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Technical Data Policy

Introduction -

Both PL 98-577 and 98-525 require that regulations be issued under the FAR system defining the legitimate proprietary interest of the United States and its contractors in "technical or other data". Both Acts list various factors to be considered in the development of the regulations. PL 98-577, applicable to civilian agencies, also prescribes certain rules that are to be followed in certain types of situations. Both Acts define the term "technical data" in a manner that limits it only to data relating to "supplies procured by an agency." Thus, while both Acts require regulations dealing with a broad range of "technical and other data" most of the more detailed requirements of these Acts address only "technical data" as defined in the Acts. Thus, the Acts principally address supply contracts or contracts calling for delivery of end items developed under the contract. As used in these Acts the term "technical data" would not apply to data delivered under contracts not requiring the delivery of hardware, such as most contracts for basic or applied research.

This statement is intended to provide guidance in the wider range of contracts, as well as grants, in which technical data is generated. The principles established are consistent with PL 98-577 and PL 98-525.

Objectives of Goverment Technical Data Policy/Legitimate Proprietary Interest

The needs of the Government for technical data, and the uses to which it will be put, of necessity vary depending on the situation. In supply contracts the need will ordinarily be limited to information on operation and maintenance. In contracts for engineering development and production there may be a need for data to allow second sources or competitive procurement of subsytems or components. In contracts for basic and applied research the Government's only need may be to ensure that the knowledge generated under the contract is made available to others working in the field.

However, these needs must be satisfied in ways that recognize the proprietary interests and expertise that contractors and grantees have provided. Contractors and grantees have a legitimate interest in the protection of data resulting, in whole or in part, from private investment. This is especially true when the data relates to products or processes developed at private expense. Contractors, subcontractors, and grantees should also be given the opportunity to build upon the expertise that they bring to the contract or grant effort.

Thus, in addition to satisfying the mission needs of the agencies, a basic objective of Government data policy is to encourage the commercial development and marketing of new ideas

and technologies developed during the performance of Government supported research through the structuring of Government grants and contracts in ways that allow agency needs and missions to be met without creating disincentives for commercial development and marketing of new ideas and technologies. The policies established below recognize that leaving the contractor the exclusive right to market its technology is a powerful incentive to encourage the undertaking of such marketing. Care must be taken that the Government not destroy these incentives lest neither the contractor or other U.S. firms will have an incentive to market new ideas. Indeed, there is reason to be concerned that destruction of proprietary positions would inure primarily to the benefit of foreign competitors that enjoy Government subsidies or concessions in their home markets, and which would take advantage of freely available technologies developed with Government support to compete in the U. S. and world market. It is therefore imperative that the data provisions of Government research awards are structured to encourage the ability of U. S. firms to compete in world markets.

A second objective of Government data policy is to encourage the most qualified commercial concerns to participate in Government R&D programs by providing them with confidence that their proprietary commercial positions will not be placed in jeopardy by competing for or performing research and development work for the Government, either as a prime contractor or as a subcontractor. This objective is fully compatible with the objective above since participation should also be encouraged by the prospect that the contractor will also be in a position to commercialize any new technologies that emerge during the performance of the contract.

Policies

Section 1. Treatment of Proposals

Proposals submitted to Government agencies for the conduct of research and development, whether solicited or unsolicited, shall be treated as confidential and not disclosed to persons outside the Government except for evaluation purposes. When disclosing proposals to persons outside the Government, including consultants or special employees, the agency should take appropriate steps to insure that such persons will not further disclose the proposal to others. Agencies should not disclose unsuccessful proposals or successful proposals which are not incorporated directly or by reference in the award instrument to third parties without the permission of the submitter. Persons submitting proposals to the Government shall be permitted to mark those portions of the proposal which contain trade secrets or commercial or financial information which they would not want released even if an award is made which incorporates the proposal, and agencies shall not discriminate against marked proposals in the award process. If a proposal that is marked is incorporated directly or by reference into an award document, the

agency shall maintain the marked portions in confidence and refrain from disclosing portions of the award document which contain the marked information unless the proposer specifically agrees to the release of the information.

Section 2. Treatment of Technical Data in Supply Contracts

When an agency is procuring standard commercial products or processes that are offered for sale to the public or which the vendor is planning to offer for sale to the public, the Government shall not seek to obtain detailed technical data relating to the product or process for the purpose of reprocurement. An agency may obtain data necessary for in-house operation and routine maintenance of the product or process. When it would be impractical to rely on vendor services for repair of the product or process, data necessary to allow in-house repair may be obtained. Normally, however, this should be limited to form, fit, and function type data, and the Government should not seek detailed technical data. If, in unusual cases, detailed technical data must be obtained to enable in-house repair, the contract will specifically limit the Government's right to use this data for repair only.

