data that qualify as limited rights data or restricted computer software, as a condition of award.

If greater rights are needed, they should be clearly set forth in the solicitation/contract and the contractor must be fairly compensated for the greater rights.

## FAR Subpart 27.401 Definitions

“**Data**” means recorded information, including technical data and computer software.

“**Form, fit, and function data**” means data sufficient to enable physical and functional interchangeability of parts.

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.

“**Limited rights**” means the rights of the Government to data as set forth in a Limited Rights Notice.

“**Limited rights data**” is data, **developed at private expense**, that embody trade secrets. Includes minor modifications.

“**Restricted computer software**” means computer software **developed at private expense** and that is a trade secret or is copyrighted. Includes minor modifications.

“**Restricted rights**” means the rights of the Government set forth in a Restricted Rights Notice.

“**Unlimited rights**” means 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.

## Types of Data

### 27.404-1 Unlimited Rights Data

The Government acquires unlimited rights in the following data (except for copyrighted works):

- (a) Data first produced in the performance of a contract (except when the data constitute minor modifications to data that are limited rights data or restricted computer software).
- (b) Form, fit, and function data delivered under contract.
- (c) Manuals, instructional and training materials for installation, operation, routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.
- (d) **All other data delivered under the contract that is not identified as limited rights data or restricted computer software.**

## Types of Data

### 27.404-2 **Limited Rights Data** and Restricted Computer Software

(a) The contractor may withhold the qualifying data/software from the Government and instead deliver form, fit, and function data.

**(c) Protection of limited rights data specified for delivery.**

- The Government may require delivery of limited rights data rather than allow the contractor to withhold the data.
- The government may identify the data at the time of contracting or during performance of the contract.
- **The contractor must identify data that is ultimately delivered with limited rights.**
- The rights provided the Government must be set forth in the Limited Rights Notice.
- Government can not use this data for purposes of manufacture or disclose the data outside the Government except as set forth in the Notice, without permission of the contractor
- Any data disclosed by the Government shall be subject to a prohibition against further use and disclosure by the recipient.

## Types of Data

### 27.404-2 **Limited Rights Data** and Restricted Computer Software

The following are examples of generally permitted uses:

- (i) Use (except for manufacture) by support service contractors.
- (ii) Evaluation by nongovernment consultants.
- (iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.
- (iv) Emergency repair or overhaul work.
- (v) Release to a foreign government if required to serve U.S. Government interests, for information or evaluation, or for emergency repair or overhaul work by the foreign government.

## Types of Data

### 27.404-2 **Limited Rights Data** and Restricted Computer Software

Limited Rights Notice (Dec 2007)

FAR 52.227-14

(a) These data are submitted with limited rights under Government Contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any; provided that the Government makes such disclosure subject to prohibition against further use and disclosure: [Agencies may list additional purposes as set forth in 27.404-2(c)(1) or if none, so state.]

**[Permitted uses are inserted here or if None, so state]**

(b) This notice shall be marked on any reproduction of these data, in whole or in part.

## Types of Data

### 27.404-2 Limited Rights Data and **Restricted Computer Software**

#### **(d) Protection of restricted computer software specified for delivery.**

The Government may require delivery of restricted computer software rather than allow the contractor to withhold such restricted computer software.

To obtain delivery the contracting officer must:

- (i) Identify the deliverable computer software in the contract; or
- (ii) Require by written request during contract performance, the delivery of computer software that has been withheld or identified to be withheld.

The rights provided to the Government are set forth in the Restricted Rights Notice.

## Types of Data

### 27.404-1 Limited Rights Data and **Restricted Computer Software**

The rights in restricted software provided the Government generally permit:

- (i) Use with the computers for which it was acquired;
- (ii) Use with a backup computer if any computer for which it was acquired is inoperative;
- (iii) Making copies for safekeeping (archives) or backup purposes;
- (iv) Modifying/adapting/combining with other computer software, provided that the modified, adapted, or combined portions of the derivative software are subject to the same restricted rights;
- (v) Disclosure to and reproduction for use by support service contractors or their subcontractors, consistent with paragraphs (3)(i) through (iv) above;  
and
- (vi) Use or copying for use with a replacement computer.

## Types of Data

### 27.404-1 Limited Rights Data and **Restricted Computer Software**

The permitted uses set forth in paragraph (d)(3) [the previous slide] are the minimum.

