

Rights in Data under the FAR

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How to get the data you want with the rights you need

- Determine the data deliverables you want.
- Determine which FAR clauses you need
 - Involve program personnel, after all you're awarding the contract for them
 - Get them to explain what they want and what they want to do with it
 - Develop a list of data deliverables

Data Bottom Line:

IF YOU DON'T ASK FOR IT, YOU DON'T GET IT

- What you get depends on what the Contract says
- YOUR RIGHTS IN DATA DEPEND ON THE CONTRACT CLAUSES
 - Consult with General Counsel if you aren't sure which clauses are needed

Also be sure you and your Program Representative have Developed a List of Data Deliverables

You **MUST** specify Data Delivery Requirements

- Rights in Data clauses do NOT require delivery
 - So generally include Additional Data Requirements FAR 52.227-16
 - Allows you to require delivery of data you didn't ask for: BUT it's subject to the Rights in Data clauses AND will cost extra

Specify three aspects for each deliverable:

- Content-level of detail or nature of information
- Recording/storage format-image files, word processing format
- Delivery/storage medium-CD-ROM, online access

More Issues

You need to know what data you want and what you want to do with it in order to put together a good solicitation or contract

- Data deliverable v. Data rights
- Technical data v. Computer software
- Commercial v. Noncommercial

THE CLAUSES

- FAR SUBPART 52.2, CLAUSES 52.227-14 through 23
- As prescribed by: FAR SUBPART 27.4

27.406-1(c) Normally the government does not require a contractor to provide unlimited rights in data that would otherwise be limited rights data or restricted computer software

***BUT IT CAN IF NECESSARY TO MEET GOVERNMENT
NEEDS***

RIGHTS IN DATA CLAUSES UNDER THE FEDERAL ACQUISITION REGULATION Parts 27 and 52

- Rights in Data – General (FAR 52.227-14)
- Representation of Limited Rights Data and Restricted Computer Software (FAR 52.227 – 15)
- Additional Data Requirements (FAR 52.227 – 16)
- Rights in Data – Special Works (FAR 52.227 – 17)
- Rights in Data - Existing Works (FAR 52.227 – 18)
- Commercial Computer Software License – (FAR 52.227 – 19) changed from “Restricted rights”
- Rights in Data- SBIR Program (FAR 52.227-20)
- Technical Data Declaration, Revision and Withholding of Payment-Major Systems. (FAR 52.227-21)
- Major System-Minimum Rights. (FAR 52.227-22)
- Rights to Proposal Data (Technical) (FAR 52.227 – 23)

The Rewrite

- Parts 27 and 52 Were revised in a “Plain Language” Rewrite effective December 7, 2007.
- Most changes were intended to be editorial.
- A significant change: “Computer software”, “Computer software documentation”, and “Computer database” have been separately defined.

The Rewrite

- **Computer Software**
 - Means Computer Programs; instructions; source code, that allow a computer to operate
- **Computer Database**
 - A collection of recorded information that can be stored in, processed and operated on by a computer. Does NOT include computer software.
- **Computer Software Documentation**
 - Owner's manuals, users manuals, operating instructions

RIGHTS IN DATA GENERAL (FAR 52.227 – 14)

- Defines Government and Contractor Rights. Without it Government could Pay for Creation of Data but Have No Rights in it
- Use in R & D Contracts and Other Contracts where Data will be Produced or Delivered.
- Does NOT Get Delivery of Data
- Contractor Protects Proprietary Data by Withholding it or Delivering it with Restrictive Markings Specified by the FAR
- Government gets Unlimited Rights in
 - ALL Data First Produced in the Performance of the Contract
 - Form, fit and function data
 - Data Delivered Under the Contact

EXCEPT FOR

- LIMITED RIGHTS DATA
- RESTRICTED COMPUTER SOFTWARE
- COPYRIGHTED DATA

RIGHTS IN DATA GENERAL (FAR 52.227-14)

UNLIMITED RIGHTS INCLUDE:

- Right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly, in any manner and for any purpose and to have or permit others to do so

RIGHTS IN DATA GENERAL (FAR 52.227-14)

- LIMITED RIGHTS DATA
- Data that Embody Trade Secrets
- Contractor Protects by Withholding from Delivery
- Contractor Provides Form, Fit, and Function Unless contract Includes
- Alternate II
 - MUST BE MARKED
 - Limited Rights Data Delivered with MARKING which Specifies how the Government May use and Disclose the Data.
 - Limited Rights May be Negotiated. Decide What You Need

RIGHTS IN DATA GENERAL (FAR 52.227-14)

RESTRICTED COMPUTER SOFTWARE

- Developed at Private Expense
- Contractor Protects By Withholding Unless Contract Includes:

Alternate III RESTRICTED RIGHTS

- MUST BE MARKED
- Requires Delivery
- Limits the Government's Use of Restricted Computer Software
 - Rights May Be Negotiated
 - For Example: Do You Need a Site License?
 - Networking?