Section 3. Treatment of Technical Data in Contracts for Engineering Development and/or Production

This section addresses contracts which have as their purpose the development of specific end items or pocesses, such as a weapons system or a component of such a system. It also has application to contracts for the development of processing or manufacturing facilities, either full scale or prototypes designed to establish commercial-scale feasibility.

(a) Treatment of Technical Data Related to Products or Processes Developed in Whole or In Part at Private Expense

Agencies should structure their data rights clauses and data requirements so as to minimize the possibility of the disclosure of technical data of their contractors and subcontractors which relates to products or processes developed at private expense by the contractor or subcontractor and which the contractor or subcontractor wishes to maintain as proprietary. The fact that the data developed under the contract may relate to a modified version of the product or process that was developed at private expense shall not affect the obligation of Government agencies to minimize the possibility of disclosure, if the disclosure would, in fact, make it easier for others to manufacture or use the unmodified product or process that was developed at private expense.

Agencies should normally allow contractors or subcontractors to provide form, fit, and function data, in lieu of detailed technical data if the data will describe products or processes

developed at private expense or improvements or modifications of such products or processes. Moreover, except when the agency has specifically identified needs for detailed technical data, contract specifications or work statements should not require the delivery of technical data.

In no event shall an agency obtain detailed technical data for the purpose of reprocurement or second sourcing that relates to a product or process which is offered or to be offered for sale by the contractor or subcontractor. This is most likely to have application to subsystems or components obtained through subcontractors and which are sold commercially.

If an agency has a specific need for detailed technical data such as to enable in-house manufacture or repair, reprocurement, or the establishment of alternative sources, and the paragraph above is not otherwise applicable, the agency should allow the contractor to mark as proprietary any such data that relates to products or processes developed at private expense or to improvements or modifications to such products or processes, and the rights of the Government to use and disclose the data to others shall be specified and defined in the contract. When the needs of the agency are not definite, for example, where it is possible that the Government may wish to establish multiple sources of supply for an item but a definite decision cannot be made until after testing, evaluation, and other considerations have been taken into account, agencies should consider using deferred ordering systems under which the detailed technical data concerning the item would remain under the control of and in the possession of the contractor until a decision has been made concerning the actual need for delivery of the data. Agencies should, in any case, strive to avoid issuing RFPs using detailed technical data of the type discussed above in which the Government has rights and should seek methods of reprocurement and second sourcing that will limit access to such data to the organizations selected as alternate sources.

(b) Treatment of Technical Data Related to Products or Processes Developed Wholly Under the Contract

In engineering development or production contracts, unless the agency has identified specific needs for detailed technical data, it shall not require the contractor to deliver detailed technical data even if the data relates to products or processes developed wholly under the contract. It should be recognized that detailed technical data, even if not directly related to privately developed products or processes, may be useful in the development of new commercial products and processes. In this context, it must also be recognized that in many cases the data will build upon the past experience, expertise, know-how, and organizational abilities which the contractor or subcontractor brings to the project. As a practical matter, it is not likely that a meaningful segregation can be made between the know-how generated under the contract and the know-how and expertise which

the contractor applied to the contract. Thus, the best way to protect the contractor's or subcontractor's equity, if this is consistent with the needs of the agency, is not to require the delivery of detailed technical data.

However, if the agency determines that it needs detailed technical data (or less detailed data such as form, fit, and function) related to a product or process developed wholly under the contract for the purpose of competitive acquisition of the product or process in substantial quantities in the future, then it shall take the data with no restrictions on its use, although it should not prevent the contractor from also making use of the data. However, the agency should consider using deferred ordering approaches to the delivery of any detailed technical data needed for competitive acquisition purposes.

In all other cases when technical data related to a product or process developed wholly under the contract is required to be delivered, whether it is detailed technical data or otherwise, the contractor will be allowed to retain ownership in the data, but the agency shall reserve an unrestricted, royalty-free right to use or have its contractors use, the technical data for governmental purposes, except that the Government shall not have the right to publish the data outside the Government.

