

ALERT

DOD Publishes Final Rule on Government Support Contractor Access to Contractor Proprietary Technical Data & Software

May 23, 2013

On Wednesday, May 22, the Department of Defense (DOD) adopted, with some changes, the March 2, 2011, interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 821 of the Fiscal Year 2010 National Defense Authorization Act (NDAA). Section 821 permitted certain types of Government support contractors access to contractor proprietary information. See 78 Fed. Reg. 30,233 (May 22, 2013).

The interim rule authorized the Government to disclose limited rights technical data and restricted rights computer software to “covered Government support contractors” for the performance of their support contracts, subject to the restrictions in the clause at DFARS 252.227-7025. See DFARS 252.227-7013 (FEB 12); 252.227-7014 (FEB 12). A “covered Government support contractor” is defined as “a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish and end item or service to accomplish a program or effort), provided that” (a) the support contractor is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of the prime or first-tier subcontractor for the items or services being provided, and (b) it receives access to technical data or computer software for purposes of performing its contract subject to the clause at DFARS 252.227-7025. See DFARS 252.227-7014(a)(6).

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Practice Areas

Government Contracts
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In response to public comments, DOD made several favorable changes to the interim rule. Key changes include the following:

- The interim rule required the covered Government support contractor to enter into a non-disclosure agreement (NDA) directly with the owner of the proprietary information, at the owner's discretion, and to provide a copy of such NDA to the Contracting Officer (CO) upon request. The final rule eliminates the requirement to provide copies to the CO, because this was not required by the statute and DOD determined that the benefit to the Government in collecting copies of these NDAs was outweighed by the administrative burden.
- DOD agreed that successful enforcement of an information owner's rights requires the covered Government support contractor to obtain individual NDAs from its employees who have access to the owner's proprietary information. Accordingly, the final rule added a new paragraph (d) to the clause at DFARS 252.227-7025 to expressly require the recipient contractor to ensure that its employees are subject to the same use and non-disclosure obligations prior to their access to or use of the information.
- Although the interim rule required the recipient contractor to notify the information owner of the recipient's access to or use of the technical data or software, it did not specify *when* that notification had to be made. The final rule amends DFARS 252.227-7025 to require the notification to be provided within 30 days of the recipient contractor's access to or use of the data.
- The final rule clarifies the definitions of "limited rights" and "restricted rights" to specify that the Government's authorized release to a covered Government support contractor is only when it is necessary for the performance of a covered Government support contract, which, by definition, is required to include the clause at DFARS 252.227-7025, and that the recipient contractor may, in turn, only disclose the information to another person authorized to receive limited rights technical data or restricted rights computer software.
- The final rule also revises the definition of "restricted rights" to clarify that the covered Government support contractor's authorized uses are no greater than the uses authorized for the Government.

Additionally, DOD revised DFARS 227.7104(b) and the definition of "Small Business Innovation Research (SBIR) data rights" to clarify the Government's limited rights in technical data and restricted rights in computer software under the SBIR data rights clause at DFARS 252.227-7018. Specifically, the final rule makes clear that SBIR data rights provide the Government limited rights in technical data and restricted rights in computer software during the five year SBIR data protection period, and that such rights will convert to unlimited rights upon expiration of the five year period.

These changes, which are largely favorable to contractors furnishing their intellectual property to the Government, are effective May 22, 2013. As the trend toward expanded Government rights continues, contractors need to remain vigilant in understanding the Government's heightened demands and the steps that can be taken to ensure their rights in technical data and computer software enjoy maximum protection.