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# *Software Acquisition Under the FAR*

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# Topics

- Rights in Data Overview
- Software Development Contracts
- Commercial Computer Software



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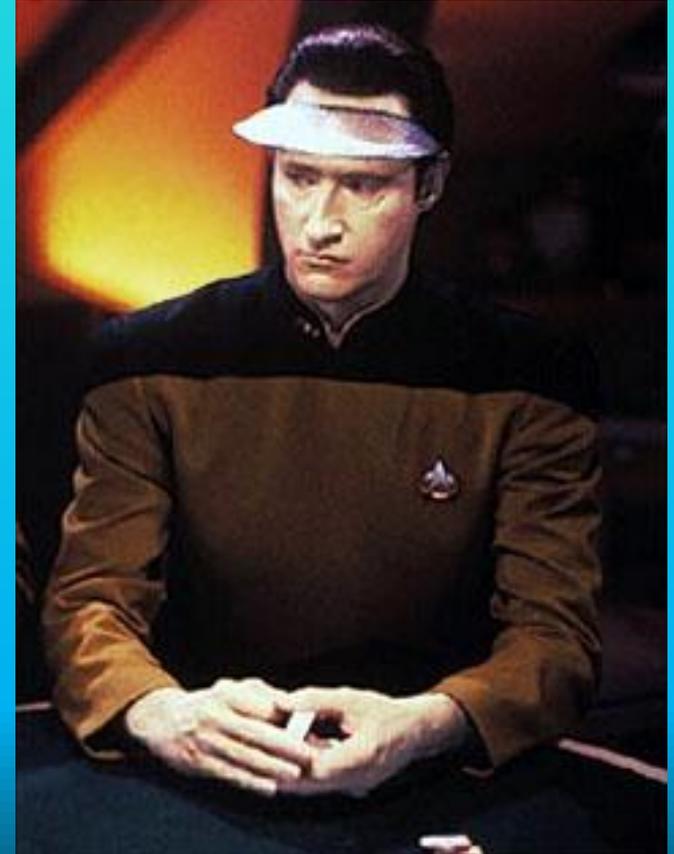
# *Rights in Data Overview*



# What is “Data”

## FAR 52.227-14(a) Definition

- “*Data* means recorded information, regardless of form or the media on which it may be recorded. The term includes **technical data and computer software**. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.”





# Additional Definitions

- “Unlimited rights” – Government’s right 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.
- “Technical data” - data other than computer software, which are of a scientific or technical nature.
- “Form, fit, and function data” - means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, physical and functional characteristics, and performance requirements. For computer software the definition specifically excludes source code, algorithms, processes, formulas, and flow charts of the software.



# Additional Definitions

- “Limited rights data” - data, other than computer software, that embody trade secrets, or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components or processes developed at private expense, including minor modifications thereof.
  - Note - for contracts that do not require the development, use or delivery of items, components, or processes, there is an alternate definition that requires only that the data were developed at private expense and embody trade secrets, or are commercial or financial and confidential or privileged. (FAR 52.227-14 (Alt. I)).
- “Restricted computer software” - computer software developed at private expense that is commercial or financial and confidential or privileged, or is published copyrighted computer software, including minor modifications thereof.
- “Limited rights” - rights of the Government in limited rights data as set forth in a Limited Rights Notice.
- “Restricted rights” - rights of the Government in restricted computer software as set forth in a Restricted Rights Notice.



# Data Rights Provisions

- FAR 27.403
  - “All contracts that require data to be produced, furnished, acquired or specifically used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor....”



# Data Rights Provisions - Summary

- FAR Subpart 27.4 - Rights in Data and Copyrights
  - provides guidance for civilian agencies
- Contract Clauses
  - Rights in Data - General (52.227-14)
  - Rights in Data - Special Works (52.227-17)
  - Rights in Data - SBIR Program (52.227-20)
- See FAR at <https://www.acquisition.gov/far/>
- Agencies may also have their own FAR Supplements that should be followed



# Striking the Balance: What We Need & What We Ask For

- Current Government Policy
  - Acquire only data and rights essential to meet Government's needs.
  - Protect contractor's proprietary data
- Policy strikes a balance between interests of contractors and the Government
  - Recognizes administrative burden (and costs) resulting from excessive data acquisition.