(c) Treatment of Technical Data Which is Not Directly Related or Descriptive of Products or Processes Being Developed Under a Contract

It can be anticipated that many engineering development and production contracts will also call for the delivery of technical data that is not related directly to final products or processes developed under the contract. These might include technical reports on preliminary research or tests carried out by the contractor. To the extent such data is required to be delivered under the contract, the policy of the Government will be to normally take such data without markings and with unlimited rights to use and publish the data, but when appropriate the Government may agree to take lesser rights in such data.

Section 4. Treatment of Technical Data in Contracts or Grants for Basic and Applied Research

Contracts or grants for basic or applied research will normally result in the generation of technical data that is not related to end products or processes that are useable either by the Government or the public. To the extent that technical data is required to be delivered under such grants or contracts, the policy of the Government will be to take such data without markings and with the unlimited right to use and publish such data, subject to any other provisions of the contract related to inventions and patents, copyrights, or other statutory forms of intellectual property protection and subject also to the third paragraph of this section.

However, as with the data discussed in Section 3(c), above, it must also be recognized that technical data, even if not directly relating to products or processes, may be useful in the development of new commercial products and processes. It must also be recognized that in many cases the data will build upon the past experience, expertise, know-how, and organizational abilities which the contractor or grantee applied to the project. Therefore, the policy of the Government will be to provide its contractors and grantees the incentive to develop potential commercial applications of technical concepts and data generated under basic and applied research by minimizing the requirements for the delivery of any detailed technical data under such projects. Detailed technical data shall not be ordered under such projects unless the agency has determined in advance that it has a specific need for such data.

In unusual cases, when detailed technical data called for by a basic or applied research grant or contract may relate to products or processes offered or to be offered for sale by the contractor or grantee to the public, the Government should not take unlimited rights in the data. Instead, the Government should take only the minimum rights needed, if any, in the data to achieve its purposes in requiring the data. Moreover, to the extent practical the Government should not require actual delivery of the data, but should agree to examine it at the contractor's premises.

Section 5. Scope of Data Rights Clauses

Any rights which the Government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared under the terms of the work statement, reporting requirements, or specifications of the contract. Broad and sweeping terminology giving the Government rights "in all data first produced or generated in the course of or under this contract" or "in all data generated under this contract whether or not delivered" should be avoided.

Section 6. Software

(a) Except in cases when the delivery of software is specifically required under a contract, agencies shall not normally acquire rights in software generated under contracts and the contractor shall be free to market any software which is developed commercially. Delivery of software shall not normally be required under contracts unless a principal purpose of the contract is the creation of software for use of the Government or for use by others for specifically defined purposes. Thus, for example, the fact that the conduct of a research project might necessitate the development of a computer program to assist the research would not be a basis for the Government claiming rights for itself or others in the program. On the other hand, if the specific purpose of the project was to develop a software program or model for widespread use by a particular class of

investigators, then the agency could consider including conditions in the award that would ensure that the intended beneficiaries of the research will be able to utilize it.

(b) When the Government acquires existing proprietary software, it shall include appropriate conditions in its contract limiting its right to disclose the software to others and specifying the purposes for which the software may be used by the Government. This is intended to include instances when proprietary software is modified to accommodate particular agency needs or hardware configurations.

(c) Normally, when the Government contracts for the development of software to meet specific agency needs, it shall attempt to structure the contract to create an ownership incentive in the contractor to develop or market the software commercially. Thus, unless the agency has a specific need to retain complete documentation on the software in-house, it shall normally allow the contractor to maintain the documentation on its own premises with a right of access, if necessary, for the agency.

Section 7. Definitions

(a) The term "detailed technical data" is intended to include technical data of a type that is necessary to allow the manufacture of a product or performance of a process on a commercial scale, as opposed to performance of a process in a laboratory. Thus, for example, if applied research were being done on the isolation or production of particular compounds on a laboratory scale, a technical report describing the experiments and procedures used would not normally be considered detailed technical data. However, if the contract also entailed research into means of producing the compound in large quantities, for example, if a scaled down production facility were designed and tested, then the know-how gained and the information on equipment design and tolerances, beyond that contained in form, fit, and function data and drawings of the equipment, would normally be considered as detailed technical data.

(b) The term "technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. Technical data does not include computer software, and it does not include financial, administrative, cost pricing, and management data, or other information incidental to contract administration.

(c) The term "contract" includes subcontracts, grants and cooperative agreements and the term "contractor" includes subcontractors, grantees and persons or organizations that are parties to a comparative agreement with an agency.

Section 8. National Security Considerations.

Nothing in this policy statement is intended to place limitations on the classification of technical data or software for reasons of national security.