



MAY THE CLAUSE BE WITH YOUSM

Data Rights Clauses

**Presented by Adam A. Bartolanzo &
Lauren S. Fleming
Miles & Stockbridge P.C.**

Your Instructors

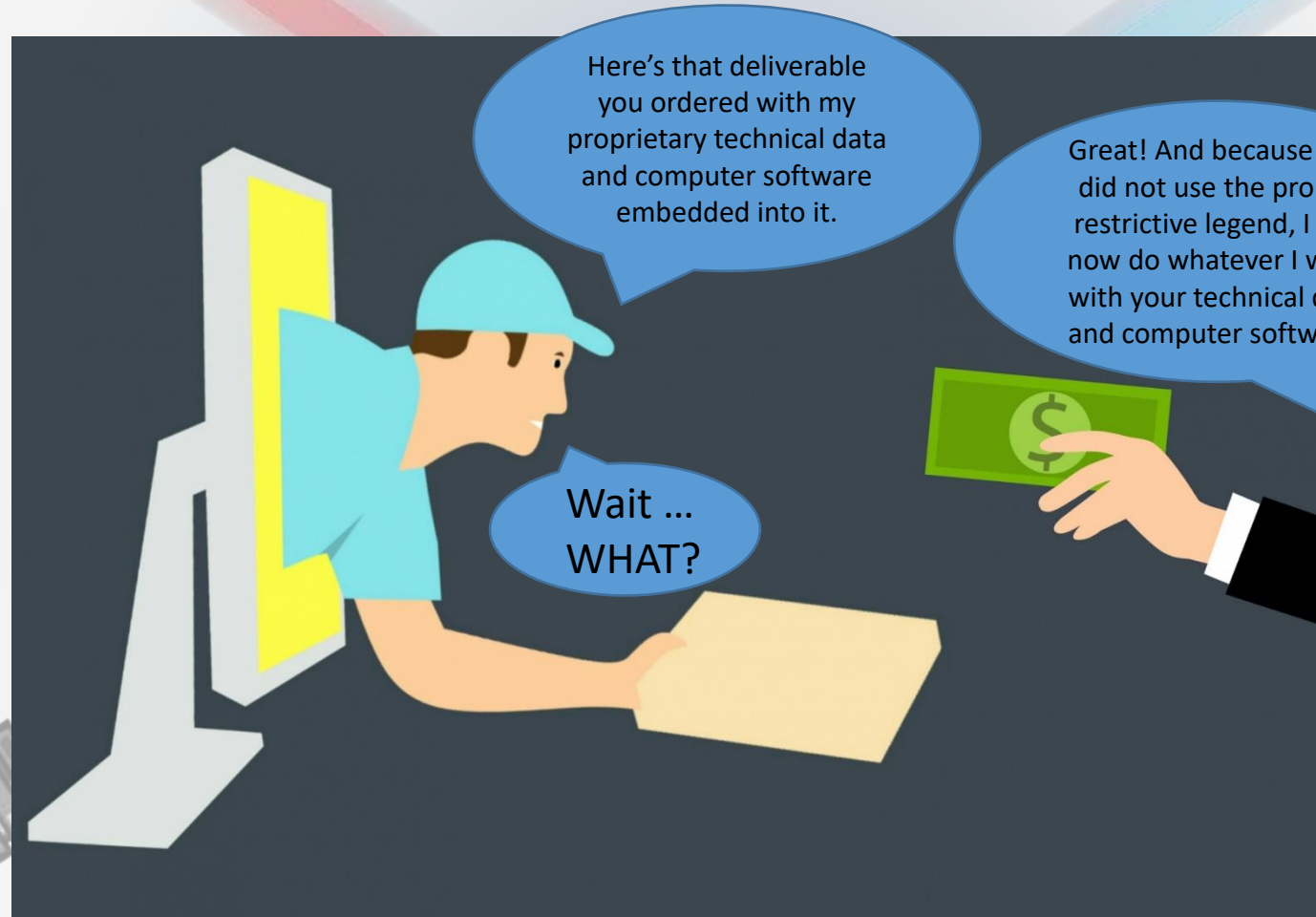


Adam A. Bartolanzo
Counsel,
Government Contracts &
White Collar
abartolanzo@milesstockbridge.com
(202) 465-8388



Lauren S. Fleming
Associate,
Government Contracts &
White Collar
lfleming@milesstockbridge.com
(410) 385-3513

Data Rights – Why Should We Care?