## Striking the Balance: Rights in Data

- Government's need for data does not equate to an obligation to deliver the data
- Policy for data developed at contractor's expense:
  - such data are not delivered to the Government unless contract authorizes delivery
    - limited rights data/restricted computer software
  - Rather, the contractor is permitted to deliver form, fit, and function data (unless Alt II or Alt II used)
- Utilize 52.227-15 to determine what data will be delivered with less than “unlimited rights”



# Government Rights in Data vs. Delivery of Data

- Rights in Data Clauses specify the respective rights of the Government and the Contractor
  - But do not specify the data to be delivered
- Government acquires unlimited rights in “data first produced in performance of the contract”
- However, Contractors only required to deliver data specified elsewhere in contract for delivery
  - Contract must specify data to be delivered (SOW/DDR identify known delivery requirements)
  - As a backup, use 52.227-16 to require delivery of data first produced or specifically used in the performance of the contract but not identified for delivery in the contract



# Requirements Development

- Data Delivery Requirements (DDRs) in the Statement of Work (SOW) should specify type, quality, quantity and delivery time for each data item
- When developing SOW, also determine desired/needed Government rights in data and software
- Ensure that contract language adequately captures Government's desires/needs
- If software will be developed:
  - What software will be delivered?
  - Is delivery of source code desired?
  - If so – specifically state as a deliverable



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# *Software Development Contracts*

## *FAR Part 27*



## Choosing the Right Clauses: Preparation

- Will software be produced, acquired or specifically used in contract performance?
- Will software be delivered?
- What software should be delivered?
- What will the Government do with the software ?



# Data Rights Clauses

- 52.227-14 Rights in Data-General
- 52.227-15 Representation of Limited Rights Data and Restricted Computer Software
- 52.227-16 Additional Data Requirements
- 52.227-17 Rights in Data-Special Works
- 52.227-19 Commercial Computer Software-Restricted Rights
- 52.227-20 Rights in Data-SBIR Program



# Rights in Data-General

## FAR 52.227-14

- Basic clause in R&D contracts if data will be produced, furnished, or delivered
  - Identifies respective rights of the Parties
- Government has
  - Unlimited Rights in data first produced or delivered under the contract, unless:
    - copyright asserted in data produced, or
    - limited rights data or restricted computer software delivered
  - Limited Rights in data/Restricted Rights in software produced at contractor's expense
    - Can be withheld from delivery unless Alt II or Alt III included in contract



# Rights in Data-General (cont.)

## FAR 52.227-14

- Contractor has right to:
  - Assert Copyright in data to extent specified in contract
  - Use, release, reproduce, distribute, or publish data first produced or specifically used in the contract; except:
    - As prohibited by Federal law or regulation
    - As expressly set forth in this contract, or
    - If Contractor is provided data necessary for performance of the contract that contain restrictive markings
  - Substantiate the use of, add, or correct limited rights, restricted rights, or copyright notices
  - Protect limited rights data and restricted computer software from unauthorized use and disclosure



# Rights in Data-General (cont.)

## FAR 52.227-14

- Contractors may assert copyright without prior approval of the Contracting Officer (CO)
  - In scientific and technical articles based on or containing data produced under the contract, and published in academic, technical or professional journals
  - Government obtains “government purpose license”
- Prior written permission of CO is required to assert copyright
  - In all other data first produced in the performance of the contract
    - includes software and information of a scientific or technical nature
- Alt IV – used when college/university performing basic research
  - Contractor may assert copyright in any data first produced under the contract



## Rights in Data-General (cont.) FAR 52.227-14

- When copyright asserted – Government gets a “Government Purpose License”
  - May use, modify, and distribute copyrighted data to the public for governmental purposes
  - But for software – can’t distribute to the public
  - Examples of permissible use
    - use the work within the Government without restriction
    - release the work outside the Government for governmental purposes, e.g.,
      - for performance of a government contract
    - authorize persons to whom released to exercise license rights on behalf of the Government



# Rights in Data-General (cont.)

## FAR 52.227-14

- Alternate I Definition Limited Rights Data - rare
- Alternate II Delivery of Limited Rights Data
- Alternate III Restricted Computer Software
- Alternate IV - Copyright for Universities
- Alternate V Inspection of Withheld Data
  
- Must negotiate for sufficient rights when using Alt II and III - consult Patent Counsel
  - may add desired extra data purposes
  - For example : use by support service contractors and use by other contractors participating in the Government program



# Rights in Data-General (cont.)

## FAR 52.227-14

- Omitted or incorrect markings
  - If data missing proper marking (Limited Rights Notice, Restricted Rights Notice, or a Copyright Notice), or has incorrect markings (e.g., “Proprietary Data”)
  - Government may treat data as Unlimited Rights Data
    - No liability for use or disclosure of any data made prior to addition of notice or resulting from the omission of the notice
- Unauthorized markings
  - Inappropriately marking unlimited rights data as limited/restricted
  - If data marked other than as authorized by the clause, CO may return it, or may cancel or ignore the markings
- CO must follow procedures specified in the clause
  - Provides contractor right to correct or substantiate use of restrictive markings



