FORM CD-83
(10-V2-80)
FORMERLY SEC-350

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO:	X	The Secretary		The Deputy Secretary

Date: FEB 20 1987

BRIEFING MEMORANDUM

From: Under Secretary for Economic Affairs RQ

Prepared by: Norman J. Latker/EA/OPTI/377-0659

SUBJECT: Federal Acquisition Regulation on Technical Data and Copyrights

GSA has proposed a regulation defining Government and contractor rights to technical data used or produced in procurement contracts. In its current form, the regulation (appended) is inconsistent with Administration policy and should not be approved.

BACKGROUND

The President's Competitiveness Initiative commits the Administration to helping commercialize nonpatentable results of Federally-funded research. The initiative would permit Federal contractors to own software, engineering drawings and other technical data generated by Federal contracts in exchange for royalty-free use by the Government. This provision on technical data follows logically from the President's memorandum of February 18, 1983, leaving the title to inventions resulting from Federally-funded research with the contractor.

GSA's proposed rule would provide unlimited discretion to agencies to retain ownership of technical data rather than giving the data to the contractor.

The appended draft letter to Jim Miller recommends that OMB not approve the GSA regulation. You urge OMB to return the regulation to GSA for revision to conform with the President's Initiative.

Control No. 701395

MAR 0 4 1987
(SIGNED)

	PREPARED BY	CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY	CLEARED BY
SURNAME AND ORGANIZATION (Typed)	DBMerrifield A/S, PTI	RELlert Ch.C./EA	ES			
INITIALS AND DATE	for JW 2/17/87	Robert E. Ellert FEB 18 1987				

USCOMM-DC 1030-P80

FEB 50 1981

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

MAR 0 4 1987

Honorable James C. Miller, III
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Jim,

OMB's Office of Information and Regulatory Affairs is reviewing a set of GSA regulations involving civilian-agency ownership of technical data. In their current form, these regulations are inconsistent with Administration policy.

Item 21 of "The President's Competitiveness Initiative" commits the Administration to helping commercialize nonpatentable results of Federally-funded research. Specifically, the item would permit Federal contractors to own software and other technical data in exchange for royalty-free use by the Government.

Item 21 is a logical outgrowth of the policy established for Government patents by the President's memorandum of February 18, 1983. This memorandum leaves title to inventions resulting from Federally-funded research with the contractor.

The proposed GSA regulations move in the opposite direction, providing unlimited discretion to agencies to retain ownership of technical data rather than giving it to the contractor.

The regulations also ignore the recommendation on contractor ownership of technical data by the White House Conference on Small Business and Section 21(b)(2) of the Federal Procurement Policy Act.

I urge that you return the regulations to GSA and request that they be revised to give contractors the first option to ownership of Federally-funded technical data as intended by Item 21.

Sincerely,

(SIGNED)

Secretary of Commerce

EA/OPTI/FTMP/Norman Latker/rh 2/17/87
bc: Dr. Ortner (2)
Dr. Merrifield
Dr. Williams
Norm Latker
ES (4)
Chron
Read

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

MAR 0 4 1987

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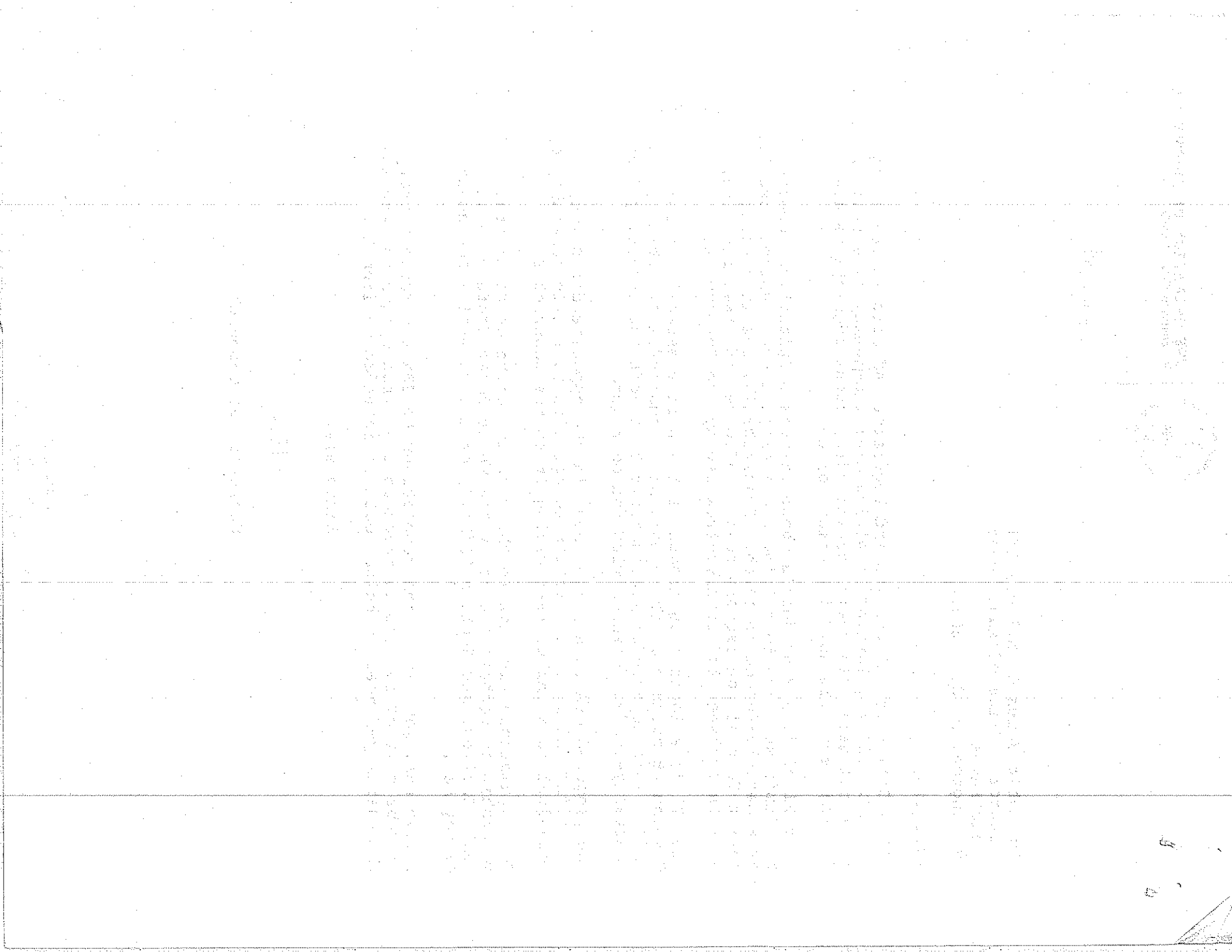

PART 27--PATENTS, DATA, AND COPYRIGHTS

2. Subpart 27.4 is revised to read as follows:

SUBPART 27.4--RIGHTS IN DATA AND COPYRIGHTS

27.400 Scope of subpart.
27.401 Definitions.
27.402 Policy.
27.403 Data Rights--General.
27.404 Basic Rights in Data.
27.405 Other data rights provisions
27.406 Acquisition of data.
27.407 Rights to technical data in successful proposals.
27.408 Cosponsored research and development activities.
27.409 Solicitation provisions and contract clauses.

27.400 Scope of subpart.

The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart sets forth civilian agency and National Aeronautics and Space Administration (NASA) policies, procedures, and instructions withrespect to (a) rights in data and copyrights and (b) acquisition of data. However, these policies, procedures, and instructions are not required to be applicable to NASA solicitations until July 1, 1986 (or until such other dateas the NASA FAR Supplement is revised to accommodate the policies, procedures, and instructions contained in this subpart). Due to the special mission needs of the Department of Defense (DOD) and as required by 10 U.S.C. 2320, the remainder of the DOD policies, procedures, and instructions with respect to rights in data and copyrights and acquisition of data are containedin the DOD FAR Supplement.

27.401 Definitions.

"Computer software," as used in this subpart, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this subpart, 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.

"Form, fit, and function data," as used in this subpart, means data relating to items, components, processes that are sufficient to enable physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

"Limited rights," as used in this subpart, means the rights of the Government in limited rights data, as set forth in a Limited Rights Notice if included in a data rights clause of the contract.

"Limited rights data," as used in this subpart, means 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. (Agencies may, however, adopt the following alternate definition:

"Limited rights data," as used in this subpart, means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404(c).)

"Restricted computer software," as used in this subpart, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

"Restricted rights," as used in this subpart, means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice, if included in a data rights clause of the contract, or as otherwise may be included or incorporated in the contract.

"Technical data," as used in this subpart, means data other than computer software, which are of a scientific or technical nature.

"Unlimited rights," as used in this subpart, means the rights of the Government 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.

27.402 Policy.

It is necessary for the departments and agencies, in order to carry out their missions and programs, to acquire or obtain access to many kinds of data produced during or used in the performance of their contracts. Such data are required to:

obtain competition among suppliers; fulfill certain responsibilities for disseminating and publishing the results of their activities; ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments; and meet other programmatic and statutory requirements. Further, for defense purposes, such data are also required to meet specialized acquisition needs and ensure logistics support.

At the same time, the Government recognizes that its contractors may have a legitimate proprietary interest (e.g., a property right or other valid economic interest) in data resulting from private investment. Protection of such data from unauthorized use and disclosure is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the contractor's commercial position, and preclude impairment of the Government's ability to obtain access to or use of such data. The protection of such data by the Government is also necessary to encourage qualified contractors to participate in Government programs and apply innovative concepts to such programs. In light of the above considerations, in applying these policies, agencies shall strike a balance between the Government's need and the contractor's legitimate proprietary interest.

27.403 Data Rights--General.

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 regarding the use, duplication, and disclosure of such data, except certain contracts resulting from sealed bidding or similar situations which require only existing data (other than limited rights data and restricted computer software) is to be delivered and reproduction rights are not needed for such data. As a general rule the data rights clause at 52.227-14, Rights in Data--General, including Alternates I, II, III, IV, and V, where determined to be appropriate as discussed in 27.404, is to be used for that purpose. However, in certain types of contracts either the particular subject matter of the contract or the intended use of the data may require the use of other prescribed clauses, or may not require the use of any prescribed clause, as discussed in 27.405 and 27.408. Also, in selecting a data rights clause, it is important to note that any such clause does not specify the data (in terms of type, quantity or quality) that is to be delivered, but only the respective rights of the Government and the contractor to use, disclose, or reproduce such data. Accordingly, the contract should also include appropriate terms to specify the data to be delivered.

27.404 Basic Rights in Data Clause.

(a) Unlimited Rights Data. Under the clause at 52.227-14, Rights in Data--General, the Government acquires unlimited rights in the following data (except as provided in 27.404(f) for copyrighted data): (1) data first produced in the performance of a contract (except to the extent such data constitute minor

modifications to data that are limited rights data or restricted computer software); (2) form, fit, and function data delivered under contract; (3) data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract; and (4) all other data delivered under the contract other than limited rights data or restricted computer software (see paragraph (b) below). If any of the foregoing data are published copyrighted data with the notice of 17 U.S.C 401 or 402, the Government acquires them under a copyright license, as set forth in 27.404(f) below, rather than with unlimited rights.

(b) Limited Rights Data and Restricted Computer Software. The clause at 52.227-14, Rights in Data--General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding such data from delivery to the Government and delivering form, fit, and function data in lieu thereof. However, when an agency has a need to obtain delivery of limited rights data or restricted computer software, the clause may be used with its Alternates II or III, as set forth in 27.404(d) and (e) below. These alternatives enable a contracting officer to selectively request the delivery of such data with limited rights or restricted rights, either by specifying such delivery in the contract or by specific request.

(c) Alternate Definition of Limited Rights Data. In the clause at 52.227-14, Rights in Data--General, in order for data

to qualify as limited-rights data, in addition to being data that either embody a trade secret or are data that are commercial or financial and confidential or privileged, such data must also pertain to items, components, or processes developed at private expense, including minor modifications thereof. However, for contracts that do not require the development, use or delivery of items, components or processes that are intended to be acquired by or for the Government an agency may adopt for general use or for use in specific circumstances the alternate definition of limited rights data set forth in Alternate I. The alternate definition does not require that such data pertain to items, components, or processes developed at private expense; but rather that such data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(d) Protection of Limited Rights Data Specified for Delivery.

(1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data--General, by use of Alternate II, which Alternate adds subparagraph (g)(2) to the clause to enable the Government to require delivery of limited rights data rather than allowing the contractor to withhold such data. To obtain such delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified as withholdable under subparagraph (g)(1) of the clause at 52.227-14 Rights in Data--General or data. In addition, if agreed to during negotiations,

the contract may specifically identify data that are not to be delivered under Alternate II or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in subparagraph (g)(2) (Alternate II). Such limited rights data will not, without permission of the contractor, be used by the Government for purposes of manufacture, and will not be disclosed outside the Government except for certain specific purposes as may be set forth in the Notice, and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes which may be adopted by an agency in its supplement and added to the Limited Rights Notice of subparagraph (g)(2) of the clause (Alternate II):

(i) Use (except for manufacture) by support service contractors .

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part, for information and use in connection with the work performed under each contract.

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such Government.

(2) As an aid in determining whether the clause at 52.227-14 should be used with its Alternate I, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data--General. This representation requests that an offeror state in response to a solicitation, to the extent feasible, whether limited rights data are likely to be used in meeting the data delivery requirements set forth in the solicitation. In addition, the need for Alternate II should be considered during the negotiation of a contract, particularly if the negotiation is based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data--General, without Alternate II does not preclude this Alternate from being used subsequently by modification during contract performance, should the need arise for delivery of limited rights data that have been withheld or identified as withholdable.

(3) Whenever data that would qualify as limited rights data, if it were to be delivered in human readable form, is formatted as a computer data base for the purpose of delivery under a contract containing the clause at 52.227-14, Rights in Data--General, such data is to be treated as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of that clause.

(e) Protection of Restricted Computer Software Specified for Delivery.

(1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data--General, by use of Alternate III , which Alternate adds subparagraph (g)(3) to the clause to enable the Government to require delivery of restricted computer software rather than allowing the contractor to withhold such restricted computer software. To obtain such delivery, the contract may identify and specify the computer software to be delivered, or the contracting officer may require by written request during contract performance, the delivery of computer software that has been withheld or identified as withholdable under subparagraph (g)(1) of the clause. In addition, if agreed to during negotiations, the contract may specifically identify computer software that are not to be delivered under Alternate III or which, if delivered, will be with restricted rights. In considering whether to use the clause at 52.227-14 with its Alternate III, it should be particularly noted that unlike other data, computer software is also an end item in itself, such that if withheld and form, fit and function data provided in lieu thereof, an operational program will not be acquired. Thus, if delivery of restricted computer software is anticipated to be needed to meet contract performance requirements, the contracting officer should assure that the clause is used with its Alternate III. Unless otherwise agreed to (see (2) below) the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in subparagraph (g)(3) (Alternate III). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be--

(i) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(ii) Used or copied for use in or with a backup computer if any computer for which it was acquired becomes inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights;

(v) Disclosed to and reproduced for use by support service contractors, subject to the same restriction under which the Government acquired the software; and

(vi) Used in accordance with (e)(1)(i) through (v) above, without disclosure prohibitions, if the computer software is published copyrighted computer software.

(2) The restricted rights set forth in paragraph (e)(1) above are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of subparagraph (g)(3) (Alternate III) of the clause. However, either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired, may be specified by the contracting officer in a particular contract or prescribed

in agency regulations. For example, consideration should be given to any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and data bases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of subparagraph (g)(3)of the clause are to be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(3) As an aid in determining whether the clause should be used with its Alternate III, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data--General. This representation requests that an offeror state, in response to a solicitation, to the extent feasible, whether restricted computer software is likely to be used in meeting the data delivery requirements set forth in the solicitation. In addition, the need for Alternate III should be considered during negotiation of a contract, particularly if negotiation is based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data--General, without Alternate III does not preclude this Alternate from being used subsequently by modification during contract performance, should the need arise for the delivery of restricted computer software that has been withheld or identified as withholdable.

(f) Copyrighted Data.

(1) Data First Produced in the Performance of a Contract.

(i) In order to enhance the transfer or dissemination of information produced at Government expense, contractors are normally authorized, without prior approval of the contracting officer, to establish claim to copyright subsisting in technical or scientific articles based on or containing data first produced in the performance of work under a contract containing the clause at 52.227-14, Rights in Data--General and published in academic, technical or professional journals, symposia proceedings and similar works. Otherwise, the permission of the contracting officer is required in accordance with subparagraph (ii) below or any applicable agency regulations, to establish claim to copyright subsisting in data first produced in the performance of a contract unless the clause is used with its Alternate IV in accordance with paragraph (iii) below. Agencies may, however, restrict copyright under certain circumstances in accordance with 27.404(g)(2).

(ii) Usually, permission for a contractor to establish claim to copyright subsisting in data first produced under the contract will be granted when copyright protection will enhance the appropriate transfer or dissemination of such data and the commercialization of products or processes to which it pertains. The request for permission must be made in writing, and may be made either prior to contract award or subsequently during contract performance. It should identify the data involved or furnish copies of the data for which permission is requested, as

well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be granted unless-- (A) the data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare; (B) the data are intended primarily for internal use by the Government; (C) the data are of the type that the agency itself distributes to the public under an agency program; (D) the Government determines that limitation on distribution of the data is in the national interest; (E) the Government determines that the data should be disseminated without restriction.

(iii) An Alternate IV is provided for use with the clause at 52.227-14, Rights in Data--General, which Alternate provides a substitute paragraph (c)(1) in the clause granting blanket permission for contractors to establish claim to copyright subsisting in all data first produced in the performance of the contract without further request being made by the contractor. Alternate IV shall be used in all contracts for basic or applied research (other than those for management or operation of Government facilities and in contracts and subcontracts in support of programs being conducted at such facilities or where international agreements require otherwise) to be performed solely by colleges and universities. Alternate IV will not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government, In addition,

Alternate IV may be used in other contracts if an agency determines to grant blanket permission for contractors to establish claim to copyright subsisting in all data first produced in the performance of contract without further request being made by the contractor. In any contract where Alternate IV is used, the contract may exclude any data, items or categories of data from the blanket permission granted, either by express provisions in the contract or by the addition of a subparagraph (d)(3) to the clause, consistent with 27.404(g)(2).