Agenda

- Overview of the DFARS Data Rights Clauses
- The Three Different Kinds of Data Rights
 - Unlimited
 - Government Purpose
 - Limited
- Differences in FAR 52.227-14's Treatment of Data Rights
- Commercial Products and Commercial Services
- Subcontractor/Supplier Flowdown
- Validation of Restrictive Markings
- Common Problems/Traps

Overview of the DFARS Data Rights Clauses

Applies to DoD Contracts

- FAR contains its own data rights clause ([FAR 52.227-14](#)) and other agencies may have their own versions as well

Separate but related clauses for:

- Noncommercial Technical Data (DFARS 252.227-7013)
- Noncommercial Computer Software and Computer Software Documentation (DFARS 252.227-7014)
- Commercial Technical Data (DFARS 252.227-7015)
- Noncommercial SBIR Technical Data and Computer Software (DFARS 252.227-7018)
 - **SUBJECT TO PROPOSED RULEMAKING**

No separate clause for commercial computer software or commercial software documentation (DFARS 227.7202-4)

- Generally acquired under the same software licenses as those provided to the public (DFARS 227.7202-3)

Overview: What's Covered?

Technical Data

- Recorded information, regardless of the form or method of the recording, of a scientific or technical nature
- Includes computer software documentation, but rights in noncommercial computer software documentation are governed by DFARS 252.227-7014
- Does not include computer software or data incidental to contract administration, such as financial and/or management information

Overview: What's Covered?