The contracting officer may specify different/additional rights.

Different rights may apply to documentation accompanying the software than apply to the software programs and databases.

Any additions to, or limitations on, the restrictions shall be expressly stated in the contract or in a separate agreement that is made part of the contract, and the notice modified accordingly.

## Types of Data

### 27.404-1 Limited Rights Data and **Restricted Computer Software**

#### Restricted Rights Notice (Dec 2007)

- (a) This computer software is submitted with restricted rights under Government Contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice or as otherwise expressly stated in the contract.
- (b) This computer software may be—
- (1) Used or copied for use with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) 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 (b)(1) through (4) of this notice; and
  - (6) Used or copied for use with a replacement computer.
- (c) Notwithstanding the foregoing, if this computer software is copyrighted computer software, it is licensed to the Government with the minimum rights set forth in paragraph (b) of this notice.
- (d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the contract.
- (e) This notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

## Types of Data

### 27.404-3 Copyrighted works.

(a) For data first produced in the performance of a contract.

(1) Contractor must obtain permission to copyright any work containing data first produced in the performance of a contract.

(2) The contracting officer should grant the contractor's request unless the—

(i) Data represents the official views of the Government or is data that an agency is required by law to prepare;

(ii) Data are intended primarily for internal use by the Government;

(iii) Data of the type that the agency itself distributes to the public;

(iv) Government determines that limitation on distribution of the data is in the national interest; or

(v) Government determines that the data should be disseminated without restriction.

## Types of Data

### 27.404-3 Copyrighted works.

(3) An exception applies to data first produced in basic or applied research contracts performed by colleges and universities.

(4) If the contractor creates a copyrighted work, The Government is granted 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, for all data (other than computer software).**

For computer software, the scope of the Government's license includes all of the rights described above, except the right to distribute to the public.

(5) Contractor must affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship.

## Types of Data

### 27.404-3 Copyrighted works.

(b) For data not first produced in the performance of a contract.

(1) Contractors may not deliver copyrighted work containing data not first produced without either:

(i) Acquiring for the Government a copyright license for the data; or

(ii) Obtaining permission from the contracting officer to do deliver such data.

(2) The copyright license granted the Government will normally be the same as presented in paragraph (4) in the pervious slide.

For computer software, the contractor must grant or secure for the Government the license described in Notice of Restrictive Rights or a license agreed to in a separate agreement that is made part of the contract.

## 27.404-5 Unauthorized, omitted, or incorrect markings.

### **(a) Unauthorized markings**

(1) The Government has the right to either return data containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies shall not cancel/ignore markings without affording the contractor at least 60 days to provide a written justification substantiating the markings.

If the contractor fails to provide a written justification, the Government may cancel or ignore the markings.

If the contractor responds and the contracting officer determines that the markings are not authorized, the contractor will be furnished a written determination which becomes the final agency decision, unless the contractor files suit within 90 days.

The markings will not be cancelled or ignored until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed.

## 27.404-5 Unauthorized, omitted, or incorrect markings.

### **(b) Omitted notices.**

(1) Data without a limited rights/restricted rights/copyright notice, will be presumed to be delivered with unlimited rights.

The contractor may, within 6 months of delivery, request to have the omitted notices placed on qualifying data.

The contracting officer may permit adding appropriate notices if the contractor:

- (i) Identifies the data;
- (ii) Demonstrates that the omission was inadvertent;
- (iii) Establishes that limitations are authorized; and
- (iv) Acknowledges that the Government has no liability for any disclosure/ use prior to the addition of the notice or resulting from the omission of the notice.

### **Incorrect notices**

(2) The contracting officer may:

- (i) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the corrected notice is authorized; or
- (ii) Correct any incorrect notices.

## Key Actions

Document the private development of technical data or software.

Statements of Work must clearly delineate contractor obligations.

Avoid obligation to deliver limited rights data or restricted rights computer software to the government.

Addressed during negotiation of Statement of Work and deliverables

If limited rights data or restricted rights computer software are to be delivered, insure:

- Such data/computer software is identified in proposal provided to the government; and
- Such data/computer software are marked in accordance with the applicable requirement; and
- Permitted uses are stated in the Limited Rights/Restrictive Rights Notices.

If you are subcontractor, do the above and do not give the prime more than it needs to fulfill its obligations to the Government.

Questions?