(iv) Whenever a contractor establishes claim to copyright subsisting in data (other than computer software) first produced in the performance of a contract, the Government is granted a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all such data, as set forth in subparagraph (c)(1) of the clause at 52.227-14, Rights in Data--General. For computer software the scope of the Government's license does not include the right to distribute to the public. Agencies may also, either on a case-by-case basis, or on a class basis if provided in implementing regulations, obtain a license of different scope than set forth in subparagraph (c)(1) of the clause if the agency determines that such different license will substantially enhance the transfer or dissemination of any data first produced under the contract, and will not interfere with the Government's use of the data as contemplated by the contract or if required for international agreements. If an agency

obtains such a different license, the scope of that license shall be clearly stated in a conspicuous place on medium on which the data is recorded. That is, if a report, the scope of the different license shall be put on the cover, or first page, of the report. If computer software, the scope of the different license shall be placed on the most conspicious place available. Whenever a contractor establishes claim to copyright in data first produced in the performance of a contract, irrespective of which alternate is used with the clause or the scope of the Government's license, the contractor is required to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgement of Government sponsorship, (including the contract number) to the data whenever such data are delivered to the Government, published, or deposited for registration as a published work in the U.S. Copyright Office. Failure to do so could result in such data being treated as unlimited rights data (see 27.404(i)).

(2) Data not first produced in the performance of a contract.

(i) Contractors are not to incorporate in data delivered under a contract any data that is not first produced under the contract and that is marked with the copyright notice of 17 U.S.C 401 or 402, without either (A) acquiring for or granting to the Government certain copyright license rights for the data, or (b) obtaining permission from the contracting officer to do otherwise. The copyright license the Government acquires for such data will normally be of the same scope as discussed in subdivision (1)(iv), above, and is set forth in

paragraph (c)(2) of the clause at 52.227-14, Rights in Data--General. However, agencies may, on a case-by-case basis, or on a class basis if provided in implementing agency regulations, obtain a license of different scope if the agency determines that such different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so statedin the contract and clearly set forth in a conspicious place on the data when delivered to the Government. In addition, if computer software not first produced under a contract is delivered with the copyright notice of 17 U.S.C. 401, the Government's license will be as set forth in subparagraph (g)(3) (Alternate III) if included in the clause at 52.227-14, Rights in Data--General, or as otherwise may be provided in a collateral agreement incorporated in or made part of the contract.

(ii) Contractors delivering data with both an authorized limited-rights or restricted-rights notice and the copyright notice of 17 U.S.C. 401 or 402 should modify the copyright notice to include the following (or similar) statement: "Unpublished--all rights reserved under the copyright laws of the United States." If this statement is omitted, the contractor may be afforded an opportunity to correct it in accordance with 27.404(h). Otherwise, data delivered with a copyright notice of 17 U.S.C. 401 or 402 may be presumed to be published copyrighted data subject to the applicable license rights set forth in subdivision (i) above, without disclosure limitations or restrictions.

(iii) If contractor action causes limited-rights or restricted-rights data to be published with the copyright notice of 17 U.S.C. 401 or 402 after its delivery to the Government, the Government is relieved of disclosure and use limitations and restrictions regarding such data, and the contractor should advise the Government, request that a copyright notice be placed on the copies of the data delivered to the Government and acknowledge that the applicable copyright license set forth in subdivision (i) above applies.

(g) Release, Publication, and Use of Data. (1) In paragraph (d) of the clause at 52.227-14, Rights in Data--General, subparagraph (d)(1) recognizes the fact that normally the contractor has the right to use, release to others, reproduce, distribute, or publish data first produced in the performance of a contract, except to the extent such data may be subject to Federal export control or to national security laws or regulations. In addition, to the extent the contractor receives or is given access to data that is necessary for the performance of the contract from or by the Government or others acting on behalf of the Government, and the data contains restrictive markings, subparagraph (d)(2) provides an agreement with the contractor to treat the data in accordance with the markings, unless otherwise specifically authorized by the contracting officer.

(2) In contracts for basic or applied research with universities or colleges, no restrictions may be placed upon the conduct of or reporting on the results of unclassified basic or

applied research, except as provided in applicable U.S. Statutes. For the purposes of this subparagraph, agency restrictions on the release or disclosure of computer software that has been, readily can be, or is intended to be, developed to the point of practical application (including for agency distribution under established programs) are not considered restrictions on the reporting of the results of basic or applied research. Agencies may also restrict claim to copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is produced. Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's right to use, release to others, reproduce, distribute, or publish any data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party, either by adding a paragraph (d)(3) to the Rights in Data--General clause at 52.227-14, or by express limitations or restrictions in the contract. In the latter case, the limitations or restrictions should be referenced in the Rights in Data--General clause. However, such regulatory restrictions or limitations are not to be imposed unless they are determined by the agency to be necessary in the furtherance of agency mission objectives, needed to support specific agency programs, or necessary to meet statutory requirements. Notwithstanding the provisions of this subparagraph, agencies may obtain, if provided in their FAR

supplement, for information purposes only, advance copies of articles intended for publication in academic, scientific or technical journals or symposia proceedings or similar works.

(h) Unauthorized Marking of Data. Except for validation of restrictive markings on technical data under contracts for major systems, or for support of major systems, by agencies subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949, the Government has,in accordance with paragraph (e) of the clause at 52.227-14, Rights in Data--General, the right to either return to the contractor data containing markings not authorized by that clause, or to cancel or ignore such markings. However, markings will not be canceled or ignored without making written inquiry of the contractor and affording the contractor at least 30 days to provide a written justification to substantiate the propriety of the markings. Failure of the contractor to respond, or failure to provide a written justification to substantiate the propriety of the markings within the time afforded, may result in the Government's action to cancel or ignore the markings. If the contractor provides a written justification to substantiate the propriety of the markings, it will be considered by the contracting officer and the contractor notified of any determination based thereon. If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing. Further, if the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contractor

will be furnished a written determination which shall become the final agency decision regarding the appropriateness of the markings and markings will be cancelled or ignored and the data will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. In any event, the markings will not be cancelled or ignored unless the contractor fails to respond within the period provided, or, if the contractor does respond, until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed. The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder. In addition, the contractor is not precluded from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this contract if applicable, that may arise as the result of the Government's action to remove or ignore any markings on data, unless such action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(i) Omitted or incorrect notices. (1) Data delivered under a contract containing the clause at 52.227-14, Rights in Data--General, without a limited-rights notice or restricted-rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such

data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may within 6 months (or a longer period approved by the contracting officer for good cause shown) request permission of the contracting officer to have omitted limited-rights or restricted-rights notices, as applicable, placed on qualifying data at the contractor's expense, and the contracting officer may agree to so permit if the contractor (i) identifies the data for which a notice is to be added or corrected, (ii) demonstrates that the omission of the proposed notice was inadvertent, (iii) establishes that use of the proposed notice is authorized, and (iv) acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also (i) permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(j) Inspection of Data at the Contractor's Facility. Contracting officers may obtain the right to inspect data at the contractor's facility by use of Alternate V, which adds paragraph (j) to provide that right in the clause at 52.227-14, Rights in Data--General. Agencies may also adopt Alternate V for general use. The data subject to inspection may be data withheld or withholdable under subparagraph (g)(1) of the clause. Such

inspection may be made by the contracting officer or designee (including nongovern-mental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) (Alternate V). If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

27.405 Other data rights provisions.

(a) Production of special works .

(1) The clause at 52.227-17, Rights in Data--Special Works, is to be used in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for--

(i) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture

scripts, musical compositions, sound tracks, translation, adaptation, and the like.

(ii) Histories of the respective agencies, departments, services, or units thereof;

(iii) Surveys of Government establishments;

(iv) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(v) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work. When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of such works by other than a Federal agency) agencies are authorized to modiffy the Rights in Data--Special Works clause for use in such contracts, with rights in data provisions which meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

(vi) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(vii) Investigatory reports; or

(viii) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release

of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(3) Subparagraph (c)(1)(ii) of the clause at 52.227-17, Rights in Data--Special Works, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(4) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(b) Rights relating to existing data other than limited rights data.

(1) Existing audiovisual and similar works. The clause at 52.227-18, Rights in Data--Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are (i) means of exhibition or transmission, (ii) time, (iii) type of audience, and (iv) geographical location. If the contract requires that works of the type indicated above are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form) the clause at 52.227-17, Rights in Data--Special Works, is to be used. (See 27.405(a).)

(2) Acquisition of existing computer software. (i) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of existing computer software (i.e. privately developed software normally vended commercially under a license or lease agreement restricting its use, disclosure, or reproduction), no specific contract clause prescribed in this subpart need be used, but the contract (or purchase order) must specifically address the Government's rights to use, disclose and reproduce the software, which rights must be sufficient for the Government to fulfill the need for which the software is being acquired. Such rights may be negotiated and set forth in the

contract using the guidance concerning restricted rights as set forth in 27.404(e), or the clause at 52.227-19, Commercial Computer Software--Restricted Rights, may be used. Restricted computer software acquired under GSA Multiple Award Schedules contracts and orders are excluded from this requirement. The guidance concerning rights set forth in 27.404(e), as well as those in the clause at 52.227-19, are the minimum rights the Government usually should accept. Thus if greater rights than these minimum rights are needed, or lesser rights are to be acquired, they must be negotiated and set forth in the contract (or purchase order). This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227-19 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host computer where the software is located. Furthermore, an indemnity for patent,copyright or trade secret infringement may be included, if the computer software is to be acquired with unlimited rights, the contract must also so state. In addition, the contract must adequately describe the computer programs and/or data bases, the form (tapes, punch cards, disk pack, and the like), and all the necessary documentation pertaining thereto. If the acquisition is by lease or license, the disposition of the computer software (by returning to the vendor or destroying) at the end of the term of the lease or license must be addressed.

(ii) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or

purchase agreement, such agreement shall be reviewed to assure that it is consistent with (i) above. Caution should be exercised in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227-19, Commercial Computer Software--Restricted Rights, is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right ot use, duplicate or disclose the computer software are reconciled by that clause.

(iii) If a prime contractor under a contract containing the clause at 52.227-14, Rights in Data--General, with subparagraph (g)(3) (Alternate III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of subparagraph (g)(3) in a collateral agreement incorporated in and made part of the contract.

(3) Other existing works. Except for existing audiovisual and similar works pursuant to paragraph (b)(1) above, and existing computer software pursuant to paragraph (b)(2) above, no clause contained in this subpart is required to be included in (i) contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which such items are

to be obtained unless reproduction rights are to be acquired; or (ii) contracts that require only existing data (other than limited rights data) to be delivered, are to be obtained (e.g., contracts resulting from sealed bidding) when such items or data are delivered without disclosure prohibitions, unless reproduction rights are to be obtained. If the reproduction rights are to be obtained in any contract of the type described, such rights must be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

(c) Contracts awarded under Small Business Innovative Research (SBIR) Program. The clause at 52.227-20, Rights in Data--SBIR Program, is for use in all Phase I Phase II contracts awarded under the Small Business Innovative Research Program (SBIR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982). The clause is limited to use solely in contracts awarded under the SBIR Program, and is the only data rights clause to be used in such contracts.

27.406 Acquisition of data.

(a) General. (1) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government

and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(2) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data, shall be specified in the contract. Further, and to the extent feasible, in major system acquisitions, data requirements shall be set out as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with paragraph (a)(1) above, develop their own contract schedule provisions in agency procedures (including data requirements lists) for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(3) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualifies as limited-rights data or restricted computer software. Rather, form, fit, and function data may be furnished with unlimited rights in lieu of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see 27.404(d) and (e)). If greater rights are needed such need should be clearly set forth in the solicitation and the contractor fairly compensated for such greater rights.

(b) Additional data requirements. (1) Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at the time of contracting, the clause at 52.227-16, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contracl solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(2) Data may be ordered under the clause at 52.227-16, Additional Data Requirements, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contractor may be relieved

of retention requirements for specified data items by the contracting officer at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the Additional Data Requirements clause by deleting the term "or specifically used" in paragraph (a) thereof if delivery of such data is not necessary to meet the Government's requirements for data. Any data ordered under this clause will be subject to the Rights in Data--General clause (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract, and data authorized to be withheld under such clause will not be required to be delivered under the Additional Data Requirements clause, except as provided in Alternate II or Alternate III, if included in the clause (see 27.404(d) and (e)).

(3) Agencies not having an established program for dissemination of computer software shall give consideration to not ordering additional computer software under the clause at 52.227-16, Additional Data Requirements, for the sole purpose of disseminating or marketing of the software to the public especially if this will provide the contractor additional incentive to make improvements to the software at its own expense and disseminate or market it. This should not preclude an agency from including a summary description of computer software

available from a contractor in any data dissemination programs which it operates, with a statement as to how the potential user can obtain it through the contractor, licensee, or assignee. In cases where the contracting officer orders software for internal purposes, consideration shall be given, consistent with the Government's needs, to not ordering particular source codes, algorithms, processes, formulae or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

(c) Acceptance of Data. Acceptability of technical data delivered under a contract shall be in accordance with the appropriate contract provision as required by Subpart 46.3, and the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment--Major Systems, when it is included in the contract. (See paragraph (d) below.)

(d) Major System Acquisition. (1) In order to assure that technical data needed to support a major system acquisition are timely delivered and are complete, accurate, and satisfy the requirements of the contract concerning the data, the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment--Major Systems, is to be included in contracts for or in support of a major system (as the term "major system" is defined in Section 4 of the Office of Federal Procurement Policy Act, as amended by Pub. L. 98-577), including every detailed design, development, or production contract for a major system acquisition and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the

major system, and other property which may be replaced during the service life ~~of~~ the system, and including spare parts and replenishment spare parts.

(2) The clause at 52.227-21, Technical Data, Certification, Revision, and Withholding of Payment--Major Systems, requires the contractor, upon delivery of any technical data made subject to the clause in the contract, to certify that to the best of its knowledge and belief, such data are complete, accurate, and comply with contract requirements. It also provides for corrections of any deficiencies in the data, as well as for the ability of the contracting officer to request revisions of the data to reflect engineering design changes made during perfor-mance of the contract and affecting form, fit, and function of the items the data depict. Further included is the authority for the contracting officer to withhold payment under the contract to assure timely delivery of the technical data and/or assure correction if the technical data are not complete, accurate, and in compliance with contract requirements.

(3) When the clause at 52.227-21, Technical Data, Certification, Revision and Withholding of Payment--Major Systems, is used, the section of the contract specifying data delivery requirements (see paragraph (a)(2) above) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of such technical data, the contracting officer or designee shall review the technical data and the contractor's certification relating thereto to assure that the data are complete, accurate, and comply with contract

requirements. If not, the contractor is to be requested to correct the deficiencies, and payment may be withheld until such is done. Final payment should not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(4) In a contract for or in support of a major system awarded by a civilian agency other than DASA or the U.S. Coast Guard the contracting officer shall include contractual provisions requiring, as an element of performance under the contract, the delivery of any technical data, other than computer software, relating to the major system or supplies for the major system procured or to be procured by the Government, which are to be developed exclusively with Federal funds in the performance of the contract if the delivery of such technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at 52.227-22, Major System--Minimum Rights, is to be included in such contracts in addition to the clause at 52.227-14, Rights in Data--General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98-577 in technical data developed exclusively with Federal funds. In any contract to which this paragraph (d)(4) applies, technical data, other than computer software, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products

or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the United States as an element of performance under the contract), shall not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

27.407 Rights to technical data in successful proposals.

(a) Contracting officers may, as consideration of contract award, desire to acquire unlimited rights in technical data (but not commercial or financial information) contained in a successful proposal upon which a contract award is based. However, before such unlimited rights are acquired, the prospective contractor must be afforded the opportunity either (1) to advise the contracting officer that the technical data, or portions thereof, (to be identified by the prospective contractor) are covered by any restrictive notice regarding the disclosure and use of proposed information authorized by Subpart 15.4 or 15.5 (or any agency supplement thereto), and request that such protection be maintained by excludiing the data from the Government's rights; or (2) to establish to the contracting officer's satisfaction that identified portions of the technical data do not relate directly to or will not be utilized in the work to be performed under the contract, and request that such portions be excluded from the Government's rights.

(b) If unlimited rights to technical data in successful proposals, as set forth in paragraph (a) above, are to be acquired, it shall be by use of the clause at 52.227-23, Rights to Proposal Data (Technical). Any excluded technical data will be identified by inserting appropriate proposal page numbers in the clause which clause enables the identification of data to be excluded from the Government's rights, as discussed in (a) above. Such exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in Subpart 15.4 or 15.5 (or agency supplements thereto) relating to proposal information (i.e., will be used for evaluation purposes only). If the clause at 52.227-23, Rights to Proposal Data (Technical), is included in a contract, the prospective contractor must be specifically afforded the opportunity to exclude technical data as set forth in paragraph (a) above, and the contract file must reflect that fact. If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to their acquisition as limited rights data, if they so qualify, in accordance with 27.404(d).

27.408 Co-sponsored research and development activities.

(a) In contracts involving co-sponsored research and development wherein the contractor is required to make substantial contributions of funds or resources(i.e., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component,

process, or computer software, developed or produced under the contract are not readily segregable, the contracting officer may limit the acquisition of or acquire less than unlimited rights to any data developed and delivered under such contract. Agencies may regulate the use of this authority in their supplements. Basically such rights should, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and will address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to directed licensing provisions if needed to carryout theobjectives of the contract. Since the purpose of the cosponsored research, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, such clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (i.e., Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. Such clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use

will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, such clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies which will be available, in any event, to the public for their direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding therefor) and so identified in the contract, any data resulting therefrom may be treated under such clause as limited rights data or restricted computer software in accordance with 27.404(d) or (e), as applicable; or if such treatment is inconsistent with the purpose of the contract, rights to such data may, if so negotiated and stated in the contract, be treated in a manner consistent with (a) above.

27.409 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.227-14, Rights in Data--General, including its use with Alternate I through Alternate V as may be required or authorized in accordance with paragraphs (b) through (f) below, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is--

(i) For the production of special works of the type set forth in 27.405(a), but the clause at 52.227-14, Rights in Data--General, shall be included in the contract and made applicable to data other than special works, as appropriate;

(ii) For the separate acquisition of existing works, as described in 27.405(b);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (see paragraph (n) below);

(iv) For architect-engineer services or construction work, in which case agencies may utilize the clause at 52.227-17, Rights in Data--Special Works, or may prescribe different clauses;

(v) A Small Business Innovation Research contract (see 27.409(l) below.)