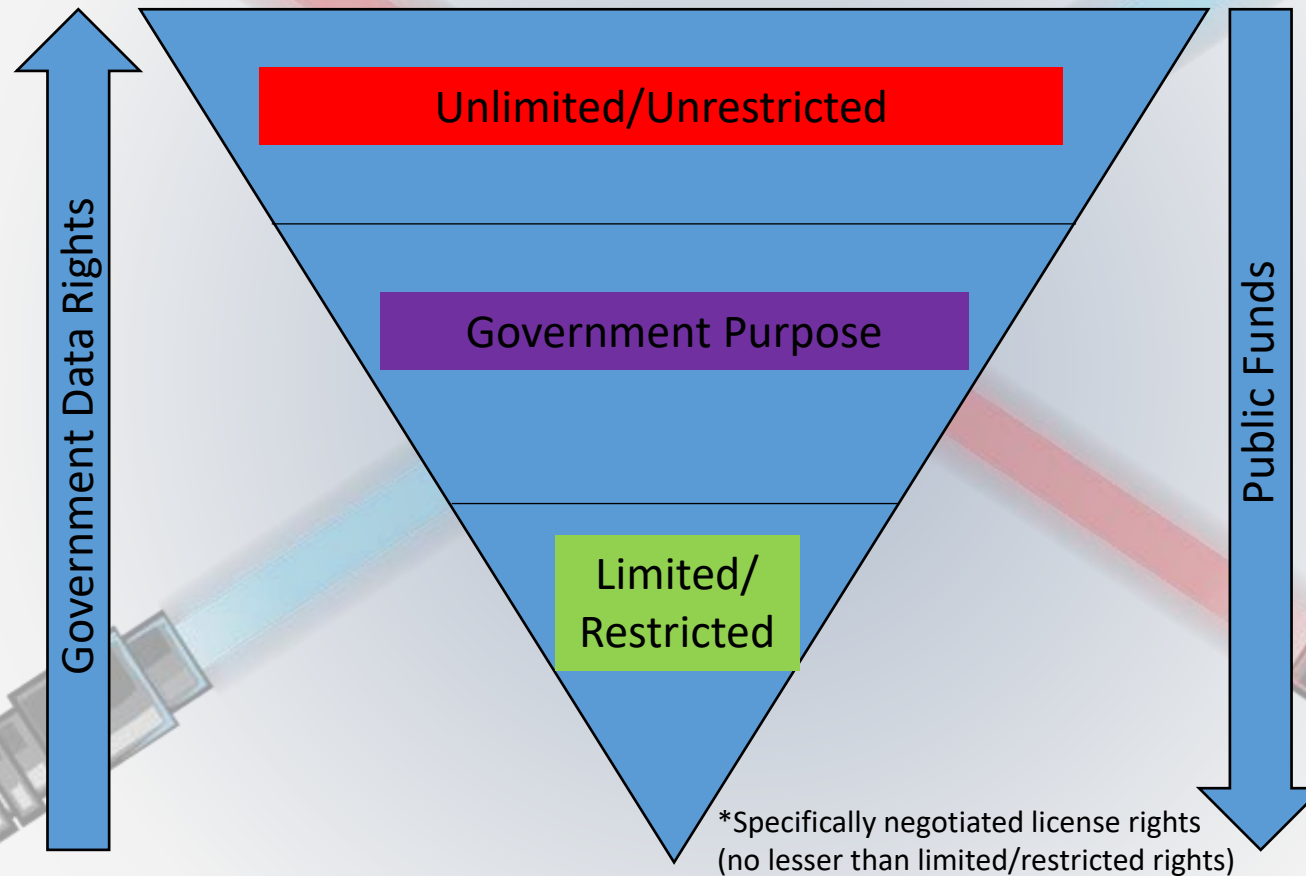
Noncommercial Computer Software

- Computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled
- Does *not* include computer databases or computer software documentation

Noncommercial Computer Software Documentation

- Owners' manuals, users' manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software

The Three* Different Kinds of Data Rights



Unlimited Rights

Unlimited rights give the Government the rights to use, modify, reproduce, perform, display, release, or disclose technical data, computer software, or computer software documentation **in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so**



Unlimited Rights

Government acquires **unlimited rights** in:

1. Technical data or computer software – has been or will be **developed exclusively with Government funds**
2. Technical data – produced as part of performance for contract
3. Computer software documentation – required to be delivered under contract
4. Technical data – **form, fit, and function data** (FFF data)
5. Technical data – necessary for **operation, maintenance, installation, or training** (OMIT) purposes
6. Corrections or changes to technical data, computer software, or computer software documentation – furnished to contractor by Government
7. Technical data, computer software, or computer software documentation – otherwise **publicly available** or have been released or disclosed by the contractor / subcontractor **without restriction**
8. Technical data, computer software, or computer software documentation – obtained with unlimited rights under the current **or** any other Government contract or because of negotiations
9. Technical data, computer software, or computer software documentation – furnished to Government with limited / restricted rights or Government purpose rights that have since **expired**
10. SBIR data – upon **expiration** of **SBIR data rights period**

Government Purpose Rights

Government purpose rights give the Government the rights:

- (1) To use, modify, reproduce, release, perform, display, or disclose technical data, computer software, or computer software documentation **within the Government without restriction; and**
- (2) To release or disclose technical data, computer software, or computer software documentation **outside the Government**, and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display or disclose that data, software, or software documentation, **for United States government purposes**



Government Purpose Rights

- Acquired by Government in technical data, computer software, or computer software documentation **developed or created with mixed Government and contractor funding**
- Expire after **5 years** (or another negotiated time period), after which Government **acquires unlimited rights**
 - Until then, contractor has **exclusive right** to use technical data, computer software, or computer software documentation for any commercial purpose
- Must be marked with **Government Purpose Rights legend** at
 - DFARS 252.227-7013(f)(2) (technical data) *or*
 - DFARS 252.227-7014(f)(2) (computer software and computer software documentation)

GOVERNMENT PURPOSE RIGHTS

Contract No.

