GovCon101: Data Rights in Practice – Assertions and Markings

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The "Data Rights Trinity"

- A contractor's restrictions on the Government's use and disclosure of the contractor's data are not self-executing

- The contractor must:
  - Document
  - Assert
  - Mark

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Document

- Have, maintain, and follow written procedures to ensure that restrictive markings are used only when authorized

- Keep sufficient accounting and engineering records to justify restrictive markings

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Assert

- Identify any technical data/computer software deliverables that will be delivered to the USG with less than unlimited rights
  - FAR 52.227-15 uses a representation approach
  - DFARS 252.227-7017 uses a table approach
- The DFARS does not require assertions as to commercial technical data or commercial computer software, but:
  - It isn't wrong to include them; and
  - More and more solicitations are requiring them

Assert (FAR 52.227-15)

REPRESENTATION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE (DEC 2007)

(a) This solicitation sets forth the Government's known delivery requirements for data (as defined in the clause at 52.227-14, Rights in Data-General). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227-16, if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data-General clause at 52.227-14 included in this contract. Under the latter clause, a Contractor may withhold from delivery data that qualify as limited rights data or restricted computer software, and deliver form, fit, and function data instead. The latter clause also may be used with its Alternates II and/or III to obtain delivery of limited rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate. In addition, use of Alternate V with this latter clause provides the Government the right to inspect such data at the Contractor's facility.

(b) By completing the remainder of this paragraph, the offeror represents that it has reviewed the requirements for the delivery of technical data or computer software and states [*offeror check appropriate block*]-

□ None of the data proposed for fulfilling the data delivery requirements qualifies as limited rights data or restricted computer software; or

□ Data proposed for fulfilling the data delivery requirements qualify as limited rights data or restricted computer software and are identified as follows:

_____

_____

_____

(c) Any identification of limited rights data or restricted computer software in the offeror's response is not determinative of the status of the data should a contract be awarded to the offeror.

(End of provision)

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Assert (DFARS 252.227-7017)

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)*****	(LIST)	(LIST)	(LIST)

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Completing an Assertions Table

- First Column
  - Identify **items of technical data or computer software** that are going to be **delivered as an element of contract performance** with **less than unlimited rights**
  - Remember the doctrine of segregability—the choice between granular entries and general entries can be strategic

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Completing an Assertions Table (cont'd)

- Second Column: Typically a reference to a development funding stream

- Third Column: Use terms of art (e.g., limited rights, restricted rights, etc.)

- Fourth Column: Name the owner of the identified data, not the person completing the table

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Completing an Assertions Table (cont'd)

- Include everything "known at the time an offer is submitted"
  - Review the PWS/SOW, CDRLs, etc. and identify all deliverable data
  - Flow assertion obligations down to subcontractors
  - Flow subcontractor assertions up to customer (subcontractors should use same format to ease integration)
  - Don't include patents (unless specifically told to do so)
- ***Follow the prescribed format!***
- If offer is successful, assertions table will be incorporated into contract
  - Additional data to be provided with restrictions may be identified and added to the attachment after award if based on new information or inadvertently omitted

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Mark

- Markings must be ***conforming*** – you must use the ***precise legend*** prescribed in the contract

- Markings follow assertions: Data may not be marked with a restrictive marking unless identified in the assertions table

- ***Follow the instructions in the clause!***

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"Conspicuous and Legible"

- Place legends on the transmittal document or storage container
- Apply legends to **_each page_** of printed material
  - Specifically identify portions of pages subject to restriction in some fashion
  - Data on a single page may be subject to different levels of restriction and must be marked accordingly
  - Reproduce legends verbatim and do not use short forms
- Embed legends in software (e.g., splash screens, "Readme" files, source code headers, etc.)
  - But not in a way that will interfere with or delay operation of the software in a combat situation or simulation thereof

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Sample Legends (DFARS)

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—Noncommercial Items 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

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.

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Sample Legends (FAR)

LIMITED RIGHTS NOTICE (DEC 2007)

(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.*]

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

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.

Restricted Rights Notice Short Form (JUN 1987)

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No. _____ (and subcontract, if appropriate) with _____ (name of Contractor and subcontractor).