(vi) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work, in which case agencies may prescribe different clauses. (See paragraph (p) below.)

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized. (See 27.408).

(2) Paragraph (e)(3) of the clause at 52.227-14, Rights in Data--General, may be deleted or reserved by an agency not subject to Title III of the Federal Property and Administrative Services Act.

(b) If an agency determines, in accordance with 27.404(c), to adopt the alternate definition of "Limited Rights Data" in paragraph (a) of the clause, the clause shall be used with its Alternate I.

(c) In accordance with 27.404(d), if a contracting officer determines it is necessary to obtain the delivery of limited rights data, the clause shall be used with its Alternate II. The contracting officer shall, when Alternate II is used, assure that the purposes, if any, for which limited rights data are to be disclosed outside the Government are included in the "Limited Rights Notice" of subparagraph (g)(2) of the clause.

(d) In accordance with 27.404(e), if a contracting officer determines it is necessary to obtain the delivery of restricted computer software, the clause shall be used with its Alternate III. Any greater or lesser rights regarding the use, duplication, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause must be specified in the contract and the notice modified accordingly.

(e) The clause shall be used with its Alternate IV in contracts for basic or applied research (other than those for the management or operation of Government facilities or where international agreements require otherwise), to be performed solely by universities and colleges. The clause may be used with its Alternate IV in other contracts if in accordance with 27.404(f)(2) an agency determines to grant blanket permission for the contractor to establish claim to copyright subsisting in all data first produced without further request being made by the contractor. When Alternate IV is used, the contract may exclude items or categories of data from the blanket permission granted, either by express provisions in the contract or by the addition of a subparagraph (d)(3) to the clause (see 27.404(g)(2)).

(f) In accordance with 27.404(i), if a contracting officer needs to have the right to inspect certain data at a contractor's facility or if by an agency generally, the clause shall be used with its Alternate V.

(g) In accordance with 27.404(d)(2), if the contracting officer desires to have an offeror state in response to a solicitation, to the extent feasible, whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, the contracting officer shall insert in the solicitation the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software in any solicitation containing the clause at 52.227-14, Rights in Data--General. The contractor's response will provide an aid in determining whether the clause should be used with Alternate II and/or Alternate III.

(h) The contracting officer shall normally insert the clause at 52.227-16, Additional Data Requirements, in solicitations and contracts involving experi-mental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,00 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. (See 27.406(b).) This clause may also be used in other contracts when considered appropriate.

(i) In accordance with 27.405(a), the contracting officer shall insert the clause at 52.227-17, Rights in Data--Special Works, in solicitations and contracts primarily for the

production or compilation of data (other than limited-rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405(a). The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released or reproduced by the contractor for other than contract performance, Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(j) The contracting officer shall insert the clause at 52.227-18, Rights in Data--Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.405(b)(1). The contract may set forth limitations consistent with the purposes for which the work is being acquired. The clause at 52.227-17, Rights in Data--Special Works, shall be used if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(k) In accordance with 27.405(b)(2), when contracting (other than from GSA's Multiple Award Schedule contracts) for the acquisition of existing computer software, the clause at 52.227-19, Commercial Computer Software-Restricted Rights, may be used in the solicitation and contract. In any event, the contracting

officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405(b)(2).

(l) If the contract is a Small Business Innovation Research (SBIR) contract, the clause at 52.227-20, Rights in Data--SBIR Program shall be used in all Phase I and Phase II contracts awarded under the Small Business Innovation Research Program established pursuant to Pub. L. 97-219 (The Small Business Innovation Development Act of 1982).

(m) While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e., the off-the-shelf purchase of such items), if reproduction rights are to be acquired the contract shall include terms addressing such rights. (See 27.405(b)(3).)

(n) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts to be performed outside the United States, its possessions, and Puerto Rico.

(o) Agencies may prescribe in their procedures the clause at 52.227-17, Rights in Data--Special Works, or prescribe, as appropriate, clauses consistent with the policy in 27.402 in contracts for architect-engineer services and construction work.

(p) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in

contracts for management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(q) In accordance with 27.406(d), the contracting officer shall insert the clause at 52.227-21, Technical Data Certification Revision, and Withholding of Payment--Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. When used, this clause requires that the technical data to which it applies be specified in the contract. (See 27.406(d).)

(r) In the case of civilian agencies except NASA and the U.S. Coast Guard, the contracting officer shall insert the clause at 52.227-21, Major System--Minimum Rights, in contracts for major systems or contracts in support of major systems.

(s) In accordance with 24.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon which a contract award is based, the contracting officer shall insert the clause at 52.227-23, Rights to Proposed Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, Subpart 27.404 must be followed to assure that such rights are appropriately addressed.

PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.227-14 is added to read as follows:

52.227-14 Rights in Data--General.

As prescribed in 27.409(a), insert the following clause with any appropriate alternates:

RIGHTS IN DATA--GENERAL (JUL 1985)

(a) Defintions.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, 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.

"Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

"Limited rights data," as used in this clause, means 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.

"Technical data, as used in this clause, means data (other than computer software) which are of a scientific or technical nature.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

"Unlimited rights," as used in this clause, means the right of the Government 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.

"Limited rights," as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

"Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

(b) Allocations of rights. (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in--

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and (iv) All other data delivered under this contract unless provided otherwise for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) The Contractor shall have the right to--

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph (d) below;

(ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) below; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) Copyright. (1) Data first produced in the performance of this contract. Unless provided otherwise in subparagraph (d) below, the Contractor may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, express written permission of the Contracting Officer is required to establish claim to copyright subsisting in all other data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting in its behalf, a paid-up nonexclusive,

irrevocable worldwide license in such copyrighted computers software to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and which contains the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) below if included in this contract or as otherwise may be provided in a collateral agreement incorporated in or made part of this contract.

(3) Removal of copyrights notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, publication and use of data. (1) The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided below in this paragraph or expressly set forth in this contract.

(2) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(e) Unauthorized marking of data. (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in subparagraphs (g) (2) or (g)(3) below and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this contract, the contracting officer may at any time either return the data to the contractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The contracting officer shall make written inquiry to the contractor affording the contractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the contractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the contracting officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the contractor provides written justification to substantiate the propriety of the markings within the period set in subdivision (i) above, the contracting officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignore. If the contracting officer determines that the markings are authorized, the contractor shall be so notified in writing. If the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contracting officer shall furnish the contractor a written determination, which determinnation shall become the final agency decision regarding the appropriateness of the markings unless the contractor files suit in a court of competent jurisdiction within 90 days of receipt of the contracting officer's decision. The Government shall continue to abide by the markings under this subdivision (iii) until final resolution of the matter either by the contracting officer's determination becoming final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in subparagraph (1) above may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(3) This paragraph (e) does not apply if this contract is for a major system or for support of a major system by a civilian

other than NASA and the U.S. Coast Guard agency subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949.

(4) Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the contractor is not precluded by this paragraph (e) from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this contract, as applicable, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this contract.

(f) Omited or incorrect markings.

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (g) below, or the copyright notice required by paragraph (c) above, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor--

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also (i) permit correction at the Contractor's expense of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(g) Protection of limited rights data and restricted computer software.

(1) When data other than that listed in subparagraphs (b)(1)(i), (ii), and (iii) above are specified to be delivered under this contract and qualify as either limited-rights data or restricted computer software, if the Contractor desires to continue protection of such data, the Contractor shall withhold such data and not furnish them to the Government under this Contract. As a condition to this withholding, the Contractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formated as a computer data base for delivery to the Government is to be treated as limited rights data and not restricted computer software.

(2) [Reserved.]

(3) [Reserved.]

(h) Subcontracting. The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a sub-contractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(i) Relationship to patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

Alternate I (JUL 1985). As prescribed in 27.409(b), substitute the following definition for "Limited Rights Data" in paragraph (a) of the clause:

"Limited rights data," as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Alternate II (JUL 1985). As prescribed in 27.409(c), insert the following subparagraph (g)(2) in the clause:

(g)(2) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or

would otherwise be withholdable. If delivery of such data is so required, the Contractor may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) above, in accordance with such Notice:

"LIMITED RIGHTS NOTICE (JUL 1985)

(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(d)(1) or if none, so state]

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

(End of notice)

Alternate III (Date). As prescribed in 27.409(d), insert the following subparagraph (g)(3) in the clause:

(g)(3)(i) Notwithstanding subparagraph (g)(1) above, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that

has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Contractor may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) above, in accordance with the Notice:

"RESTRICTED RIGHTS NOTICE (JUL 1985)

(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 below or as otherwise expressly stated in the contract.

(b) This computer software may be--

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copied for use in 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, combined, or adapted portions of the derivative software incorporating restricted computer software are made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by support service contractors in accordance with subparagraphs (1) through (4) above, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) above.

(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."

(End of notice)

(ii) Where it is impractical to include the above Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

"RESTRICTED RIGHTS NOTICE

(SHORT FORM (JUL 1985)

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

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) above, unless the Contractor includes the following statement with such copyright notice: "Unpublished--rights reserved under the Copyright Laws of the United States."

Alternate IV (JUL 1985). As prescribed in 27.409(e), substitute the following subparagraph (c)(1) in the clause:

(c) Copyright. (1) Data First Produced in the Performance of the Contract. Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. When claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting on its

behalf, a paid up, nonexclusive, irrevocable worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

Alternate V (JUL 1985) As prescribed in 27.409(f), add the following paragraph (j) to the clause:

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this contract, inspect at the Contractor's facility any data withheld pursuant to paragraph (g)(1) above, for purposes of verifying the Contractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

4. Section 52.227-15 is added to read as follows:

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

As prescribed in 27.409-(g), insert the following provision in solicitations that include the clause at 52.227-14, Rights in Data--General:

{REPRESENTATION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE (JUL 1985)}

(a) This solicitation sets forth the work to be performed if a contract award results, and the Government's known delivery requirements for data (as defined in FAR 24.401). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227-16 of the FAR, 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 that is to be 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 in lieu thereof. 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) As an aid in determining the Government's need to include any of the aforementioned Alternates in the clause at 52.227-14, Rights in Data--General, the offeror's response to this solicitation shall, to the extent feasible, complete the representation below to either state that none of the data qualify as limited-rights data or restricted computer software, or identify which of the data qualifies as limited-rights data or

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

REPRESENTATION CONCERNING DATA RIGHTS

Offeror has reviewed the requirements for the delivery of data or software and states (offeror check appropriate block)--

/_/ None of the data proposed for fulfilling such requirements qualifies as limited-rights data or restricted computer software.

/_/ Data proposed for fulfilling such requirements qualify as limited-rights data or restricted computer software and are identified as follows:

_____

_____

_____

_____

_____

NOTE: "Limited rights data" and "Restricted computer software" are defined in the contract clause entitled "Rights In Data--General."

(End of provision)

5. Section 52.227-16 is added to read as follows:

52.227-16 Additional Data Requirements.

As prescribed in 27.409(h), insert the following clause:

ADDITIONAL DATA REQUIREMENTS (JUL 1985)

(a) In addition to the data (as defined in the clause at 52.227-14, Rights in Data--General clause or other equivalent included in this contract) specified elsewhere in this contract to be delivered, the Contracting Officer may, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.

(b) The Rights in Data--General clause or other equivalent included in this contract is applicable to all data ordered under this Additional Data Requirements clause. Nothing contained in this clause shall require the Contractor to deliver any data the withholding of which is authorized by the Rights in Data--General or other equivalent clause of this contract, or data which are specifically identified in this contract as not subject to this clause.

(c) When data are to be delivered under this clause, the Contractor will be compensated for converting the data into the prescribed form, for reproduc-tion, and for delivery.

(d) The Contracting Officer may release the Contractor from the requirements of this clause for specifically identified data items at any timeduring the 3-year period set forth in (a) above.

6. Section 52.227-17 is added to read as follows:

52.227-17 Rights in Data--Special Works.

As prescribed in 27.409(i), insert the following clause:

RIGHTS IN DATA--SPECIAL WORKS (JUL 1985)

(a) Definitions.

"Data," as used in this clause, means recorded information regardless of form or the medium 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.

"Unlimited rights," as used in this clause, means the right of the Government 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 whatsoever, and to have or permit others to do so.

(b) Allocation of Rights. (1) The Government shall have--

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) below for copyright.

(ii) The right to limit exercise of claim to copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in such data, in accordance with subparagraph (c)(1) below.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) below.

(2) The Contractor shall have, to the extent permission is granted in accordance with subparagraph (c)(1) below, the right to establish claim to copyright subsisting in data first produced in the performance of this contract.

(c) Copyright. (1) Data first produced in the performance of this contract.—

(i) The Contractor agrees not to assert, establish, or authorize others to assert or establish, any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When claim to copyright is made, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including contract number) to such data when delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in subdivision (i) above, the Contracting Officer may direct the Contractor to establish, or authorize the establishment of, claim to copyright in such data and to assign, or obtain the assignment of, such copyright to the Government or its designated assignee.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data

delivered under this contract any data not first produced in the performance of this contract and which contain the copyright notice of 17 U.S.C. 401 and 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above.

(d) Release and use restrictions. Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor shall the contractor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) Indemnity. The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction;

nor do these provisions apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

7. Section 52.227-18 is added to read as follows:

52.227-18 Rights in Data--Existing Works.

As prescribed in 27.409(j), insert the following clause:

RIGHTS IN DATA--EXISTING WORKS (JUL 1985)

(a) Except as otherwise provided in this contract, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under this contract, or for which this clause is specifically made applicable.

(b) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as

required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

8. Section 52.227-19 is added to read as follows:

52.227-19 Commercial Computer Software--Restricted Rights

As prescribed in 27.409(k), insert the following clause:

COMMERCIAL COMPUTER SOFTWARE -- RESTRICTED RIGHTS (JUL 1985)

(a) As used in this clause, "restricted computer software" means any computer program, computer data base, or documentation thereof, that has been developed at private expense and either is a trade secret, is commercial or financial and confidential or privileged, or is published and copyrighted.

(b) Notwithstanding any provisions to the contrary contained in any contractor's standard commercial license or lease agreement pertaining to any restricted computer software delivered under this purrchase order/contract, and irrespective of whether any such agreement has been proposed prior to or after issuance of this purchase order/contract or of the fact that such agreement may be affixed to or accompany the restricted computer software software upon delivery, vendor agrees that the Government shall have the rights that are set forth in paragraph (c) below to use, duplicate or disclose any restricted computer software delivered under this purchase order/contract. The terms and provisions of this contract, including any commercial lease or license agreement, shall be subject to paragraph (c) below and shall comply with Federal laws and the Federal Acquisition Regulation.

(c)(1) The restricted computer software delivered under this contract may not be used, reproduced or disclosed by the Government except as provided below or as expressly stated otherwise in this contract.

(2) The restricted computer software may be--

(i) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(ii) Used or copied for use in or with backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to same restrictions set forth in this purchase order/contract; and

(v) Disclosed to and reproduced for use by support service contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract.

(vi) Used or copied for use in or transferred to a replacement computer.

(3) If the restricted computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in subparagraph (2) above unless expressly stated otherwise in this purchase order/contract.

(4) To the extent feasible the contractor shall affix a Notice substantially as follows to any restricted computer software delivered under this purchase order/contract; or, if the vendor does not, the Government has the right to do so:

"Notice - Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction and disclosure are as set forth in Goverrnrnment Contract (or Purchase Order) No._____.)

(d) If any restricted computer software is delivered under this contract with the copyright notice of 17 U.S.C. 401, it will be presumed to be published and copyrighted and licensed to the Government in accordance with subparagraph (c)(3) above, unless a statement substantially as follows accompanies such copyright notice: "Unpublished - rights reserved under the copyright laws of the United States."

(End of clause)

9. Section 52.227-20 is added to read as follows:

52.227-20 Rights in Data--SBIR Program.

As prescribed in 27.409(l), insert the following clause:

RIGHTS IN DATA--SBIR PROGRAM (JUL 1985)

(a) Definitions.

"Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.

"Data," as used in this clause, 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.

"Form, fit, and function data," as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

"Limited-rights data," as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

"Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or priviledged; or is published copyrighted computer software; including modifications of such computer software.

"SBIR data," as used in this clause, means data first produced by a Contractor that is a small business firm in performance of a small business innovation research contract issued under the authority of 15 U.S.C. 638 (Pub. L. 97-219, Small Business Innovation Development Act of 1982), which data are not generally

known, and which data without obligation as to its confidentiality have not been made available to others by the Contractor or are not already available to the Government.

"SBIR rights," as used in this clause, mean the rights in SBIR data set forth in the SBIR Rights Notice of paragraph (d) of this clause.

"Technical data," as used in this clause, means that data which are of a scientific or technical nature.

"Unlimited rights," as used in this clause, means the right of the Government 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 whatsoever, and to have or permit others to do so.

(b) Allocation of rights. (1) Except as provided in paragraph (c) below regarding copyright, the Government shall have unlimited rights in--

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d)

below or for limited-rights data or restricted computer software in accordance with paragraph (g) below.

(2) The Contractor shall have the right to--

(i) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) below;

(ii) Withhold from delivery those data which are limited-rights data or restricted computer software to the extent provided in paragraph (g) below;

(iii) Substantiate use of, add, or correct SBIR rights or copyrights notices and to take other appropriate action, in accordance with paragraph (e) below; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this contract to the extent provided in subparagraph (c)(1) below.

(c) Copyright. (1) Data first produced in the performance of this contract. Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. If claim to copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 and 402 and acknowledgement of Government sponsorship (including contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Contractor grants to the Government, and others acting on its behalf, a

paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

(2) Data not first produced in the performance of this contract. The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that are not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (1) above.

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Rights to SBIR data. (1) The Contractor is authorized to affix the following "SBIR Rights Notice" to SBIR data delivered under this contract and the Government will thereafter treat the data, subject to the provisions of paragraphs (e) and (f) below, in accordance with such Notice:

SBIR RIGHTS NOTICE (JUL 1985)

These SBIR data are furnished with SBIR rights under Contract No._____ (and subcontract _____ if appropriate). For a period of 2 years after acceptance of all items to be delivered under this contract, the Government agrees to use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and disclosure prohibitions, such data may be disclosed for use by support Contractors. After the aforesaid 2 year period the Government has a royalty-free license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This Notice shall be affixed to any reproductions of these data, in whole or in part.