Contractor Name

Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical Data—Other Than Commercial Products and Commercial Services clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

Limited Rights (Technical Data)

- **Limited Rights** give Government the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, **within the Government**
 - Government *generally* may not release, disclose, use, or authorize another to use technical data **without written permission of contractor**
- Acquired by Government in technical data **developed exclusively at private expense**, *provided* data are properly marked with **Limited Rights legend** at DFARS 252.227-7013(f)(3)

LIMITED RIGHTS
Contract No.
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data—Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

Restricted Rights (Computer Software)

Restricted rights give Government rights to:

1. Use a computer program with **one** computer **at one time**
 2. Transfer computer program to another agency, provided transferor destroys all copies of program and related computer software documentation and notifies licensor
 3. Make reasonable number of copies required for safekeeping, backup, or modification purposes
 4. Use and modify software, and permit contractors / subcontractors to use and modify software, for **certain limited enumerated purposes**, provided notice is given to licensor and software is not otherwise released or disclosed
 - Ex: for emergency repairs / overhaul of items under this or related contract
- Acquired by Government in computer software **developed exclusively at private expense**, provided software is properly marked with **Restricted Rights legend** at DFARS 252.227-7014(f)(3)

RESTRICTED RIGHTS
Contract No.
Contractor Name
Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

Differences in FAR 52.227-14's Treatment of Data Rights

- Does not provide for delivery of limited rights data / restricted computer software, even if appropriately marked
 - Instead, contractor *may withhold from delivery* qualifying limited rights data *or* restricted computer software, provided not data first produced in performance of the contract, FFF data, or OMIT data
- Alternates II and III permit delivery of limited rights data *and* restricted rights computer software, respectively, but *only if marked* with the “Limited Rights Notice” and “Restricted Rights Notice” set forth in the alternate clauses
- Contains narrower definition of “limited rights” and “restricted computer software” than DFARS
 - To **qualify for limited / restricted rights protection**, data / software must (1) have private expense development, (2) embody trade secrets, (3) be commercial or financial *and* confidential or privileged, **or** (4) be copyrighted computer software
- No Government purpose rights

Technical Data – Commercial Products and Commercial Services

- Government obtains an **“unrestricted rights” license** in:
 - Data provided to Government without restrictions
 - FFF data
 - Data that are a correction or change to technical data furnished to contractor by Government
 - OMIT data
 - Data provided to Government under a prior contract through which Government has acquired ***unrestricted license rights***
- **No** public funding versus private expense requirement
- For all other commercial technical data, Government acquires a **“limited rights” license**, *provided data are **marked as restricted***
 - No specific format for restrictive legend
- **No** Government purpose rights

Polling Question

Contractor delivers to the Air Force commercial technical data that Contractor developed exclusively at its own expense. The data are needed for the operation, maintenance, and sustainment of an aircrew training system. Contractor marks the data with the following restrictive legend: “This data are confidential and/or proprietary to Contractor. It shall not be reproduced, distributed, or disclosed to others, except as expressly authorized in writing.” Can the Air Force challenge the restrictive marking?

- A. No, because the data were developed exclusively at Contractor’s expense
- B. No, because there is no specific format Contractor must use for the restrictive legend to assert rights in commercial technical data
- C. A & B
- D. Yes, because the data were delivered with unrestricted rights

And the Correct Answer is...D!

FlightSafety International, Inc., ASBCA No. 62659, 23-1 BCA ¶ 38,245

- Data were necessary for the **operation and maintenance** of the aircrew training system
 - Government has unrestricted rights in OMIT data
 - Does not matter that data were developed exclusively at private Contractor expense for the commercial marketplace
- Government has the right to challenge a restrictive marking, *even when* the Government has not dictated the specific language of a commercial restrictive marking
 - Because legend inhibited Air Force's unrestricted rights in the data, marking was invalid