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Mark (cont'd)

- Commercial Technical Data
  - Treated as limited rights technical data under the FAR; mark accordingly
  - No prescribed legend under the DFARS; any marking is appropriate, but consider a "familiar" marking as a risk-mitigation strategy
- Commercial Computer Software
  - No prescribed legend anywhere
  - Any marking is appropriate, but consider a "familiar" marking as a risk-mitigation strategy

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Failure to Mark

- If a marking is prescribed, unmarked data are presumed delivered with unlimited rights
  - It is possible to request permission to fix an inadvertent failure to mark, but that may not mitigate harm to contractor IP that occurred before the error was caught
- If no marking is prescribed, there is no presumption of delivery with unlimited rights, but the USG has no liability for acting beyond the scope of its license
  - Essentially: If you fail to put the USG on notice of its license, you probably won't be able to recover if the USG violates that license

Unjustified vs. Non-Conforming Markings

- ## Unjustified Markings
  - Markings that restrict the USG's use/disclosure of data **without legal basis for the restriction**
  - Addressed through the validation and challenge process (*e.g.*, FAR 52.227-14(e), DFARS 252.227-7037, DFARS 252.227-7019)
  - If unresolved, these ultimately become contractor claims under the CDA
- ## Non-Conforming Markings
  - Markings that restrict the USG's use and disclosure of data, but that are **not in the prescribed form**
  - Addressed through a less formal process, but can still mature into contractor claims under the CDA

Third-Party Markings:
The Boeing Co. v. Sec'y of the Air Force

- The dispute arose under two Boeing contracts for the Air Force's F-15 Eagle Passive Active Warning Survivability System (EPAWSS) program
- Boeing submitted numerous data deliverables with unlimited rights
- Boeing marked these deliverables with a legend intended to put third parties on notice of Boeing's retained rights and not intended to restrict the USG's use and disclosure (*e.g.*, not to interfere with the USG's unlimited rights)
- The Air Force rejected the deliverables for containing non-conforming markings
- Boeing appealed the COFD confirming the rejection of the deliverables to the ASBCA

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Third-Party Markings (cont'd): *The Boeing Co. v. Sec'y of the Air Force*

- Boeing moved for summary judgment on a single legal question:

  Whether Boeing may mark technical data in which it has given the Government unlimited rights with a marking that restricts the rights of third parties but expressly recognizes – and in no way impairs – the Government's unlimited rights in those data

- The Board denied summary judgment, holding that Boeing's markings were non-conforming:

  The legends set forth in -7013(f) "are the only permissible legends for limiting data rights and no other data rights legends are allowed"

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Third-Party Markings (cont'd):
The Boeing Co. v. Sec'y of the Air Force

- Boeing appealed to the Federal Circuit, which reversed
  - Begin with the plain language, read as a whole, not in isolation
  - -7013(f) only applies to restrictions on the USG, because any other reading renders the first sentence superfluous
  - This interpretation also "remains faithful to the overall purpose of the -7013 clause and the broader technical data rights regulations in DFARS parts 227 and 252, all of which govern the allocation of data rights between contractors and the government"

Third-Party Markings (cont'd): *The Boeing Co. v. Sec'y of the Air Force*

- The Federal Circuit recognized that its interpretation "allows Boeing a bare minimum of protection for the data, namely, the ability to notify the public of its ownership. A contrary interpretation would result in Boeing de facto losing all rights in any technical data it delivers to the Government"

- The court rejected the USG's contention that this would "lead to an epidemic of confusion that would broadly prevent the government from exercising its license rights under government contracts"

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Third-Party Markings (cont'd):
The Boeing Co. v. Sec'y of the Air Force

- A third-party marking is permissible as long as it does not restrict the USG's rights
- The court remanded the question of whether the specific marking at issue did or did not restrict the USG's rights to the Board
- The parties settled and published their settlement marking

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Third-Party Markings (cont'd):
The Boeing Co. v. Sec'y of the Air Force

THE DATA HEREIN ARE NONCOMMERCIAL TECHNICAL DATA DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No. _____

Contractor Name ____The Boeing Company_____

Contractor Address _____

© [YYYY] Boeing. The technical data herein are owned by The Boeing Company. The U.S. Government authorizes non-U.S. Government recipients of these data to use these data for the performance of U.S. Government contracts or subcontracts. Any other third-party use of these data requires permission from the U.S. Government or The Boeing Company.

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Third-Party Markings (cont'd): Post-*Boeing*

- *FlightSafety Int'l* (ASBCA No. 62659)
  - ASBCA rejected FlightSafety's purported third-party markings on the basis that they *did* restrict the USG's rights
  - Fully briefed at the Federal Circuit as of 12/12/23
- December 2022 proposed rulemaking responsive to *Boeing*

Check on Knowledge

TRUE or FALSE:

The contractor always bears the burden of proof in a dispute over a restriction on the Government's use and disclosure of contractor data.

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Check on Knowledge

TRUE or FALSE:

There are no prescribed markings for commercial technical data under FAR 52.227-14.

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Check on Knowledge

TRUE or FALSE:

The Federal Circuit's *Boeing* decision established a permissible third-party marking for technical data.

Check on Knowledge

TRUE or FALSE:

If a solicitation does not include DFARS 252.227-7017, you are not obligated to submit a data rights assertion table.

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Presenter

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Scott helps clients identify, protect, manage, and enforce their intellectual property rights. His practice focuses on the complex intellectual property issues confronted by government contractors, including patent rights and rights in technical data and computer software, with emphasis on the aerospace, defense, and intelligence sectors.