(End of notice)

(2) The Government's sole obligation with respect to any SBIR data shall be as set forth in this paragraph (d).

(e) Omitted or incorrect markings. (1) Data delivered to the Government without any notice authorized by paragraph (d) above, and without a copyright notice, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data have not been disclosed without restriction outside the Government, the Contractor may request, within six months) or a longer time approved by the Contracting

Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor--

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also (i) permit correction, at the Contractor's expense, of incorrect notices if the Contractor identifies the data on which correction of the notice is to be made and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(f) Protection of limited rights data. When data other than that listed in subdivisions (b)(1)(i),(ii), and (iii) above are specified to be delivered under this contract and such data qualify as either limited-rights data or restricted computer software, the Contractor, if the Contractor desires to continue protection of such data, shall withhold such data and not furnish them to the Government under this contract. As a condition to this withholding the Contractor shall identify the data being

withheld and furnish form, fit, and function data in lieu thereof.

(g) Subcontracting. The Contractor has the responsibility to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government such rights, the Contractor shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subcontract award without further authorization.

(h) Relationship to patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

10. Section 52.227-21 is added to read as follows:

52.227-21 Technical Data Certification, Revision, and Withholding of Payment--Major Systems.

As prescribed in 27.409(q), insert the following clause:

TECHNICAL DATA CERTIFICATION, REVISION, AND WITHHOLDING OF PAYMENT--MAJOR SYSTEMS (JUL 1985)

(a) Scope of clause. This clause shall apply to all technical data (as defined in the Rights in Data--General clause included in this contract) that have been specified in this contract as being subject to this clause. It shall apply to all such data delivered, or required to be delivered, at any time during

contract performance or within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth herein. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) Technical data certification. (1) All technical data that are subject to this clause shall be accompanied by the following certification upon delivery:

TECHNICAL DATA CERTIFICATION (JUL 1985)

The Contractor, _____ , hereby certifies that to the best of its knowledge and belief the technical data delivered herewith under Government contract No._____ (and subcontract _____, if appropriate) are complete, accurate, and comply with the requirements of the contract concerning such technical data.

(End of certification)

(2) The Government shall rely on the above certification in accepting delivery of the technical data, and in consideration thereof may, at any time during the period covered by this clause, request correction of any deficiencies which are not in compliance with contract requirements. Such corrections shall be made at the expense of the Contractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data--General clause included in this contract.

(c) Technical data revision. The Contractor also agrees, at the request of the Contracting Officer, to revise technical data that are subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor may submit a request for an equitable adjustment to the terms and conditions of this contract for any revisions to technical data made pursuant to this paragraph.

(d) Withholding of payment. (1) At any time before final payment under this contract the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $100,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion respecting any technical data that are subject to this clause, the Contractor fails to--

(i) Make timely delivery of such technical data as required by this contract;

(ii) Provide the certification required by subparagraph (b)(1) above; (iii) Make the corrections required by subparagraph (b)(2) above; or

(iv) Make revisions requested under paragraph (c) above.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has delivered the data and/or has made the required corrections or revisions. Withholding shall not be made if the failure to make timely delivery, and/or the deficiencies relating to delivered

data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

(3) The Contracting Officer may decrease or increase the sums withheld up to the sums authorized above. The withholding of any amount under this paragraph, or the subsequent payment thereof, shall not be construed as a waiver of any Government rights.

11. Section 52.227-22 is added to read as follows:

52.227-22 Major System--Minimum Rights.

As prescribed in 27.409(r), insert the following clause:

MAJOR SYSTEM--MINIMUM RIGHTS (JUL 1985)

Notwithstanding any other provision of this contract, the Government shall have unlimited rights in any technical data, other than computer software, developed in the performance of this contract and relating to a major system or supplies for a major system procured or to be procured by the Government, to the extent that delivery of such technical data is required as an element of performance under this contract. The rights of the Government under this clause are in addition to and not in lieu of its rights under the other provisions of this contract.

12. Section 52.227-23 is added to read as follows:

52.227-23 Rights to Proposal Data (Technical).

As prescribed in 27.409(s), insert the following clause:

RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUL 1985)

Except for data contained on pages _____, it is agreed that as a condition of award of this contract, and notwithstanding the conditions of any notice appearing thereon, the Government shall

have unlimited rights (as defined in the "Rights in Data--General" clause contained in this contract) in and to the technical data contained in the proposal dated _____, upon which this contract is based.

A Quest for Excellence

Appendix

Final Report
by the President's
Blue Ribbon Commission
on Defense Management

June 1986

APPENDIX I

The Department of Defense and Rights in Technical Data

Prepared by
THE LOGISTICS MANAGEMENT INSTITUTE*

*This appendix was prepared for the President's Blue Ribbon Commission on Defense Management. The analysis and recommendations it contains do not necessarily represent the views of the Commission.

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I. BACKGROUND

The government—including the Department of Defense (DoD)—requires rights in data for many reasons, among them logistic support, the dissemination of knowledge, and the need to operate, maintain, and repair the systems procured (and to train personnel to execute these functions). The need for DoD to have access to technical data for these purposes has never been at issue, nor is it now. What is new, and what is causing industry concern, is a heavy emphasis in DoD on receiving unlimited rights in technical data pertaining to proprietary items so that the data can be used to enable other firms to compete with the firm providing the data.

While the question of rights in technical data has never been simple or trouble-free and no ideal solutions have been found, industry and government usually have been able to agree on the basis of precedent, commonly accepted principles, good will, common sense, and negotiation on a case-by-case basis. But DoD's new push for competition has caused an imbalance in weighing the contractor's legitimate interest in protecting data, and hence its competitive position and economic interests, against the government's need for data, especially for competitive procurement.

Keeping the various elements in balance is in the public interest. Doing so encourages innovation, keeps suppliers in the industrial base, and increases contractors' willingness to permit government access to and use of data. Recent DoD actions and the proposed DoD technical data regulations represent a tilt, and the balance must be restored.

The spare parts storm of 1983 and 1984 led to a flood of studies and legislative initiatives to avoid the overpricing of spare and replacement parts. While lack of adequate, accurate, legible data was identified as a major impediment to competition for spare parts, treatment of the government's rights in technical data acquired from contractors was also found to result in sole sourcing for spares.[1]

The legislative initiatives referred to above led to the enactment of two largely identical laws covering technical data acquisition and rights. One, the Small Business and Federal Procurement Competition Enhancement Act of 1984, Public Law (P.L.) 98-577, dealt with the technical data aspects of civil agency procurement; the other, the Defense Procurement Reform Act of 1984 (P.L. 98-525),[2] related to DoD procurements. Both acts required the promulgation of regulations concerning technical data acquisition and rights as a part of the "single system of government-wide procurement regulations," that is, the Federal Acquisition Regulation (FAR) System.

In the absence of a uniform regulation, each federal agency has pursued its own data acquisition and rights policies. This lack of uniformity was exacerbated within DoD by a blanket deviation (effective from August 1983 until December 30, 1985) from the DoD FAR Supplement (DFARS) technical data rights policy. During this period, the various Services used differing approaches to data acquisition and rights, raising concern in private industry. This concern was brought to a head by DoD's late-1985 proposal to issue new technical data rules in the DFARS. The resulting outcry caused the proposed rules to be suspended; interim rules, close to those previously in existence, were put in place (and are now in effect) to meet minimum statutory requirements until these issues could be worked out. Industry's concerns were expressed to the Commission at an April 14, 1986, public hearing on how DoD acquires rights in technical data.

Representatives from DoD and industry testified. Annex A lists the witnesses heard.

From the information provided the Commission, plus our own survey of the field, it is evident that three primary areas need to be considered: the new statutes; policy (much of it independent of statute), which is often reflected in regulations but which also operates in other ways; and the regulations themselves. We will start with the statutes.

II. THE STATUTES

The data policy in P.L. 98-577 and P.L. 98-525 is based on a number of legislative compromises. First, regarding basic data rights policy considerations, the legislative history indicates that the following principles were agreed upon:

- The legitimate proprietary interests (as defined in the FAR) of the contracting parties may not impair any right of the parties as to patents or copyrights, or any other right established by law (e.g., state trade secret law).
- Since ambiguity increases uncertainty as to the allocation of rights, the FAR should define the legitimate proprietary interests of the government and the contractor, including what items of technical data qualify for restrictive legends.
- With respect to acquisition of commercial products, the surrender of design, development, or manufacturing technical data should not be a condition of the acquisition except to the extent technical data are necessary for operation and maintenance.
- In determining the rights in technical data, the FAR should require agencies to consider:
  (1) whether the item or process to which the technical data pertain was developed exclusively with federal or private funds, or with a mix of such funds;
  (2) the policy and objectives of 35 U.S.C. 200;
  (3) the Small Business Innovation Development Act of 1982 and the policy of the Small Business Act;
  (4) the interest of the government in increasing competition; and
  (5) for DoD, the prohibition against acquiring certain technical data pertaining to commercial products.
- With respect to civil agencies, the following additional policy guidance was established: The government should obtain unlimited rights in technical data pertaining to products developed exclusively with federal funds, if the delivery of such data is required *and* the data are needed for the future competitive procurement of substantial quantities of supplies or services; otherwise the government should obtain royalty-free, unrestricted rights to use the data for governmental purposes (excluding the right to publish).
- Computer software, except for computer software documentation (as technical data), was not specifically covered by these laws.
- With respect to DoD, a period of up to seven years may be negotiated after which the government would obtain unlimited rights in certain technical data delivered with limited rights.
- The regulations shall specify that the contractor will not unreasonably restrict suppliers from selling directly to the government items or processes produced under a subcontract.

The legislative agreements also specified adoption of a number of data management techniques, many of which had been recommended by the Air Force Management

Analysis Group (AFMAG). In this regard, the acts and the underlying legislative history required that the regulations call for appropriate contractual provisions that:

- specify the technical data to be delivered and the delivery schedules for the data (this requirement should reflect a coordinated strategy based on the accuisition, program management, and integrated logistic support plans for the system; the plans in turn should consider what technical data will be needed and when the data will be needed);
- specify or reference procedures for determining the acceptability of the technical data delivered, in terms of usability, completeness, and legibility (at this point, the agencies should consider challenging any restrictive markings on delivered technical data);
- require that technical data items to be delivered be specified as separate line items (to permit separate pricing for such data items);
- permit techniques, such as pre-notification, to be used to identify restrictively marked technical data in advance of delivery (to permit the government to take remedial action);
- require contractors to deliver updated versions of technical data previously delivered to the government;
- provide, at the time of delivery, written assurances that the technical data are complete and accurate and satisfy the contract requirements;
- establish remedies, including payment withholding, if the technical data delivered are incomplete or inaccurate; and
- with respect to DoD, require that supplies furnished under a contract identify the name of the actual manufacturer of the item; the national stock number, if any; the identity of the contractor; and the source of any delivered technical data.

Finally, recognizing that a contractor's legitimate proprietary rights should not be violated merely because the government obtained access to them through a federal procurement, the acts established (1) a due-process procedure for reviewing the legitimacy of asserted restrictions on delivered technical data and (2) sanctions to ensure adherence with the contract terms:

- A contracting officer may challenge any prime contractor's or subcontractor's assertion of restrictions on the use of delivered technical data if the contracting officer determines that a challenge is warranted; that is, that "reasonable grounds" or "probable cause" exists to question the current validity of the asserted restrictions *and* that continued adherence to them would make it impracticable to procure the item competitively.
- The challenge must be in writing and specify the grounds for the challenge.
- The contractor or subcontractor must, within 60 days, respond to the challenge with a justification of the restrictions.
- The contracting officer should then issue a final decision on the legitimacy of the restrictions. This decision is appealable under the Contract Disputes Act.
- The government will adhere to the restrictions on the technical data until final disposition of the challenge.
- If the restrictions are found not to be substantially justified, the contractor or subcontractor shall be liable for the government's cost of the challenge. If the restrictions are upheld, the government is liable to the contractor or subcontractor if the challenge is found not to have been made in good faith.

- As to the administrative burden on the contractor or subcontractor to retain records to prove proprietary assertions, the Congress rejected the concept of prepackaging justification for restricted markings and instead adopted the requirement that the contractor or subcontractor be prepared to furnish written justification of any restrictions on technical data for so long as the contractor or subcontractor asserts them.

Analysis of the statutes is contained in Annex B.

Findings and Recommendations

Our findings and recommendations regarding the statutes whose technical data provisions have been described above are as follows:

1. The intellectual property statutes and recent legislation bearing on technical data—such as P.L. 98-525 and P.L. 98-577—are not the basic problem.[3] DoD's troubles with technical data are not caused by poorly drawn laws, nor are they likely to be overcome by adding to, changing, or deleting current statutory provisions. We have, however, identified areas in which changes to the legislation would correct problems, resolve ambiguities, and create a beneficial uniformity; these areas are discussed in Annex B.
2. While we have found no fundamental statutory impediment to development of a satisfactory technical data rights policy for DoD, we note that P.L. 98-525 and P.L. 98-577 differ in some respects and that this leaves the way open for widely diverging interpretations, resulting in unnecessary confusion, delay in implementation, and lack of uniformity. We therefore recommend adoption of a single statute covering technical data or, if dual statutes are required in this area, that they be identical.

III. POLICY

DoD's approach to rights-in-technical-data issues is not driven solely or even primarily by statute. It is largely a matter of DoD policy, expressed to some degree in the DFARS but also handed down by nonregulatory directives and memoranda. Because no government-wide rights-in-technical-data policy has been arrived at, clearly articulated, or strongly enforced, the federal agencies, as has been noted, are free to go their own ways. A stronger and more definitive Executive statement of government-wide policy is required to balance the interests of the parties.

We have not found problems with DoD's policies regarding copyrights or its well-established policy of obtaining limited rights in the case of products developed at private expense. "Limited rights" and "developed at private expense," to be sure, are terms requiring careful definition. On the other hand, we find in general that a policy of *invariably* acquiring unlimited rights whenever development has occurred at public expense removes incentive to commercialize. More importantly, we find that a policy of permitting contractors *no* rights in data developed with mixed funding creates even greater disincentives.

Recommendations

We recommend that the Executive Branch develop an overall technical data rights policy embracing the following principles:

1. Except for data needed for operation and maintenance, the government should not, as a precondition for buying the product, acquire unlimited rights in data pertaining to commercial products or products developed exclusively at private expense. If, as a condition of the procurement, the government seeks additional rights in order to establish competitive sources, it should normally acquire lesser rights (such as directed licensing or sublicensing) rather than unlimited ones. The rights least obtrusive to the private developer's proprietary position should be selected.
2. The government should encourage a combination of private and government funding in the development of products. Significant private funding in this mix should entitle the developer to ownership of the resulting data, subject to a license to the government permitting use internally and use by contractors on behalf of the government. If government funding is substantial, the license should be on a royalty-free basis; otherwise, it should be on a reduced or fair-royalty basis. Whenever practicable, the rights of the parties should be established before contract award.
3. If products are developed exclusively with government funding, the contractor/developer should be permitted to retain a proprietary position in the technical data (a) not required to be delivered under the contract or (b) delivered but not needed by the government for competition, publication, or other public release. Use by or for the government should be without additional payment to the contractor/developer.

The analysis from which these recommendations have been drawn is set forth in Annex C.

IV. REGULATIONS

There should be more specific guidance than is now provided on procedures for ensuring that DoD's valid needs for data are met without placing contractors at an undue disadvantage that is ultimately not in the public interest. Implementation in the FAR is the appropriate means for translating this overall guidance into uniform policies and procedures. The DFARS should cover only those implementing and supplementing policies and procedures required for DoD but not suitable for civil agencies.

We have said that the statutory treatment of technical data is generally satisfactory. However, further and better policy guidance is necessary before satisfactory regulations—for DoD and for the government as a whole—can be written. The proposed FAR coverage is not comprehensive enough for DoD's needs. On the other hand, the proposed DFARS coverage is unnecessarily complicated and difficult to understand. In important ways, the statutory requirements regarding technical data are not being followed in the implementations proposed for the FAR and DFARS. This is partly because there is no adequate structural basis for consistent, uniform regulatory implementation.

Industry comments to the Commission criticized DoD's proposed technical data regulations implementing P.L. 98-525. In addition to objecting to the substance, industry saw no reason for independent DoD technical data coverage that did not follow the FAR, especially since the data provisions of P.L. 98-525 and P.L. 98-577 refer to the FAR System. The proposed DFARS treatment of technical data rights was seen as inconsistent with and supplanting (rather than supplementing) the technical data rights coverage proposed for the FAR. Furthermore, some considered the proposed DFARS too long, too complicated, poorly organized, and ambiguous, especially when compared with the proposed FAR coverage. Annex D traces the currently proposed regulatory implementation of the statutory requirements for technical data and summarizes our analysis of it.

Recommendations

1. The FAR System (a single uniform regulation applicable to all agencies, with supplements by agencies as needed) should be used to cover data rights. Without the discipline of a uniform system, similar terms and concepts are defined and treated differently. The differences are not justified. The FAR should provide common definitions of basic terms, since there is no apparent reason for agencies to use differing definitions, a practice that causes great confusion.

2. In determining whether an item or process was "developed at private expense," the following definitions should apply: *Developed* means the item or process exists and is workable. The demonstration of workability may occur either prior to, or under, the contract. *At private expense* means that the funding for the development work has not been reimbursed by the government, or such work was not required as an element of performance under a research or development government contract or subcontract (however, private expense includes independent research and development (IR&D) or bid and proposal (B&P) costs even though reimbursed).

3. Detailed guidance specifying the circumstances under which additional rights

will be acquired in limited rights data, to establish alternative sources of supplies, should be incorporated into DFARS Subpart 227.4. The existing requirement to obtain approval for any deviation from policy and contract clauses prescribed in this subpart should be adhered to. The use of technical data clauses that acquire additional rights for the government in limited rights data, if not specifically prescribed in the regulations, should require prior deviation approval.

4. There is a great need to reduce the complexity of the contractual treatment of rights in technical data. We recommend the following steps:

   - Separate the coverage for technical data from that for computer software. Provide for separate clauses covering each.
   - Combine and simplify the three mandatory clauses concerning technical data rights required to be included in all prime contracts and subcontracts calling for the delivery of technical data.
   - Consider providing basic technical data rights coverage with alternates for differing contractual situations (e.g., basic research, hardware development, production, supply) rather than the lengthy and detailed technical data rights clause now used to cover all situations.