Subcontractor/Supplier Flowdown

- Contractor and higher-tiered subcontractors and suppliers are **required** to flowdown the DFARS data rights clauses ***whenever*** technical data or computer software are expected to be obtained from a subcontractor or supplier for delivery to Government under the contract
- Contractor and higher-tiered subcontractors and suppliers are **prohibited** from using their power to award contracts to pressure their subcontractors or suppliers into forfeiting their data rights
- Contractor and higher-tiered subcontractors and suppliers are **obligated** to ensure that subcontractor or supplier rights are recognized and protected
 - Contractor is **prohibited from using this obligation** as an excuse for failing to satisfy its contractual obligations to the Government

Validation of Restrictive Markings

- Contractor **must** have **written procedures** to assure restrictive markings are used **only** when authorized and is responsible for **maintaining records** sufficient to *justify the validity of any restrictive markings*
 - Contracting Officer may request Contractor provide sufficient information to allow Government to evaluate asserted restrictions



Common Problems/Traps

1. Submitting data / software to Government you developed at private expense **or** with mixed funds or generated under a SBIR contract without a restrictive legend
 - *How to avoid?* Always marking such data / software with appropriate restrictive legend
2. Using your own legend that is different from those authorized in the data rights clauses to assert a restriction to Government's data rights
 - *How to avoid?* Always using the legends as they appear in the data rights clauses
3. Forgetting to list data / software in which Government has *only* limited / restricted, Government purpose, or SBIR/STTR data rights in the Data Rights Assertion Table
 - *How to avoid?* Keeping a Data Rights Assertion Table listing your proprietary or SBIR/STTR data / software and update and reference Table each time you enter into a new contract with Government

Common Problems/Traps

4. Failing to keep sufficient records to show the data / software you are delivering to Government were developed at private expense *or* with mixed funds *or* generated under a SBIR contract
 - *How to avoid?* Meticulously maintaining records showing how data / software were developed and with what funds so you can *justify the validity* of an asserted restriction

5. Asserting a restriction in data / software without substantial justification
 - *How to avoid?* Marking data / software as restricted in which you know *and can prove* Government has *other* than unlimited rights

Common Problems/Traps

6. Assuming data / software that are marked as restricted under one contract will *always* be treated as restricted under *all* contracts
 - *How to avoid?* Being consistent across your Government contracts in how you mark data / software in which Government has *other* than unlimited rights

7. Volunteering your data rights away during negotiations with Government
 - *How to avoid?* Understanding your rights under the data rights clauses
 - Note: If dealing with a **civilian agency**, make sure to negotiate FAR 52.227-14 Alternates II and III into your contract (or a similarly protective agency-specific clause)
 - Just because a Government contract involves delivery of data or software does not mean you have to sacrifice everything with respect to the data / software you worked hard and at great expense to develop!

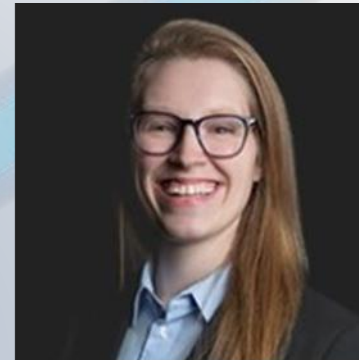
Questions?



Thank you!



Adam A. Bartolanzo
Counsel,
Government Contracts &
White Collar
abartolanzo@milesstockbridge.com
(202) 465-8388



Lauren S. Fleming
Associate,
Government Contracts &
White Collar
lfleming@milesstockbridge.com
(410) 385-3513

Disclaimer

Miles & Stockbridge is an Am Law 200 law firm with approximately 200 lawyers and eight offices across Maryland and in Virginia, Washington, D.C. and New York. The firm's lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

The opinions expressed and any legal positions asserted in this presentation are those of the authors and do not necessarily reflect the opinions or positions of Miles & Stockbridge P.C. or its other lawyers. No part of this presentation may be reproduced or transmitted in any way without the written permission of the author. Images are subject to copyright. All rights reserved.



Miles & Stockbridge



Miles & Stockbridge



@mstockbridgelaw