

DoD Adopts Final Rules That May Allow Project Management Support Contractors to See Your Proprietary Technical Data and Software

Legal Alert
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Garvey Schubert Barer Legal Update, June 5, 2013.

In late May 2013, the DoD adopted final rules to streamline program management by giving certain “support contractors” access to proprietary technical data and software provided to the DoD by other contractors. That makes sense from a DoD management viewpoint – but it means contractors should take care to protect proprietary technical data and software being shared. In the same rulemaking, DoD also updated generally its “data rights” rules and contract clauses.

Now is a good time for all contractors and subcontractors who do business with DoD to make sure they understand DoD’s rights to use and disclose their proprietary technical data and software delivered under a DoD contract, and restrictions on their access to and use of third party data and software furnished by the Government.

What is “Technical Data?” and What Determines the Scope of DoD’s Rights?

“Technical data,” as used in the rights allocation rules, has little to do with “data,” as understood in computer and data processing realms. It is a very broad and often misunderstood concept. The definition of “technical data” under 10 USC Section 2302 (the basic DoD procurement statute) is:

Recorded information (regardless of the form or method of recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer

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software or financial, administrative, cost or pricing, or management data or other information incidental to contract performance.

Generally, all technical data pertains to either an item, or a process, developed by a contractor or a subcontractor, and relating to something supplied to the government. Thus, if recorded information documenting an internal proprietary process relates to manufacturing an item supplied to the Government, it would qualify as technical data. Engineering documents and technical specifications of a product supplied to the Government may also qualify as technical data.

The “source of funding” test generally defines the interests of the Government and the contractor or subcontractor, respectively, in technical data pertaining to an item or process and software. Generally, if the item, process or software is developed by the contractor or a sub exclusively with federal funds, DoD gets “unlimited rights” to use technical data pertaining to the item, process, or the software. Importantly, this includes rights to release and disclose to, and allow use of, the technical data or software by persons outside the Government without restriction. Conversely, if the item or process is developed entirely at private expense, the contractor may assert “limited rights” in technical data, and “restricted rights” in software, which restrict the Government’s rights to use, release and disclose the information to others, subject to certain exceptions. If the component is developed with a mix of Government and private funding, then the Government obtains “Government Purpose Rights (“GPR”),” which permits disclosure to and use by third parties only for Government purposes, for a specific duration, usually five years, at which point the DoD’s rights convert to unlimited rights. The “source of funding” test is applied at the **lowest segregable component level**, meaning that the determination must be made for each segregable component of the deliverable item. Contractors delivering data or software subject to limited rights/restricted rights or GPR must mark the deliverables with specific legends prescribed in the rules.

May 2013 Final Rules: Support Contractors Have Access, But Must Sign NDA

On May 22, 2013, the Department of Defense revised the Defense Federal Acquisition Regulation Supplement (DFARS) to allow the DOD to disclose a contractor’s proprietary “limited rights” technical data and “restricted rights” software to certain other contractors providing support to the DoD. The goal is to allow the DOD to better utilize its support contractors by allowing them to see critical proprietary materials provided by other contractors. As safeguards, the new rules require the recipient contractor to use the proprietary material only for purposes of performing its duties in providing support, and not further disclose it to unauthorized persons. In addition, the contractor asserting proprietary rights may require the support contractor to execute a non-disclosure agreement in a form prescribed by the DFARS. The final revisions may be found [here](#).

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Historically, the DoD could not share a contractor's proprietary technical data or software (i.e., material developed entirely at private expense and designated by a contractor or third party as "limited rights" data or "restricted rights" software), except when the data met the definition of "form, fit and function" data, or in certain exigent circumstances, e.g., emergency repair and overhaul; and, even then, only when the recipient was made subject to strict restrictions on further release. These restrictions were cumbersome for DoD because a contractor engaged to manage, oversee or provide technical advice or assistance to a program could not see another contractor's limited rights data or restricted rights software delivered to the Government unless one of the two statutory exceptions applied.

Among others, the final rules amend standard contract clauses at DFARS 225.227-7013 (Rights in Technical Data – Noncommercial Items), 225.227-7014 (Rights in Noncommercial Software), 225.227-7015 (Technical Data – Noncommercial Items), and 225.227-7025 (Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends).

The final rules and clauses now spell out in fairly clear and comprehensive detail the basic obligations of the DoD and contractors regarding technical data and software. The rules impose additional restrictions on "project management" type contractors, require notice of access to parties whose data and software carry restrictive legends, allow parties asserting proprietary rights to require the support contractor to execute an NDA, and provide such parties with third party beneficiary rights to enforce the restrictions against the support contractor.

Understanding the "technical data" rules and contract clauses is critical to prime contractors and subcontractors who have delivered to the Government technical data or software marked with restrictive legends, as well as those to whom the Government furnishes proprietary data or software in which third parties claim rights. Applying the clauses and rules to specific situations can be complex and we encourage you to contact [Ben Lambiotte](#) of GSB's D.C. office who will be pleased to help you navigate these important rules.