5. The subcontract provision of the rights-in-technical-data clause should be modified to require the prime contractor and higher tier subcontractors to obtain, after written request from a proposed subcontractor, a government contracting officer's determination that the need to acquire the right to use the subcontractor's limited rights data for competitive reprocurement has been established in accordance with the regulations.

In summary, our most important recommendations regarding the regulations are to (1) adopt uniform government-wide definitions and concepts and (2) simplify DoD's basic rights-in-data clause, with a provision for alternates to be added when necessary to cover various types of situations.

V. ADDITIONAL MATTERS

Commercial Product Data

The overall balancing of interests of the contracting parties in technical data adopted by P.L. 98-525 and P.L. 98-577 was that the government would obtain rights in the technical data pertaining to products developed with public funds; the implementing regulations would define the rights of the parties to data pertaining to products developed with private or mixed funding; and (except for data needed for operation and maintenance) design, development, or manufacturing technical data pertaining to commercial products would generally not be acquired as a condition of the procurement. Industry, in its comments to the Commission, showed particular concern over the proposed and interim DFARS provisions implementing the statutory restriction concerning the acquisition of commercial product data. This concern related to the proposed DFARS definition of commercial products as those offered or sold in substantial quantities to the public at established catalog or market prices, and to the exceptions permitting contracting officers to negotiate to acquire commercial product data, including rights in the data, if advantageous to the government.

The concept of limiting DoD's acquisition of commercial product data is a throwback to DoD's pre-1964 data rights policy. That policy permitted a contractor to withhold from delivery, even if called for by the contract, data concerning items sold or offered to the public commercially if the contractor identified the source and characteristics of the product sufficiently to permit it or an adequate substitute to be purchased. P.L. 98-525 now requires DoD to blend its present limited rights/unlimited rights policy with limitations on acquiring certain technical data for commercial products. Technically, this can be accomplished by using the data-withholding provisions of the prior policy or by strict limitations on the contract data requirements or order provisions.

P.L. 98-525, unlike P.L. 98-577, does not *mandate* the restriction on acquiring design, development, or manufacturing data for commercial products. Further, the requirements for planning for the procurement of supplies for future competition in both acts[4] encourage obtaining, during the award of a production contract for a major system, proposals for acquiring rights to use technical data for competitive reprocurement purposes. Therefore, the DFARS must contain detailed guidance specifying when the general restriction concerning the acquisition of design, development, or manufacturing data for commercial products is or is not to apply. As indicated elsewhere in this paper, the restriction should apply to the acquisition of unlimited rights in limited rights data rather than to acquisition of the data themselves, and should be extended to products developed at private expense in general, not just commercial products.

Annex E gives additional background on commercial product data.

Software

Software poses a peculiar problem in that it represents a category of information as well as an end item to be delivered under the contract. While it is possible—and has been found convenient—to treat software simply as a subset of data, it would be an improvement to treat software as a special case, partly because to do so would simplify the treatment of technical data.

Software and DoD's handling of it are

analyzed and discussed in a series of 1986 technical memoranda and a technical report resulting from research sponsored by DoD and performed by Professor Pamela Samuelson.[5] Samuelson discusses software's hybrid nature, saying that in its machine-readable form, software has some characteristics of hardware and some characteristics of technical data. She concludes that this hybrid character has led to confusion about the manner in which software should be acquired and maintained after acquisition: should it be treated like hardware, like technical data, or differently from both? She says that a central problem for DoD, among others, is that software development is not thoroughly understood and that, as a consequence, DoD has not been able to fashion rules that make sense in terms of the technology and the economics of the industry.

The problems associated with acquisition and maintenance of software are bothersome and probably could be avoided if DoD were operating under policies and procedures more closely aligned with the realities of the software industry.

At the beginning, software was acquired by DoD under its technical data policy. It soon became apparent that the cost of acquiring government-wide rights—which is what the technical data rights policy provides—to software needed at only one government installation was impeding the acquisition of such software. While rights attaching to proprietary software now are different from those that attach to technical data, the same standard data rights clause is used to acquire rights in both types of items.

Samuelson has said that, with one or two exceptions, all the problems discussed in her report are problems identified by DoD personnel. The inescapable conclusion is that it is time to adopt a new policy that is (1) clear and coherent, (2) no more divergent from commercial practice than is necessary for DoD to achieve its mission, (3) appropriate in terms of DoD's need to use the technology, and (4) appropriate in terms of the intellectual property rights associated with software. The first step in this direction should be to establish a separate standard software rights clause.

Recommendations

1. The contractual coverage of computer software (programs and data bases), including the associated documentation, should be separated from technical data clauses and included in a separate clause or set of clauses. The associated documentation should be accorded treatment similar to that given the computer programs and data bases.

2. The regulations should uniformly define common software terms such as "computer software" and "developed at private expense" and should provide for equitable allocation of rights in software developed with mixed funding, so as to encourage the development of new computer software having a military application.

Annex E gives additional background and details regarding software.

Mask Works

The Semiconductor Chip Protection Act of 1984, P.L. 98-620, 17 U.S.C. 901-914, created a new form of intellectual property rights to protect persons who create original mask works for semiconductor chips.[6] P.L. 98-525 and P.L. 98-577 require the FAR and DFARS to define the legitimate proprietary interests of the government and the contractor. Since this new form of intellectual property falls within this requirement, the FAR and DFARS should include this area.

Recommendation

The technical data rights clause should be expanded to cover mask works related to semiconductor chips (a new form of intellectual

property established by Congress in 1984, P.L. 98-620).

Data Management

In the technical data area, DoD faces a problem even more serious and less amenable to solution than the rights-in-data issues. This problem is the overall one of data management, defined to include, as a minimum, procedures for:

- deciding under what conditions to acquire or require data from the contractor;
- deciding *which* data to acquire or require and when;
- verifying that the data delivered are adequate, current, accurate, legible, and useful (a particular difficulty here is with items for which the manufacturing *techniques* are all-important, as distinguished from those for which ordinary engineering drawings will suffice); and
- determining the best means of storing, maintaining, updating, retrieving, and disseminating the data.

Guidance on the several facets of data management is contained in DoD Instruction 5010.12, Management of Technical Data, the latest version of which was released in December 1968, and in DoD Directive 5000.19, March 12, 1976, Policies for the Management and Control of Information. Despite the existence of these regulations, data management continues to be a significant problem. Appearing before the Commission, Assistant Secretary of Defense (Acquisition and Logistics) James Wade cited a June 1984 DoD data rights study[7] that concluded that "a far more serious problem concerned our inability to manage the data in our possession." It is apparent from review of this material and DoD's technical data regulations that the preparation of the instruction and directive was not adequately coordinated with the preparation of the acquisition regulations covering the same subject.

Recognition of this problem led the Joint Logistics Commanders to form a panel to develop a DoD-wide program to improve data quality. The panel has been given six months to develop a program that will:

- establish uniform procedures for identification, specification, acquisition, and enforcement of data requirements, including treatment of mismarking of data and missing or incomplete data;
- assign responsibilities for acquisition and for enforcement of data requirements prior to acceptance;
- establish a program to challenge restrictive legends on data stored in data repositories; and
- establish a small team of full-time technical experts to train and assist others in the acquisition and enforcement of data rights.

Recommendation

We recommend that DoD energetically pursue its ongoing efforts to improve data management, including those directed to enhancing the capabilities of its people in this area, and that these efforts be coordinated with the Defense Acquisition Regulatory Council's activities in preparing technical data acquisition regulations.

ANNEX A

APRIL 14, 1986, PUBLIC HEARING ON TECHNICAL DATA—WITNESSES HEARD

James P. Wade, Jr.—Assistant Secretary of Defense for Acquisition and Logistics

James R. Ambrose—Under Secretary of the Army

Paul Seidman, Esq.—On behalf of National Tooling and Machinery Association

Bruce Hahn—Government Affairs Manager, National Tooling and Machinery Association

Walter C. Rideout—Chairman, Technical Data Task Group, Council of Defense and Space Industry Associations (CODSIA)

Charles W. Stewart—President, Machinery and Allied Products Institute

Paul J. Gross—Director, Proprietary Industries Association

Stuart F. Platt—Rear Admiral, Supply Corps, USN, Competition Advocate General of the Navy

Daniel S. Rak—Deputy Assistant Secretary of the Air Force for Acquisition Management

Jefferson Z. Amacker—President and CEO, Leach Corporation, on behalf of American Electronics Association

Dennis M. Biety—Counsel, Pneumo Abex Corporation

Richard C. Geib—Patent Counsel, Grumman Corporation

Donald F. Ridley—Senior Vice President, Marine Division, Bird-Johnson Company

ANNEX B

RECOMMENDED CHANGES TO STATUTES BEARING ON TECHNICAL DATA

Applicability Issue

The comments and testimony received by the Commission at its April 14, 1986, hearing on data rights highlighted the present practices of the Services in acquiring data and data rights as well as general concern over the impact of the proposed regulatory implementation of P.L. 98-525 on innovators and developers of new products and technology. We examined the data rights and management provisions of P.L. 98-525 along with the largely identical provisions in P.L. 98-577, which apply to civil agencies other than NASA. Both P.L. 98-525 and P.L. 98-577 contemplate basic coverage for data rights and data acquisition management as a part of the FAR, with implementation and supplementation as needed by DoD.

Since the data provisions of P.L. 98-525 and P.L. 98-577 have been only partially implemented, no information exists on their actual impact on DoD's mission. Nevertheless, on the basis of information presented to the Commission and experience with the concepts embodied in these acts, we have attempted to determine whether there are flaws in their data provisions that require correction. Our assessment is that some improvements are called for, but in general it is the *applicability* of these statutes that causes concern.

Table D-1 in Annex D reviews the data-related requirements of P.L. 98-525 and P.L. 98-577 and the proposed FAR[8] and DFARS[9] implementation of these requirements. This review highlights a major interpretive difference between the FAR and DFARS regarding the types of acquisitions covered by these requirements. For example, the proposed FAR proprietary data validation procedures[10] would be limited to the acquisition of major systems by civil agencies (except for NASA), whereas DoD in the interim DFARS Subpart 227.4 applies the identical validation procedures in P.L. 98-525 to *all* procurements involving technical data.[11]

Similarly, the proposed FAR, interpreting P.L. 98-577, limits the technical data certification requirements, the remedies for incomplete or inadequate data, payment withholding, and so on, to major system acquisitions. The interim DFARS, on the other hand, interprets the same requirements in P.L. 98-525 as applying to all contracts that require the delivery of technical data and therefore applies these requirements to a very broad range of contracts. The only difference between the language of P.L. 98-525 and that of P.L. 98-577 in this regard is that P.L. 98-577 defines the terms "item," "item of supply," and "supplies" as being related to major systems, whereas P.L.98-525 does not. Evidently, if one carries this relationship over into the definition of "technical data" (which refers to "supplies"), the result is to limit the civil agency coverage to major systems but let the DoD coverage extend to all acquisitions.

These differences in interpretation may be part of the cause of the problem that DoD is experiencing in considering its use of the proposed FAR data provisions. While we do not disagree with DoD's interpretation[12] of P.L. 98-525, DoD's approach in its interim implementation of P.L. 98-525 may, in some instances, be too onerous for many contracting situations. For example, in basic research contracts, the need for a technical data certification or prenotification of limited rights is probably unnecessary. If P.L. 98-525 is interpreted as requiring such provisions in all contracts calling for the delivery of any technical data, corrective legislation should be sought.

Part of the interpretation problem stems from the differing legislative histories of P.L. 98-577 and P.L. 98-525. Clearly, the concern of the legislators in drafting the data portions of these acts involved major system acquisitions

and the related problem of overpriced spare parts. The differences in interpretation could be resolved if a single statute covered this subject; or, if dual statutes are used, they should be identical in language and include statements of legislative intent that they be implemented uniformly.

Recommended Revisions

Other statutory changes that should be considered are as follows:

Commercial Product Data

P.L. 98-577 and P.L. 98-525 both contain prohibitions against acquiring design, development, or manufacturing data pertaining to products offered or to be offered for sale to the public, except data required for operation and maintenance.[13] Annex E reviews these provisions and their legislative history, noting that the prohibition, although mandatory for civil agencies, is not mandatory for DoD, and that, as worded, it is a prohibition against acquiring technical data, not rights in data.

Since we recommend that DoD not seek unlimited rights in technical data pertaining to products developed at private expense as a precondition for buying the product (regardless of whether the product is commercial), these provisions should be modified to extend the prohibition now applying to commercial products to apply to *all* products developed at private expense. Concurrently, the provisions should be restated to generally prohibit forced acquisition of *unlimited rights* in limited rights technical data pertaining to commercial products and products developed at private expense, rather than to forbid acquisition of the data themselves.

In light of our recommendation, we reviewed two related provisions of P.L. 98-525 for possible change. These are the provision for planning for future competition (10 U.S.C. 2305(d)(2)) and the 7-year limitation on limited rights markings (10 U.S.C. 2320(c)). Although the legislative history clearly establishes that these provisions could be used to justify acquisition of unlimited rights for competitive reprocurement purposes, they do not specifically mandate acquisition of unlimited rights in data delivered with limited rights. Since competitive reprocurement can be accomplished with less-than-unlimited rights (see the variety of techniques available, as outlined in Annex C), and implementation of our recommendation should override the general language of these provisions, no modification of them is necessary.

Definition of Technical Data

Both P.L. 98-525 and P.L. 98-577 define "technical data" as excluding computer software but including computer software documentation. This distinction differs from commercial practice, which includes documentation within the term "computer software." Its effect is to place vendors of commercial-type software unsuspectingly in a position of losing their proprietary rights in software when dealing with DoD unless they are knowledgeable about the intricacy of the DoD technical data rights policy and take precautionary steps. Although the drafters of the proposed FAR have "solved" this problem by contriving a series of definitions arranged so that software documentation is not treated as technical data (see Table E-1 in Annex E), it is questionable whether this definitional approach will ultimately be successful. Therefore, we recommend that a minor change be made in both acts to exclude computer software documentation from the definition of "technical data."

Expansion and Modification of Validation Procedures

The proprietary data validation procedures (10 U.S.C. 2321 and 41 U.S.C. 253d) now apply only to contracts awarded on solicitations

issued after October 19, 1985, by DoD and after January 1, 1986, by civil agencies. Since validation was adopted as a fair procedure for challenging data restrictions[14] in an area that has been notably deficient in applying due process,[15] we recommend expanding validation procedures to *all* assertions of technical data rights restrictions by prime contractors or subcontractors, regardless of when the contract was entered into.

We recognize that a full-blown challenge over data rights restrictions as specified in both acts, including court or board appeals, or both, is costly and time-consuming for both parties and does not provide the quick access to technical data sought by the government for its use in competitive procurements. This has led, in the proposed FAR and interim DFARS, to a short-cutting of some of the statutory time requirements. Since the statutory validation procedure, especially with regard to appeals, can be time-consuming, the validation procedure in P.L. 98-525 should be amended to provide for an expedited appeals procedure in the Armed Services Board of Contract Appeals (ASBCA) and in the courts, similar to the appeals procedures in the Freedom of Information Act.[16]

ANNEX C

POLICY REVIEW

With regard to the basic concepts governing the allocation of rights in copyrights, software, and technical data, there is no overall government policy similar to the treatment accorded to inventions developed under government contract; nor is there clear specific statutory policy guidance. This lack of policy guidance was addressed in 1972 by the Commission on Government Procurement, which recommended that a government-wide data rights and copyright policy statement be issued.[17] Various organizations within the Executive Branch have attempted to implement this recommendation without success. While the development of government-wide policy is not a matter to be undertaken solely by DoD, a number of the data rights problems presented to the Commission could have been solved long ago by the issuance of such a government-wide statement. With the advent of the FAR System, there now exists a unique opportunity to achieve uniformity in policy and in contract language regarding technical data rights.

DFARS Subpart 227.4, Technical Data, Other Data, Computer Software, and Copyrights, recognizes the government's and the contractor's competing interests in technical data, especially for innovative contractors "who can best be encouraged to develop at private expense items of military usefulness where their rights in such items are scrupulously protected." It attempts to strike a balance, recognizing the controls necessary to "insure Government respect for its contractors' economic interests in technical data relating to their privately developed items."

The DFARS approach to weighing these competing interests has been studied by DoD over the years. The most recent general study, *Who Should Own Data Rights: Government or Industry? Seeking a Balance,*[18] found that "the current technical data rights policy is basically sound in its approach to balancing the interests of DoD and its contractors."[19] James Wade, Assistant Secretary of Defense (Acquisition and Logistics), in his prepared statement to the Commission during its data rights hearing on April 14, 1986, noted that DoD's "drive to compete must be balanced" against DoD's need for access to the most advanced technology and the innovative capability that can be developed by our industrial base. Most of the industry witnesses at this hearing testified that, in the recent drive for competition, the scales have shifted significantly in favor of the government. Examples were cited of DoD contracting officers using their economic leverage to acquire, for little or no consideration, contractors' proprietary rights in limited rights technical data. It is therefore proper to examine just how DoD has balanced these interests in the past and, if an unbalancing of interests has occurred, what should be done to restore equilibrium.

The components of this equation are (1) how the DFARS allocates rights in technical data between the contracting parties, and (2) DoD's acquisition techniques for privately developed items. Allocation of rights in technical data is covered in DFARS Subpart 227.4; the guidance on acquisition techniques, which resulted from a 1966 DoD study on protecting the private innovator, is included in DFARS 217.7201, Privately Developed Items, and to some extent in DFARS Subpart 227.4.

Allocation of Rights in Technical Data

The basic technical data rights clause used by DoD, set forth in DFARS 252.227-7013, identifies the technical data rights of the government only, but impliedly the contractor also has rights in technical data. The major classes of government rights are *limited rights* and *unlimited rights*. Table C-1 highlights the complexity of defining these rights and shows that, even when a product has been fully developed with private funds, DoD acquires a significant amount of the technical data pertaining to it with unlimited rights. Table C-2 lists the government's and contractor's rights in

technical data.