## Rights in Data-General (cont.) FAR 52.227-14

- Government has rights in more than data deliverables
  - Difficulty to exercise those rights unless data is in the Government's possession
  - Important to identify all data needed as contract deliverables
- Subcontracts – Contractor responsible for obtaining all data rights necessary to fulfill its contract obligations



# Are You Still With Me?





# Representation of Limited Rights Data and Restricted Computer Software FAR 52.227-15

- Use in all solicitations for R&D contracts
- Answers given by contractor are important
  - indicate whether contractor desires to impose restrictions on background data
- Aid to determine whether to use Alternate II and III



# Additional Data Requirements

## FAR 52.227-16

- Use in solicitations and contracts involving experimental, developmental, research, or demonstration work
- Government practice is to determine, to the extent feasible, data requirements for inclusion in solicitation
  - Data to be delivered is then identified in the contract
- In R&D contracts, it may not be feasible to ascertain all data requirements at contract award
- Clause enables CO to order additional data first produced or specifically used in the performance of the contract as the actual requirements become known



# Rights in Data - Special Works

## FAR 52.227-17

- May be used when Government requires exclusive rights
  - used in contracts that are primarily for the production of data for the Government's own use, or
  - when there is a specific need to either limit distribution and use of the data or to guarantee its public access
  - also includes the development of software
  - FAR 27.405 provides guidance
- Prior written permission of Contracting Officer is required to assert copyright
- Contracting Officer may instead direct contractor to assign the copyright to the Government



# SBIR Contracts

## FAR 52.227-20

- SBIR data is:
  - data first produced in performance of an SBIR contract,
  - not generally known,
  - not already available to the Government, and
  - not made available to others without an obligation of confidentiality
- SBIR data may be marked with SBIR Rights Notice
  - Government may not disclose SBIR data to any party, other than support service contractor, for 4 years after acceptance
    - SBIR Phase III can re-start the 4 year clock (daisy-chaining)
    - If Phase III work derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements
- If not marked with SBIR Rights Notice
  - No additional restrictions on Government's use



# Rights to Proposal Data (Technical) 52.227-23

- Allows the Government to acquire unlimited rights to technical data in successful proposals
- But, prospective contractor is afforded the opportunity to specifically identify pages containing technical data to be excluded from the grant of unlimited rights.



# *Commercial Computer Software*



## FAR Part 12 - Acquisition of Commercial Items

- “Commercial item” - any item that is of a type customarily used by the general public or non-governmental entities for purposes other than governmental purposes and
  - Has been sold, leased, or licensed to the general public, or
  - Has been offered for sale, lease, or license to the general public
- If a product or service meets definition of “commercial items”
  - Government’s data rights associated with such service or items vary from standard Part 27 data rights.
- “Commercial item” encompasses commercial products of any kind, including commercial software.
  - FAR Definition - “Commercial computer software” means any computer software that is a commercial item



# Commercial Computer Software

- FAR 12.212
  - Sets forth the guidance for the acquisition of commercial computer software
  - Government will accept a vendor's "standard commercial license" unless inconsistent with law or Government's requirements
  - Contractors not normally required to provide technical information related to commercial computer software or documentation
  - For additional guidance regarding use and negotiation of license agreements for commercial computer software, see 27.405-3



# Commercial Computer Software

- License terms inconsistent with law
  - Indemnity clauses violate the Anti-Deficiency Act
  - Applicable law clauses violate the Contract Disputes Act
  - Late payment penalties violate the Prompt Payment Act
  - Sole-source follow on clauses violate the Competition in Contracting Act
  - Merger clauses that typically state the license is the complete and final agreement between the parties
    - With the exception of credit card purchases, there will always be a contract with required clauses



# Commercial Computer Software

- FAR 27.405-3
  - When acquiring commercial computer software, no specific clause prescribed in subpart 27.4 need be used
  - But the contract shall specifically address Government's rights to use, disclose, modify, distribute, and reproduce the software
  - If the contract incorporates, makes reference to, or uses a vendor's standard commercial license, such license shall be reviewed to assure it is consistent with section 27.405-3
  - Inconsistencies in vendor's standard commercial license shall be addressed in the contract
    - the contract shall take precedence



# Commercial Computer Software

- Greater or lesser rights shall be negotiated and set forth in the contract.
  - Example of greater rights may include:
    - Rights necessary for networking
    - Use of software from remote terminals communicating with a host where software is located
- Contract should describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation
- FAR 52.227-19 may be used in lieu of the vendor's standard commercial license
  - inconsistencies in vendor's license regarding the Government's right to use, reproduce or disclose the computer software are reconciled by the clause



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