Limited rights attach to a contractor's technical data pertaining to a product developed at private expense and delivered under a prime contract or subcontract of DoD. However, not all technical data meeting this test may be subject to a limited rights restriction upon delivery to the government. A number of other tests must also be met. The technical data must not be published, must not fall within the five unlimited rights categories enumerated in Table C-1, and must be properly identified. In addition, the contractor, in placing the DFARS-prescribed limited rights legend on the technical data, must explain the method used to identify the limited rights technical data and must establish and follow a restrictive-marking quality review system.

Unlimited rights generally apply to: all technical data "resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract" (category (1) in Table C-1); changes to government-furnished data; form, fit, and function data; operation, installation, training, or maintenance manuals; and technical data normally released by the contractor without restrictions on further disclosure.

TABLE C-1

DEFINITIONS DFARS SUBPART 227.4

LIMITED RIGHTS TECHNICAL DATA

- Pertains to an item, component, or process.
- Developed at private expense.
- Not within categories (1) to (5) of unlimited rights.[a]
- Unpublished and delivered to government.
- Containing:
  (1) prime contract number;
  (2) name of contractor generating the data; and
  (3) an explanation of method used to identify limited rights technical data.
- Contractor is in compliance with restrictive-marking quality review system.

UNLIMITED RIGHTS TECHNICAL DATA

- Technical data falling into categories (1)-(5), whether or not delivered to government:[a]
  (1) resulting directly from performance of any government contract or subcontract requiring research and development (R&D);
  (2) changes to government-furnished data;
  (3) form, fit, and function data;
  (4) operation, installation, training, or maintenance manuals; and
  (5) public domain data.
- Published copyrighted data.
- Delivered limited rights technical data where the contractor breached the restrictive-marking quality control requirements.
- Limited rights technical data delivered to government without restrictive markings.

[a]A sixth category is described in DFARS 227.403-2(b) as manufacturing technical data for items, components, or processes developed under a government research and development (R&D) contract. This category appears redundant or possibly inconsistent with category (1).

Mix of Development Funds

A critical element of these definitions is the split between what technical data properly fall within or outside of the term "limited rights," since all contract technical data outside this term are acquired with "unlimited rights." This distinction turns on the undefined phrase "developed at private expense." Although the DFARS does not specifically so state, DoD's long-held interpretation of the "private expense" portion of this phrase is that private expense includes IR&D indirect funds but excludes all cases where there is any *mixture* of government and private funds in the development of the item or process.[20] This rather strict interpretation of "private expense" emphasizes the definition of "developed," since a loose definition of "developed" could result in a claim of limited rights, while a rigid definition could virtually exclude such a claim for most military hardware.

DoD's lack of recognition that a mix of public and private funds in developing new militarily useful items or processes is desirable and should be encouraged has resulted in a policy that discourages private investment in such technology. It is important, in our view, that DoD restore the balance of interests by clearly defining the rights of both parties when development funds are mixed, rather than adopting a government-take-all approach. Proposed FAR 27.408 defines the mix-of-funds situation for civil agencies as a cosponsored effort with more than 50 percent of the funds provided by the contractor. In such cases, the contractor may claim limited rights in the technical data resulting from the cosponsored project. However, this concept is of little value for DoD, since most mixes of development funds for DoD do not occur under cosponsored or cost-shared contracts; rather, they result from a sequencing of development activities (some portions or segments are funded by the government, others by a private firm). DoD should encourage sharing of development costs, whether or not a 50 percent level of private funding is achieved, and can do so by permitting the funding contractor to retain proprietary rights in the resulting technical data on some equitable basis.

Ownership of Publicly Developed Technology

The rights of the government and the contractor in limited rights and unlimited rights technical data under the basic technical data rights clause of DFARS 252.227-7013 and its related regulations are specified in Table C-2. As this table indicates, DoD obtains unlimited rights (*i.e.*, broad government license and sublicense rights) in technical data resulting from the performance of R&D specified by a government contract or falling into any of the enumerated unlimited rights categories, whether or not the data would otherwise be within the sphere of the contractor's legitimate proprietary interests. In addition to unlimited rights, DoD acquires limited rights (or a limited license) to use internally a contractor's legitimately protected technical data. A most important element of this limited license is the right to use the data, without paying a fee to the owner, for incoming inspection purposes. Thus, if DoD acquires a spare part competitively using only form, fit, and function data, loans a spare part for copying, or solicits competition on a brand-name-or-equal basis, DoD may use the original contractor's limited rights technical data in its possession to ascertain whether the supplying vendor has properly met the contract requirements.

Unlimited rights have been categorized as a license right in technical data rather than an ownership interest in the government.[21] This license is of rather broad scope, since it is not limited in purpose and permits unrestricted sublicensing by the government, which can effectively place the data in the public domain. This broad license attaches to all technical data falling within the enumerated unlimited rights categories, whether or not the technical data are delivered to the government. It has been

TABLE C-2

RIGHTS OF THE PARTIES

	LIMITED RIGHTS	UNLIMITED RIGHTS
Government	• License to use internally (including incoming inspection) but not for manufacture, or, if computer software documentation, not for preparing same or similar computer software; • License to disclose externally (subject to further disclosure and use limitations) for (1) certain emergency repair or overhaul or (2) evaluation by a foreign government; • Must include restrictive legend on any reproductions. • May also negotiate for certain sublicense rights: —Contractor will license others to use data for governmental purposes (directed license); —Government may sublicense third parties for government use only; or —Government may remove legends after a period not to exceed seven years. • If copyrighted, copyright license equal to limited rights license.	• Right to use, disclose, or duplicate for any purpose, and to permit others to do so; and • Right not to pay charges for any use of the data. • If copyrighted, copyright license is equal to unlimited rights.
Contractor	• Ownership of proprietary rights in such technical data (including copyrights); right to enforce limitations against government for so long as contractor protects proprietary position; and right to enforce proprietary position against third parties who improperly obtain such data. • Subcontractor may deliver such technical data directly to government.	• Right to claim copyright ownership; and • Right to use, disclose, or duplicate delivered technical data. If not delivered, may be able to claim ownership interest to some extent.

argued that this broad license right often exceeds the government's needs, removes incentives from innovators to develop and exploit publicly funded technology commercially, makes publicly funded technology more readily accessible to foreign competitors, and is out of line with congressional and executive statements concerning inventions made under government contracts. A number of alternative concepts have been adopted in legislation to provide the developing contractor with certain proprietary rights in technical data resulting from the performance of government-funded research and development. These include:

Limited Rights Treatment for a Specified Time Period. The Small Business Innovation Development Act of 1982, P.L. 97-219, provides for the "retention of rights in data generated in the performance of the contract by the small business concern." The Small Business Administration implementing regulation for the Small Business Innovation Research (SBIR) program provides that, for a two-year period from the completion of the project, technical data generated under the contract will not be disclosed by the government.[22] After this period, the government has a royalty-free license for government use of any technical data delivered under the contract. DFARS 252.227-7025 sets forth a technical data clause for use in the DoD SBIR program that provides the government with limited rights in the technical data generated under the contract for a two-year period, and thereafter a royalty-free license right to use or disclose the technical data for government purposes only.

Unrestricted vs. Unlimited Rights. P.L. 98-577, applicable to the civil agencies, requires the preparation of implementing regulations that will provide the government with unlimited rights in technical data developed exclusively with federal funds *if* delivery of the data was required as an element of performance under the contract *and* the data are needed to "ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future." Otherwise, the agency will acquire "an unrestricted, royalty-free right to use, or to have its contractors use, for governmental purposes (excluding publication outside the government) technical data developed exclusively with federal funds." This provision, which has not yet been proposed for implementation in the FAR, provides the contractor with a limited proprietary position in undelivered technical data and in certain delivered technical data even though federal funds were used to generate the technical data.

Where delivered technical data are needed for competitive purposes for a substantial number of items, the government obtains unlimited rights. The definition of data that qualify for unlimited rights seems too narrow, since reasons other than competition may drive a need for unlimited rights in technical data. Further, this concept of unlimited rights may well deny the contractor any copyright in the data. The "unrestricted rights" category is puzzling, since it merely prohibits the publication of the technical data outside the government, not disclosure. Thus, "unrestricted rights" technical data may be found to be subject to release to the public under the Freedom of Information Act. Therefore, it is not clear what "legitimate proprietary interests" are established by the unrestricted rights category, especially with respect to third parties.

Providing additional incentives to contractors developing new technology under government contracts to establish domestic commercial uses for the technology is a goal worth pursuing. This goal is easier to achieve with regard to patents, copyrights, or mask works, since the underlying invention or work may, within a short period of time, be broadly released to the public and used by the government with the inventor, author, or mask-work developer still retaining ownership of the technology. In return for its funding, the government can obtain a royalty-free license for the further use of the technology by or for the

government. The legitimate proprietary rights in technology other than patents, copyrights, or mask works depend upon contract and trade secret law. Contracts can protect technology among the contracting parties even though the technology may subsequently be disclosed to the public. To obtain broader protection for technology disclosed in technical data, the government must agree to a trade secret type of protection (*i.e.*, the government may not disclose the technical data without limitations on its subsequent use or disclosure by third parties). Undertaking such an obligation with respect to technical data pertaining to products developed with public funds entails administrative costs that must be weighed against any benefits to be achieved by such a policy.

Developing Competition for Proprietary Products

DoD previously considered and adopted regulations to ensure that the pursuit of full and open competition did not in actual practice violate the government policy of honoring rights in technical data resulting from private development. This policy, now contained in DFARS 217.7201, provides for full and open competition for items available from more than one source as a result of independent development, licensing, or competitive copying. Where DoD lacks an unlimited rights technical data package for the competitive acquisition of privately developed items, contracting officers are required to use the following procedures for obtaining alternative sources, in the stated order of preference:

- Where identical designs are not required, use competitive procurement, relying on performance specifications in which the government has unlimited rights.
- Where identical designs are required and sole-source acquisition is authorized pursuant to DFARS Part 6, purchase from the private developer or its licensee if the price is fair and production and quality are adequate.
- If additional sources are needed for the acquisition of identical items, encourage the developer to license others, or consider the specific acquisition of adequate rights in data, and if technical assistance is also needed from the primary source, consider leader-follower techniques (FAR Subpart 17.4).
- As a last alternative, use reverse engineering by the government if cost savings can reasonably be demonstrated and the action is authorized by the head of the contracting activity.

The only policy guidance on this subject previously in the DFARS technical data coverage of Subpart 227.4 is paragraph 227.403-2(f), on the specific acquisition of unlimited rights in technical data. This paragraph permits the specific acquisition of unlimited rights in limited rights data, by negotiation or as part of a competition among several entities at the prime or subcontractor level, and requires line-item identification and separate pricing of the rights sought. Before unlimited rights are to be acquired, a finding upon a documented record is required that (1) there is a clear need for a reprocurement of the product involved, (2) no suitable alternative is available, (3) the data to be acquired will suffice for use by other competent manufacturers, and (4) anticipated net savings exceed the acquisition cost of the data and the rights therein.

Now paragraph 227.403-2(h) of the interim DFARS has added a sentence requiring contracting officers to consider use of alternative proposals for obtaining the right to use limited rights data for competitive reprocurement, and 227.403-2(a)(3)(i) contains a new provision restricting contracting officers

—as a condition for obtaining the contract—from acquiring technical data (except for operation and maintenance) pertaining to design, development, or manufacture of products developed at private expense and offered or to be offered for sale, license, or lease to the public. However, exceptions to this restriction are authorized if the agency head determines that the interest of the government in increasing competition and lowering costs by developing alternative sources is best served by obtaining the data or, in the absence of such a finding, if the contracting officer nevertheless negotiates for the data, such acquisition having been found (presumably by the contracting officer) advantageous to the government. The offeror's willingness to provide the data may be evaluated as a part of source selection.

Proposed DFARS 227.473-2 would significantly expand the techniques available to contracting officers for obtaining additional rights in limited rights technical data by providing for (in addition to specific acquisition of unlimited rights as provided for in DFARS 227.403-2(f)) licensing rights, direct licensing, negotiating time limits for limited rights legends, and options to acquire such rights. But specific guidance on the use of these techniques and the need to balance the government's interests and economic leverage with the negative impact these techniques may have on private developers is sadly missing from this proposed regulation. The lack of specific guidance, along with a blanket deviation in the data rights area, has resulted in some overreaching by the Services and great industry concern.

The widespread use of techniques for acquiring rights or options to rights—especially the broad requirement for acquiring, as a precondition of procurement, unlimited rights in data for products developed at private expense, so that the product to which they pertain may be reprocured competitively—has in our view been driven by a strong desire for competitive reprocurement and expected cost savings, often at the expense of the private developer's proprietary position. Where there is a significant existing or potential commercial market for the product and DoD seeks to acquire unlimited rights, the private developer will likely either price the data to include their commercial value or forego the sale. Where DoD is the only market, the private developer's choices are more limited, since the developer must accommodate DoD's requirements. When faced with the choice between loss of the sale to DoD and loss of a proprietary position, the developer will either forego the sale or price its product higher to recoup its development costs over a shorter period. Neither choice will in the long run benefit DoD.

In addition, acquiring unlimited rights is often unnecessary. Before considering acquisition of such data rights for a particular system, subsystem, or component so that a technical data package can be assembled for reprocurement purposes, the contracting officer should determine whether identical or functionally equivalent items are required, whether additional sources already exist in the marketplace, whether competitive copying or use of form, fit, and function data will suffice, and whether the package will be adequate for use by a second source to manufacture the product.

We recommend that DoD's policy be changed to restore the delicate balance between the drive for competition and the need for incentives of private developers. Forced acquisition for unlimited rights in limited rights technical data pertaining to commercial products or products developed at private expense should generally be prohibited. Where second sourcing is contemplated, rather than acquiring unlimited rights in limited rights technical data, DoD should consider other techniques for establishing competitive production sources (*e.g.*, directed licensing, sublicensing rights limited to use for the government, contract teaming, use of performance and interface specifications (form, fit, and function data), competitive copying) and should select the technique least obtrusive

to the developer's proprietary data rights. The guidance of DFARS 217.7201 should be updated to implement this recommendation.

Furthermore, the present guidance does not deal with new techniques for acquiring additional sources for privately developed items, such as sublicense rights in the government to use limited rights technical data for competition, loan of replenishment parts, use of expiration dates on limited rights technical data, directed licensing, or the establishment of a not-to-exceed ceiling price for the acquisition of unlimited rights in limited rights data during a competitive negotiation.

To restore the balance, DFARS 217.7201, along with DFARS Subpart 227.4, should be revised to establish a hierarchy of techniques that may be used in order to seek additional sources for privately developed items, but with a requirement that unlimited rights generally not be acquired in limited rights data and that the method least obtrusive to the private developer be selected. We recommend, for example, that the DFARS state the contracting situations to which each technique applies (*e.g.*, major systems, hardware development, initial production); that techniques such as directed licensing by the contractor/developer be considered before sublicensing rights are obtained by the government; that other less-than-unlimited rights be sought where directed licensing or sublicensing rights or similar lesser rights will suffice for establishing additional sources; that use of alternative proposals (with and without unlimited data rights) in a competitive acquisition require higher level approval; that use of form, fit, and function data and competitive copying be given priority over obtaining additional rights as well as over reverse engineering by the government (or by a contractor for the government); and that expiration dates on limited rights technical data be used to rid the system of stale markings, not to acquire unlimited rights in limited rights data.

ANNEX D

SUMMARY OF ANALYSIS OF THE REGULATIONS

We have reviewed the existing technical data rights policies of the civil agencies, the proposed FAR, and the interim and proposed DFARS, and we agree that the proposed DFARS coverage of this subject, as well as that in the interim DFARS, is too complex, somewhat ambiguous, and—more significantly—missing important policy guidance. The ambiguities, complexities, and omissions have a negative impact on subcontractors, especially small businesses, since the basic technical data rights clause of the DFARS[23] is required to be used in subcontracts, at all tiers, whenever the subcontract calls for the delivery of technical data.

While many industry comments to the Commission supported the treatment accorded to technical data rights in the proposed FAR Subpart 27.4 over the proposed DFARS Subpart 227.4 or the interim DFARS Subpart 227.4, our review indicates that the proposed FAR is deficient in the treatment accorded many of the complex technical data rights and management issues facing DoD. This is partly because it is not directed to many of the problems encountered in acquiring major systems, meeting the logistics needs in support of these systems over their life cycles, and providing adequate coverage for subcontracts. Nevertheless, the proposed FAR *is* satisfactory for simpler R&D activities and is structured in such a manner that it could form a base for further detailed implementation by DoD. Table D-1, following, outlines the implementation of the statutory requirements for technical data in the regulations as currently proposed and comments on deficiencies in meeting statutory requirements.

Deviations

A major concern of industry is that the Services may overreach in acquiring, through a variety of techniques, unlimited rights in limited rights technical data pertaining to privately developed products. The Services, through use of economic leverage as the major or only buyer of a product, have forced contractors and subcontractors to give up what they believe to be their legitimate proprietary interests. In the past, the balance between the government's use of economic leverage and a contractor's protection of legitimate proprietary interests was safeguarded or controlled by strict deviation procedures. Prior to August 1983, any deviations from prescribed provisions and procedures for acquiring technical data rights required special approval. Between August 1983 and December 30, 1985, during which period the requirement to seek approval of deviations was suspended, the Services were free to conceive and implement any technical data rights policy or procedure that would result in obtaining spare parts at reasonable prices. This freedom led to an imbalance.

While the blanket authority for deviation has been rescinded, the Services do not appear to have reverted to the procedure of seeking approval for deviations, but, rather, seem to be relying on two features of the interim DFARS. First, the interim DFARS infers approval of the use of a clause canceling limited rights legends after a fixed period (see the policy set forth in DFARS 227.402-2(c)(3)). Second, the interim DFARS recognizes the use of contract terms requiring a contractor to permit its potential competitors access to the contractor's limited rights technical data without any guidance as to when this procedure is to be used, what findings are to be made before it is used, or what contract technical data rights clauses are prescribed to cover the desired acquisition of rights.[24] A contrasting example of the guidance formerly used to ensure that additional rights in limited rights technical data were acquired only when cost-effective and only in case of an existing clear need can be found in DFARS 227.403-2(f), Specific Acquisition of Unlimited Rights in Technical Data. This paragraph calls

for findings upon a documented record and specifies the technical data rights clause to be used to accomplish the acquisition.

The existing DFARS deviation procedures to accommodate variations in technical data policies and clauses should be reinforced by requiring the Services to get advance approval of any techniques employed to obtain the right to use limited rights data for competitive reprocurements where such techniques and implementing clauses are not contained in the DFARS. The request for deviation approval should explain the extent of the rights sought, the proposed solicitation and contract provisions, the parameters for calculating the compensation to be provided to the owner of the limited rights data, and the cost and benefits of the proposal, along with the impact the proposal may have on the supplier or similar suppliers. Further, as a requirement in seeking approval of a deviation, the Services should specify whether the preferences of DFARS 217.7201, Privately Developed Items, are being followed.

Developed at Private Expense

The Commission also received numerous comments on the proposed DFARS definition of "developed at private expense." It is important for both parties to know what this term means, if it is to describe the basic split between the technical data that can be delivered to the government as limited rights data and the technical data that are to be treated with unlimited rights. Although initially only the term "developed" created controversy, testimony received by the Commission indicates that the scope of the term "private expense" is also in doubt. For instance, does it include all indirect expenses? Only IR&D? B&P? Or overrun costs absorbed by a company?

It is surprising that the phrase, "developed at private expense," so critical to the definition of a contractor's proprietary rights, has remained undefined for three decades and has been the subject of very few reported decisions. The most detailed analysis of this phrase is Judge Lane's ASBCA decision in Bell Helicopter Textron, ASBCA No. 21192, September 23, 1985. Judge Lane, after reviewing all the legal precedent on this phrase, including the Armed Services Procurement Regulation (ASPR) Committee's attempt of over two years at a definition (ASPR Case No. 72-65), found that to be "developed" an item must exist (*i.e.*, a fabricated prototype), and practicability, workability, or functionality must be demonstrated (*i.e.*, the item must be analyzed and/or tested sufficiently to demonstrate to reasonable persons skilled in the applicable art that there is a high probability the item will work as intended). Whether or not testing is required and the degree of testing depend on the nature of the item and the state of the art. Finally, Judge Lane recognized that further development of an item or process may occur after it has reached the point of being developed for data rights purposes.

We accept this definition with one proviso: in our view workability need not actually be demonstrated prior to the contract. If the item or process exists and the item's design or the process parameters are not significantly modified under the contract, then a demonstration of workability under the contract can be used to establish that the item or process (which was available prior to the contract) was developed prior to the contract. Conversely, if significant modifications are required under the contract to achieve workability, this fact establishes that the item or process was not developed prior to the contract. When a decision is needed prior to a contract as to whether or not an item or process has been "developed," the item or process must exist and be sufficiently designed and/or tested so that persons reasonably skilled in the art would conclude that it would work.

Judge Lane defined the term "private expense" as excluding any government reimbursement, as a direct or indirect cost (except for IR&D), of any of the costs of

developing the item or process. We believe a more detailed definition is needed, since development may occur as a required element of an R&D government contract where the contractor's costs are not reimbursed under the contract (*e.g.*, in overrun situations, or in fixed-price contracts whose costs have been underestimated). We recommend the following definition: "at private expense," in the context of development, means that funding for the development work has not been reimbursed by the government, nor was the work required as an element of performance under an R&D government contract or subcontract. However, private expense also includes IR&D and B&P, even if reimbursed.[25]

Subcontracts

The Commission received a number of complaints from subcontract suppliers of major weapon subsystems and components that they were being required to give up their proprietary interest in technical data packages as the price of doing business with DoD. In the past, subcontractors have been concerned that prime contractors, often their competitors in the commercial market, were acquiring rights in the subcontractors' technical data beyond the government's needs. The issue was resolved by DoD with the requirement that DoD's basic clauses dealing with rights in technical data be incorporated, without change, into all subcontracts calling for the delivery of technical data and that prime contractors were not to use their economic leverage in awarding subcontracts in order to acquire rights for themselves. Further, recognizing that prime contractors and their subcontractors may be competitors, the data rights clauses permit the subcontractor to fulfill its requirements to deliver limited rights technical data by delivering the data directly to the government.

These subcontract provisions appear to have protected the legitimate proprietary interest of subcontractors *vis-a-vis* prime contractors, but they are ineffective in protecting the subcontractor from a government requirement in the prime contract calling for technical data packages with unlimited rights or other reprocurement rights. Most often the consequence of a contracting officer's decision to acquire reprocurement rights in proprietary products falls hardest on an innovative supplier. By the time the supplier's product and related technical data are to be acquired, the prime contractor is locked into a requirement for an unlimited rights technical data package, and the supplier is faced with a take-it-or-leave-it requirement.

We recommend elsewhere that specific guidelines be established requiring a determination before a contracting officer acquires additional rights in limited rights technical data for reprocurement purposes and that, in these situations, the government acquire only the minimum additional rights needed. Such guidelines would answer many subcontractor complaints. However, provision for access to the government contracting officer by proposed subcontractors, to question whether a particular acquisition of additional government rights in proprietary technology is proper, may be an improvement that can restore the balance of interests of the parties and may be cost-effective.

Complex and Ambiguous Clauses

Finally, the existing basic DFARS clauses for prime contracts and subcontracts calling for delivery of technical data are overly complex and ambiguous, require unwarranted administrative costs, and place an excessive burden on contractors trying to understand and comply with them—without commensurate benefit for DoD. These clauses are Rights in Technical Data and Computer Software (252.227-7013), Restrictive Markings on Technical Data (252.227-7018), and Validation of Restrictive Markings on Technical Data (252.227-7037).

These clauses do not represent a coherent, successful approach for establishing rights in technical data. We see no reason why they could not be consolidated into one basic technical data clause that would establish the rights of the contracting parties, the requirements for using restrictive markings, and the remedies for mismarking. The validation procedures of 10 U.S.C. 2321 could be adopted for the most part by reference rather than by resorting to a complex 1,500-word clause. The value of the use of the Restrictive Markings on Technical Data clause should be reconsidered in light of the statutory validation procedures. Further, as we recommend with respect to computer software in this paper, the coverage for computer software should be separated from that for technical data, helping to simplify the technical data clause.

In addition, we question DoD's general approach to contractual coverage of this subject, particularly to the structuring of the rights-in-technical-data clause. DoD uses a basic, complex technical data rights clause (actually a set of clauses, as noted above) for all procurements requiring delivery of technical data at the prime contractor or subcontractor level, regardless of the amount and complexity of the data to be acquired or the complexity, amount, type, or purpose of the contract—that is, regardless of whether the contract is for basic research, a study, large-scale production, or ordinary supplies. This approach results in the use of complex technical data clauses in all situations, providing excess contractual coverage in most cases. What is gained is administrative simplicity, at both the prime contract and subcontract level, since the contract drafter does not have to decide which clause to use to fit a particular situation (indeed, no choice exists). At some point, however, this approach becomes too complicated to be generally useful, and the use of simpler, tailored clauses becomes appropriate.

TABLE D-1. IMPLEMENTATION OF STATUTORY REQUIREMENTS FOR TECHNICAL DATA

STATUTORY REQUIREMENTS	PROPOSED FAR[a]	PROPOSED DFARS[b]	COMMENTS
1. Definitions of technical data, major systems, and "item, item of supply, and supplies" for civil agencies. 10 U.S.C. § 2302(4) and (5), 41 U.S.C. § 403(9), (10), and (11).	27.401. Definitions (technical data only). 52.227-14. Rights in Data – General clause, paragraph (a) *Definitions*.	227.471. Definitions (for technical data only). 252.227-7013. Rights in Technical Data and Computer Software clause, paragraph (a) *Definitions*.	Under the proposed FAR, computer software documentation is treated as computer software rather than technical data, as this term is defined in the statute.
2. In production contracts for major systems, consider requiring proposals for (1) the Government's right to use technical data delivered under the contract for competitive reprocurement, along with the cost for such rights, and (2) the qualification or development of multiple sources of supplies. 10 U.S.C § 2305(d)(2); 41 U.S.C § 253b(f)(2).	Not covered.	Not specifically covered, but note that 227.473-2, Obtaining rights in technical data and computer software, lists various ways of obtaining rights in data, including specific acquisition using clause at 252.227-7015; acquisition of license rights using clause at 252.227-7013 with Alternate IV; direct licensing using clause at 252.227-7036; using expiration dates on limited rights using clause at 252.227-7013 with its Alternate III; and acquiring option of type listed above. (Not limited to major system production contracts.)	Interim DFARS 227.403-2(h)[c] requires alternative proposals that provide DoD the right to use limited rights technical data for reprocurement. Not limited to major system production contracts.
3. Define legitimate interests of parties in technical or other data. 10 U.S.C.§ 2320(a); 41 U.S.C.§ 418a.	Not defined, but limited-unlimited rights, restricted rights, and copyright provisions do it part-way.	Not specifically defined, but limited-unlimited rights, restricted rights, and copyright provisions do it part-way.	
4. Limit acquisition of technical data for commercial items and processes. Section 1202(6) of P.L. 98-525. 41 U.S.C. § 418a(a).	27.406(d)(4). Major system acquisition. Exclusion limited to major systems.	227.472(b). Policy. Limits acquisition of technical data for standard, off-the-shelf commercial items.	Interim DFARS 227.403-2(a)(3)(i) limits acquisition of technical data for products or processes sold to the public but provides for override.
5. Consider public, private, and mixed funding. 10 U.S.C § 2320 (a); 41 U.S.C.§ 418a(c).	27.408. Recognizes cosponsored research and development as a mixed-funding situation.	227.472-1. Rights in technical data and computer software. Limited-unlimited rights only partially consider this subject. 252.227-7013. Rights in Technical Data and Computer Software clause. Limited-unlimited category only partially recognizes funding.	Mixed funding not specifically addressed in DFARS, but DoD's policy is that a mix of funding in the development process is equivalent to purely public funding of that process. Proposed FAR covers only cosponsored mix of funding case. DoD's mixed-funding situations are not generally based on cost sharing, but on the parties' funding different stages of the development process.
6. Consider 35 U.S.C. § 200, SBIR Program, Small Business Act, and need for competition, in prescribing the regulations defining rights of the parties.10 U.S.C.§ 2320(a); 41 U.S.C.§ 418a(c).	No evidence of consideration of guidelines. For Small Business Innovation Research Program contracts, 27.409(l) requires use of the clause at 52.227-20, Rights in Data – SBIR Program.	No evidence of consideration of guidelines. 272.480. Rights in technical data and software developed under the Small Business Innovation Research Program (SBIR Program). Requires use of clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), for this program.	Inadequate policy coverage.

[a]50 FR 32870, August 15, 1985.
[b]50 FR 36887, September 10, 1985.
[c]Interim DFARS; Subpart 227.4 as modified by 50 FR 43158, October 24, 1985.

TABLE D-1. IMPLEMENTATION OF STATUTORY REQUIREMENTS FOR TECHNICAL DATA (Continued)

STATUTORY REQUIREMENTS	PROPOSED FAR	PROPOSED DFARS	COMMENTS
7. Provide for unlimited or unrestricted rights in technical data developed with public funds, depending on the need to use such data for competitive reprocurements. 41 U.S.C.§418a(b).	27.406(d)(4). Major system acquisition. Requires the use of 52.227-22, Major Systems – Minimum Rights clause, which gives government unlimited rights in technical data developed during contract performance in major system contracts if the data relate to a major system or supplies and are required to be delivered to the government.	N/A	Concept of statute not adopted by proposed FAR.
8. Define respective rights of United States, contractor, and subcontractor in delivered technical data. 10 U.S.C.§ 2320(b)(1); 41 U.S.C.§ 418a(d)(1).	27.404. Basic Rights in Data clause. 52.227-14. Rights in Data – General clause, paragraph (b) *Allocation of rights* and paragraph (c) *Copyright*. Clause not limited to delivered data and does not specify subcontractor's rights.	227.472-1. Rights in technical data and computer software. Requires use of 252.227-7013, Rights in Technical Data and Computer Software clause. Not limited to delivered data. Alternate II limits government sales of data.	Inadequate coverage. Copyright policy not effectively followed in the Rights in Technical Data and Computer Software clause.
9. Specify technical data to be delivered and delivery schedule. 10 U.S.C.§ 2320(b)(2); 41 U.S.C.§ 418a(d)(2).	27.406(a)(2). Agencies may use own procedures.	227.474. Delivery of technical data. Implemented by 252.227-7031, Data Requirements; 252.227-7026, Deferred Delivery of Technical Data and Computer Software; and 252.227-7027, Deferred Ordering of Technical Data and Computer Software.	
10. Establish or reference procedures for determining acceptability of delivered data. 10 U.S.C.§ 2320(b)(3); 41 U.S.C.§ 418a(d)(3).	27.406(d)(3). Agencies required to review data, no procedures referenced. (Limited to major systems.)	227.473-3(b). Marking of technical data. Implemented by 252.227-7018, Restrictive Markings on Technical Data and Computer Software clause.	Proposed DFARS does not specify procedure but does include an audit clause giving the government the right to review contractor's procedures regarding placing restrictions on technical data.
11. Use separate line item for technical data items.10 U.S.C.§ 2320(b)(4); 41 U.S.C.§ 418a(d)(4).	27.406(d)(3). Agencies to use own techniques. (Limited to major systems.)	227.474(d), Policy, and 227.494-1(c), Data requirements. Implemented by 252.227-7031, Data Requirements clause.	
12. Determine which items of data are restricted, in advance of delivery. 10 U.S.C.§ 2320(b)(5); 41 U.S.C.§ 418a(d)(5).	27.404(d)(2). The solicitation provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in the solicitation to determine whether data items to be delivered are restricted in any manner.	227.473-1. Identification of limited rights in technical data and restricted rights in computer software. Implemented by 252.227-7035, Prenotification of Rights in Technical Data and Computer Software, and 252.227-7013 and Alternate I, Notice of Certain Limited or Restricted Rights.	
13. Updated technical data required to be delivered. 10 U.S.C.§ 2320(b)(6); 41 U.S.C.§ 418a(d)(6).	27.406(d)(2). Implemented by clause at 52.227-21, Technical Data Certification, Revision, and Withholding Payment – Major Systems.	227.474-2(c). Deferred ordering. Data Accession List can be used to determine data being generated by contractor.	Proposed DFARS does not specifically meet this requirement. But Interim DFARS at 227.415 requires a listing of technical data reflecting engineering changes on DD Form 1423.
14. Written assurance at time of delivery that data are complete, accurate, and satisfy contract. 10 U.S.C.§ 2320(b)(7); 41 U.S.C.§ 418a(d)(7).	27.406(d)(2) requires use of clause at 52.227-21, Technical Data Certification, Revision, and Withholding Payment – Major Systems.	227.474-3. Technical data certifications. Implemented by 252.227-7028, Certification of Technical Data – Prior Delivery, and 252.227-7037, Certification of Technical Data Conformity.	Clauses require certification at time of contracting that data delivered will be complete, accurate, etc.; not at time of delivery of the data.

TABLE D-1. IMPLEMENTATION OF STATUTORY REQUIREMENTS FOR TECHNICAL DATA (Continued)

STATUTORY REQUIREMENTS	PROPOSED FAR	PROPOSED DFARS	COMMENTS
15. Remedies for submission of incomplete or inadequate data. 10 U.S.C.§ 2320(b)(8); 41 U.S.C.§ 418a(d)(8).	46.708. Warranties of data. Requires appropriate agency implementation. 27.406(d)(2). Implemented by clause at 52.227-21.	227.474-3(b)(2). Technical data certifications. 227.474-7. Warranties of technical data. Requires consideration of factors in 246.708, Warranties of technical data. Implemented by clause at 252.246-7001, Warranty of Data, plus Alternates I and II.	Interim DFARS 227.414 requires the contracting officer to consider appropriate remedies, which would include existing DFARS warranty coverage for technical data at 246.708.
16. Withholding as a remedy. 10 U.S.C.§ 2320(b)(9); 41 U.S.C.§ 418a(d)(9).	27.406(d)(2). Implemented by clause at 52.227-21.	227.474-5. Technical Data – Withholding of payment. Implemented by 252.227-7030, Technical Data – Withholding of Payment clause.	
17. Provision for removal of legends, if used, may not exceed seven years. 10 U.S.C. 2320(c).	N/A	227.473-2(e). *Expiration of Limited and Restricted Rights.* Implemented by 252.227-7013, Rights in Technical Data and Computer Software clause, with Alternate III.	Testimony by Air Force said standard commercial items are excluded. Proposed DFARS not so limited.
18. Prescription of regulations for sale or loan of replenishment parts for design replication or modification. 10 U.S.C. 2320(d).	N/A	Not covered.	DFARS 227.7201 may be inconsistent.
19. Contract provision prohibiting contractors from unreasonably restricting subcontractor sales directly to government. 10 U.S.C.§ 2402; 41 U.S.C.§ 253g.	3.503.[d] Unreasonable restrictions on subcontractor sales. Implemented by clause at 52.203-6, Restrictions on Subcontractor Sales to the Government. Mandatory for all contracts for supplies or services.	FAR coverage relied on.	FAR gives no guidance on what is unreasonable, such as, are fees permitted to be charged by prime. Interim DFARS 252.227-7017, Rights in Technical Data – Major System and Subsystem Contracts clause, contains similar coverage for major systems.
20. Identification of contractor, manufacturer, or other source of supply, stock numbers, and source of any technical data. 10 U.S.C.§ 2384.	N/A	227.474-4. Identification of technical data. Implemented by 252.227-7029, Identification of Technical Data clause.	DFARS 217.7204, Identification of Sources of Supply, and a clause for use in most supply contracts, DFARS 252.7270, have been adopted to meet this requirement.[e]
21. Contract provision on statutory validation procedure. 10 U.S.C.§ 2321; 41 U.S.C.§ 253d.	Proposed FAR 27.409[f]. Proposed clause at FAR 52.227-24, Validation of Restrictive Markings on Technical Data. Applies to DoD contracts calling for delivery of technical data and such civilian contracts if for major systems. Does not apply to NASA.		Interim DFARS 227.413 essentially adopts proposed FAR coverage.

[d]FAC 84-11; 50 FR 35475, August 30, 1985.

[e]51 FR 19552, May 30, 1986.

[f]50 FR 45442, October 31, 1985.

ANNEX E

ADDITIONAL MATTERS

Commercial Product Data

Both P.L. 98-525 and P.L. 98-577 prohibit the acquisition, as a condition for the procurement of these products, of technical data relating to design, development, or manufacture of products "offered or to be offered for sale to the public," that is, commercial products. Excluded from this prohibition are data necessary for operation, maintenance, and use. The legislative history of both acts indicates that Congress was concerned with protecting proprietary rights in data pertaining not only to commercial products, but also to items developed at private expense. However, as the laws were enacted, only commercial product data were covered.[26] We believe this is an error and have recommended that revised coverage restraining the acquisition of unlimited rights in limited rights technical data apply to all items or processes developed at private expense, not just commercial products.

Proposed DFARS 242.472(b) defines the products referred to in the acts in terms of DoD's definition of commercial off-the-shelf products,[27] that is, "existing products or processes developed at private expense and offered or to be offered for sale, license, or lease in substantial quantities to the public at established catalog or market prices." On the other hand, the interim DFARS implements the prohibition by a policy statement in 227.403-2(a)(3)(i) directed to products offered or to be offered for sale to the public but includes an exemption when the agency head determines that the government's interest in acquiring additional sources is best served by acquiring the prohibited data as a condition of the procurement. These regulations also permit the contracting officer to acquire such technical data, with rights to use and disclose the data, whenever their acquisition would be advantageous to the government.

James Wade's prepared statement to the Commission indicated that DoD was experiencing interpretive problems with this requirement, "as it shifted the normal rules governing the use of technical data from 'rights in the data' to the 'delivery of the data.' " Indeed, the concept of withholding data concerning commercial items is a throwback to DoD's pre-1964 data rights policy, which permitted contractors to withhold all data pertaining to standard commercial items sold to the public. DoD rejected the data-withholding concept in 1964 and instead began requiring delivery of such data with limited rights if the product was developed at private expense and otherwise was qualified for limited rights treatment.

We examined the legislative history of P.L. 98-525 and P.L. 98-577 to further understand the legislative intent of this concept. First, although proposed by the DFARS, there appears to be no basis for limiting to commercial off-the-shelf products the prohibition against ordering certain technical data. Second, while both acts use substantially the same language concerning the acquisition of technical data related to commercial products, the prohibition in P.L. 98-577 is mandatory,[28] whereas in P.L. 98-525 it is listed as one of the factors to be considered in promulgating the implementing regulations.[29] Nevertheless, both acts adopt the policy limiting the acquisition of design, development, or manufacturing technical data (except for operation, maintenance, and use) by the government as a precondition to the procurement of a commercial product.[30] The balance adopted by these acts is that the government would obtain rights in technical data pertaining to products developed at government expense; the implementing regulations would define the rights of the parties to technical data pertaining to products developed at private expense or with a mix of funding; and commercial product technical

data (manufacturing, design, or development) would not generally be acquired as a condition of the acquisition of the product. This does not mean that DoD could not acquire commercial product data and the right to use the data for competitive reprocurement by specifically negotiating for the rights independently from the acquisition of the commercial product. Clearly, the statutory restraints deal only with the acquisition of the data as a precondition of the procurement of the commercial product and not to the independent purchase of the data or rights.

One seemingly inconsistent section in this balance deals with the planning-for-future-competition provisions (10 U.S.C. 2305(d) and 41 U.S.C. 253(b)), which provide for alternative proposals for acquiring rights to use data during the competition for major system *production* contracts. This section has been explained as not intending to require proposers to give up their technical data rights as a cost of doing business with the government but, rather, permitting the consideration of such matters in the price evaluation when the agency believes it appropriate.[31] Therefore, in appropriate situations during competition for major systems production contracts, DoD may obtain cost proposals for acquiring additional rights in technical data that may pertain to commercial products.[32]

The DFARS should provide specific guidance implementing the statutory restraint against acquiring commercial product design, development, or manufacturing data. In this respect, the DFARS should state, as a general policy, that unlimited rights in such data shall not be acquired; however, where an agency still considers it proper to acquire them, the DFARS should detail the determination to be made, at an appropriate agency level, before they are acquired. The determination should include whether the rights being sought are appropriate, considering the needs of the government and the value of the data to the owner. As to major system production contracts, the DFARS should define the situations where it is appropriate to obtain proposals for acquiring commercial product data along with rights sufficient for competitive reprocurement and how such proposals are to be evaluated and used, to ensure that private proprietary rights in the data will be accorded proper treatment.

Software Issues and Definitions

Computer software is a commodity that is alike in some respects but differs in others from technical data. Recognizing this difference about 10 years ago, DoD expanded the coverage in its technical data rights contract clause to cover computer software. Computer software was defined to be in a category of recorded information different from technical data, except that computer software documentation (computer listings and printouts in human-readable form and information concerning the design, specifications, and operating instructions for using the software) was defined as technical data. The separation of computer software documentation from computer software was unfortunate, since it is contrary to commercial practice and has led to a great deal of confusion. The DFARS definition of technical data, which includes computer software documentation but excludes computer software, was essentially adopted by P.L. 98-525 and P.L. 98-577.

Table E-1 describes the definitions related to computer software in the above acts and the government's acquisition regulations (*i.e.*, the proposed FAR, the interim and proposed DFARS, and the Federal Information Resources Management Regulation [FIRMR][33]). Apparent from Table E-1 are the government's conflicting definitions for the same or similar terms and the crying need for uniformity.

At the Commission's hearing on data rights, some industry representatives stated that computer software was sufficiently distinct from technical data to warrant separate

contractual coverage. A recent comprehensive report,[34] prepared by the Software Engineering Institute for DoD, reached the conclusion, for a number of cogent reasons, that software and software documentation should be treated separately from technical data.

Our study of this issue similarly reached the conclusion that computer software and related documentation should be separated from the rights-in-technical-data clause and included in a separate contract clause or set of clauses. The basis for this conclusion is the hybrid nature of computer software, and several other considerations. While both the DFARS and the proposed FAR generally combine the treatment of software with that of technical and other data, in many instances it has been found necessary to provide separate coverage for software. DoD's software acquisition policy, unlike its policy regarding technical data, requires that predetermination be used for all restricted rights software. The DFARS regulatory coverage for technical data is complex enough without even considering software. Finally, separate coverage for software will focus greater attention on the proprietary rights treatment to be accorded software and will permit more attention to be directed to this area of fast-changing technology.

The proposed FAR and DFARS as well as the present DFARS coverage for computer software provide for the acquisition of restricted rights when computer software "developed at private expense" is purchased, leased, or licensed. As is the case with the technical data coverage, the term "developed at private expense" is not defined for computer software. To forestall here the problems that have arisen with respect to technical data, the FAR should define this term as it applies to computer software. However, we recognize that computer software has other facets that must be recognized. For instance, definition of "development" may require a concept for a computer data base different from that for a microcode on a semiconductor chip (firmware).

TABLE E-1. COMPUTER SOFTWARE DEFINITIONS

COVERAGE	P.L. 98 525, P.L. 98-577	PROPOSED FAR[a]	INTERIM DFARS AND PROPOSED DFARS[b]	FIRMR[c]
Data	Term "other data" used but not defined.	Recorded information; includes technical data and computer software.	Recorded information.	
Technical Data	Includes computer software documentation; excludes computer software.	Data (other than computer software) of a scientific or technical nature.	Recorded information of a scientific or technical nature. Term includes computer software documentation; excludes computer software.	
Computer Software	Not covered.	Computer programs, computer data bases, and documentation thereof.	Computer programs and computer data bases; excludes documentation.	Defines term "software" as computer programs, software documentation, and computer data bases.
Firmware	Not covered.	Not defined.	Not defined.	ADP hardware-oriented programming at the basic logic level.
Commercial Computer Software	Not covered.	Term is not defined. But 52.227-19 sets forth a clause entitled Commercial Computer Software – Restricted Rights, and 27.405(b)(2), *Separate Acquisition of Existing Computer Software*, specifies that such software is "privately developed software normally vended commercially under a license or lease agreement restricting its use, disclosure, or reproduction."	Computer software used regularly for other than government purposes, sold or leased in significant quantities to the general public at established market or catalog prices.	Defines term "commercially available software" as software available through lease or purchase in commercial market from a concern having ownership or marketing rights.

[a]50 FR 32870, August 15, 1985.
[b]Interim DFARS, Subpart 227.4 as amended by 50 FR 43158, October 24, 1985; proposed DFARS, 50 FR 36887, September 10, 1985.
[c]Federal Information Resources Management Regulation, 50 FR 4321, January 30, 1985.

TABLE E-1. COMPUTER SOFTWARE DEFINITIONS (Continued)

COVERAGE	P.L. 98-525, P.L. 98-577	PROPOSED FAR	INTERIM DFARS AND PROPOSED DFARS	FIRMR
Restricted Rights (Computer Software)	Not covered.	Applies to computer software developed at private expense that is a trade secret, is commercial or financial and confidential or privileged, or is published copyrighted computer software, including minor modifications of such software.	Applies to computer software developed at private expense and listed or described in a license or agreement made a part of the contract (i.e., predetermined) wherein the parties agreed that the computer software will be furnished with restricted rights.	Not covered.
Restricted Rights (Commercial Computer Software)	Not covered.	Not covered, except for 27.405(b)(2), which provides for the use of the clause at 52.227-19, Commercial Computer Software – Restricted Rights, which overrides the vendor's terms and specifies the minimum rights of the government in such software.	Applies to commercial computer software and related documentation developed at private expense and not in public domain.	Not covered.
Unlimited rights	Not covered.	Applies to computer software first produced in the performance of a contract except to the extent it constitutes minor modifications to restricted rights software; form, fit, and function data except for source codes, algorithms, process formulae, and flow charts of the software; installation, operation, and maintenance manuals except to the extent the data are included with restricted computer software; and all other computer software delivered under the contract except for restricted computer software.	Applies to computer software resulting directly from or generated in performing R&D work as specified by a government contract or if required to be generated as a necessary part of performing a contract; changes to government-furnished software; public domain software; and computer data bases prepared under a government contract consisting of information in which the government has unlimited rights.	Not covered.

NOTES

[1]The Air Force Management Analysis Group (AFMAG), *Spare Parts Acquisition*, Final Report, October 1983, found that competition was prohibited for 8 percent of the spare items examined because the technical data pertaining to them had been delivered with limited rights. Inadequate or nonexisting data prohibited competition for 16 percent of the parts reviewed. The Office of the Secretary of Defense (OSD) Technical Data Rights Study Group Report, *Who Should Own Data Rights: Government or Industry? Seeking a Balance*, June 22, 1984, found that 4 percent of the parts screened had a proprietary data rights problem, whereas 27 percent could not be purchased competitively because the data were insufficient, inaccurate, or illegible.

[2]Title XII of the Department of Defense Authorization Act, 1985.

[3]It has been persuasively argued that P.L. 98-525 is defective because its vagueness has permitted overzealous DoD (DFARS) implementation. This is one way of looking at the matter. However, if implementation has been excessive, the remedy lies in correcting the implementation, not the statute; industry has *not* found the civil agency (FAR) implementation of a very similar statute (P.L. 98-577) oppressive.

[4]10 U.S.C. 2305(d); 41 U.S.C. 253b.

[5]The four papers produced by Samuelson as the Principal Investigator, Software Licensing Project, under auspices of the Software Engineering Institute, Carnegie-Mellon University, Pittsburgh, PA 15213, are CMU:

SEI-86-TRI *Toward a Reform of the Defense Department Software Acquisition Policy, April 1986.*

SEI-86-TM1 *Adequate Planning for Acquiring Sufficient Documentation About and Rights in Software To Permit Organic or Competitive Maintenance, March 1986.*

SEI-86-TM2 *Comments on the Proposed Defense and Federal Acquisition Regulations, March 1986.*

SEI-86-TM3 *Understanding the Implications of Selling Rights in Software to the Defense Department: A Journey Through the Regulatory Maze, March 1986.*

[6]Mask works are defined as a series of related images representing the pattern of conducting, insulating, or semiconductor material to be present or removed from the layers of a semiconductor chip product, where each image has the pattern of the surface of one form of the product (17 U.S.C. 901(a)(2)).

[7]*Who Should Own Data Rights: Government or Industry? Seeking a Balance*, a report prepared for the Under Secretary of Defense (Research and Engineering) by the OSD Technical Data Rights Study Group, June 22, 1984.

[8]50 FR 32870, August 15, 1985.

[9]50 FR 36887, September 10, 1985.

[10]50 FR 45442, October 31, 1985.

[11]50 FR 43158, October 24, 1985.

[12]Conference Report, H.Rep.No. 98-1080, 98th Cong. 2nd Sess., September 26, 1984, 321. This report notes the conferees' intention to expand the data rights coverage to include all items and not just major systems.

[13]Section 21(a) of the Office of Federal Procurement Policy Act of 1984, 41 U.S.C. 418; Section 1202(6) of the Defense Procurement Reform Act of 1984.

[14]Senate Report No. 98-523, Committee on Small Business, 98th Cong. 2nd Sess., June 14, 1984 (to accompany S.2489), p. 48.

[15]International Engineering Co. v. Richardson, 367 F. Supp 640 (D.D.C. 1973), rev'd on other grounds, 512 F.2d 573 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976).

[16]5 U.S.C. 552(a)(4)(D).

[17]Recommendations I-10 and I-16, Report of the Commission on Government Procurement, Volume 4, 1972.

[18]Prepared for the Under Secretary of Defense (Research and Engineering) by the OSD Technical Data Rights Study Group, June 22, 1984.

[19]It should be noted that the policy referred to was that of the now-superseded Defense Acquisition Regulation, not that of the proposed DFARS.

[20]Nash and Rawicz, *Patents and Technical Data*, The George Washington University, 1983, pp. 445, 446, citing DoD movie script prepared by the authors of DoD technical data policy in 1964.

[21]CMU/SEI-86-TR1, *Toward a Reform of the Defense Department Software Acquisition Policy*, by Pamela Samuelson, Principal Investigator, April 1986.

[22]50 FR 917, January 8, 1985.

[23]252.227-7013, Rights in Technical Data and Computer Software.

[24]Specifically, interim DFARS paragraph 227.403-2(h), Alternative Proposals for Enhancement of Competition, states only that

contracting officers "shall consider use of solicitation provisions to obtain alternate proposals from contractors that provide the United States the right to use limited rights technical data for competitive reprocurement or that otherwise provide for the establishment of alternate sources of supply."

[25]Certain other expenditures reimbursed as indirect costs probably should also be included within the meaning of "private expense," but determining which costs these are will require further analysis.

[26]This prohibition against acquiring certain data was originally considered as a part of the definition of technical data and dealt with products developed at private expense, as well as products developed at private expense and offered for sale to the public; Amendment No. 3203 by Senator Levin to S.2723, Omnibus Defense Authorization, 1985, Congressional Record S7156, June 13, 1984; S.2487, Small Business and Federal Procurement Competition Enhancement Act of 1984, Congressional Record, S9790, August 7, 1984. The definition was subsequently modified to cover acquisition of commercial product data only; Amendment No. 3272 by Senator Grassley to S.2723, Congressional Record S7816, June 16, 1984; Weicker Amendment to S.2487, Congressional Record S9795, August 7, 1984. As enacted, the prohibition language was removed from the definition section and added as a policy consideration. There appeared to be some concern that excluding technical data pertaining to commercial products or products developed at private expense from the definition of technical data would be too limiting on the Department, and it was considered instead that this exclusion should be treated as a policy matter in the implementing regulations; Senator Levin's statement on S.2723, Congressional Record S7818, June 20, 1984. The policy regarding commercial products was incorporated into the bill as passed. The record is unclear as to why similar coverage for products developed at private expense was omitted.

[27]DoD Directive 5000.37, September 29, 1978, Acquisition and Distribution of Commercial Products.

[28]Section 21(a) of the Office of Federal Procurement Policy Act of 1984, 41 U.S.C. 418, states that the regulations implementing the act "shall provide . . . that the United States may not require" such technical data as a condition of procurement of the commercial product.

[29]Section 1202(6) of the Defense Procurement Reform Act of 1984 provides that the Secretary of Defense "should—(6) ensure" that such technical data will not be acquired as a condition of procurement of the commercial product or process. 10 U.S.C. 2320(a), in requiring implementing regulations that do not impair the legitimate proprietary rights of the contracting parties in technical data, requires that the policy in Section 1202(6) be considered in prescribing such regulations. This difference in approach was explained to the House by Congressman Mitchell, the floor manager, during the passage of P.L. 98-577 as follows:

> For both civilian and military agencies the substitute would require that the technical data regulations not impair any right of the United States or any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. With respect to civilian agencies only, the regulations must contain a prohibition on the Government's requiring technical data as a precondition for its purchase of any commercial item to which that data pertains unless such data is either offered for sale to the Government or is necessary for the Government to maintain or operate the commercial item. For military agencies, this commercial product "exemption" is to be a consideration of the Secretary of Defense in promulgating DoD's technical data regulation as its supplement to the FAR.

Congressional Record, H10839, October 2, 1984.

[30]The legislative history is somewhat confusing as to whether the restriction on acquiring design, development, or manufacturing data prohibits ordering them or merely prohibits ordering them with unlimited rights. Our reading of the restraints and of the overall legislative history is that the prohibition deals with the ordering of the data.

[31]Congressman Mitchell's explanation of H.R. 4209, Congressional Record H10838, October 2, 1984, the Department of Defense Authorization Act, 1985.

[32]Conference Report, H.Rep.No. 98-1080, 98th Cong. 2d Sess. (to accompany H.R. 5167), September 26, 1984, 318 states:

> The conferees agreed to require the Secretary of Defense to ensure that in preparing a solicitation for the award of a contract for a major system, the agency consider requiring the offeror to identify a plan for obtaining items procured in connection with the system on a competitive basis. The plan may include proposals to provide the government unlimited rights to use technical data relating to the items, or any other alternative method to ensure the government is not restricted to one source for future acquisitions. The offeror's proposal would then be considered in the agency's evaluation of the offeror's price.

[33]Federal Information Resources Management Regulation (FIRMR), 50 FR 4321, January 30, 1985. The FIRMR is issued by GSA under the Federal Property and Administrative Services Act and the Brooks Act, P.L. 89-306, and is applicable to all federal agencies including DoD except for specified DoD acquisitions such as for weapon systems (10 U.S.C. 2315).

[34]CMU/SEI-86-TR1, *Toward a Reform of the Defense Department Software Policy*, by Pamela Samuelson, Principal Investigator, April 1986.