RIGHTS IN DATA GENERAL (FAR 52.227-14)

- 27.406-1(c) Normally the government does not require a contractor to provide unlimited rights in data that would otherwise be limited rights data or restricted computer software
- BUT IT CAN IF NECESSARY TO MEET GOVERNMENT NEEDS

RIGHTS IN DATA GENERAL (FAR 52.227-14)

- COPYRIGHT
- Contractor May Not Assert Copyright Except
 - With the Permission of the C.O.
 - In Scientific and Technical Articles

Government Retains Broad License

Government License in Computer Does Not Include the
right to Distribute

RIGHTS IN DATA GENERAL (FAR 52.227-14)

- **ALTERNATE V**
 - If Included in the Contract, Allows the C.O. or Authorized Representative to Inspect at the Contractor's Facility any Data Withheld from Delivery

REPRESENTATION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE (FAR 52.227-15)

- Use in Solicitations When the 52.227-14 Clause Will be Used
- Requires the Offeror to Identify Data it will Withhold or Deliver as Limited Rights Data (Alt.II) or Restricted Computer Software (Alt.III)
- Allows C.O. to Determine Whether Alts. II or III should be Used in the contract

ADDITIONAL DATA REQUIREMENTS FAR (FAR 52.227-16)

- A LIFESAVER if DATA DELIVERABLES WERE NOT SPECIFIED
 - Use with FAR 52.227-14
 - Allows C.O. to Order Data First Produced or Specifically Used in the Contract AT ANY TIME DURING the Contract and for Up to THREE YEARS after Completion of the Contract
 - Data are Still Subject to Limited Rights and Restricted Rights and Any Other Limitation in FAR 52.227-14

RIGHTS IN DATA - SPECIAL WORKS (FAR 52.227-17)

- Use When the Government Needs to Limit the Contractor's Rights In Data
- Contractor May Be Required to Assign Copyright to Government
- Contractor's Right to Use or Release Can be Prohibited
- May NOT be Appropriate for Entire Contract
- May be Limited to Particular Tasks

RIGHTS IN DATA – SPECIAL WORKS (FAR 52.227-17)

- USE SPARINGLY – NOT APPROPRIATE FOR MOST CONTRACTS Generally not to be Used in R & D Contracts

USE FOR:

- Films, Audiovisual Works, Policy Documents
- Computer Programs Developed for NIH
- NIH has used the Clause in Connection with Determinations of Exceptional Circumstances where Necessary to Limit Rights in Data as well as Patent Rights

RIGHTS IN DATA – EXISTING WORKS (FAR 52.227-18)

- Use in Contracts Requiring Contractor to Supply Existing Works, such as Books, and Audiovisual Works Without Modification
 - Requires Contractor to Obtain Broad License for the Government
 - Requires Contractor to Indemnify Government

COMMERCIAL COMPUTER SOFTWARE LICENSE (FAR 52.227-19)

- Use in Contracts and Purchase Orders for the Acquisition of Commercial Software
- Clause takes Precedence over Contractor's Commercial License to Ensure that Government gets the Minimum Rights it Needs
- Use if there's any Uncertainty that the Vendor's License Meets Your Needs
- Mirrors the Restricted Computer Software License of Alt. III of FAR 52.227-14

COMMERCIAL COMPUTER SOFTWARE LICENSE (FAR 52.227-19) (continued)

- Paragraph (a)(1) states that the terms of the contract shall comply with Federal law and the FAR
- Paragraph (b)(1) makes it clear that the government's rights in the software are as set forth in (b)(2) OR AS EXPRESSLY STATED OTHERWISE in this contract

RIGHTS IN DATA-SBIR PROGRAM (FAR 52.227-20)

- Only for Small Business Innovation Research (SBIR) contracts
- Limits the Government's right to disclose SBIR Data first produced under the contract

MAJOR SYSTEMS (FAR 52.227-21 and 22)

- Used in addition to the Rights in Data General clause of FAR 52.227-14
- Ensures that the Government obtains necessary information and rights to utilize a Major Systems (as defined in FAR 2.101) acquisition

RIGHTS TO PROPOSAL DATA (technical) (FAR 52.227-23)

- Except for specifically identified pages, allows the Government to obtain rights in technical data in successful proposals
- Can't use part of a proposal other than of a successful proposal. Can't use just the "juicy bits" of an unsuccessful proposal
- If the proposal has internal problems, they become your problems

One More Time

- If Data will be generated under the contract YOU NEED:
 - A Rights in Data Clause (More than One Clause May Be Applicable to Various Tasks)
- A List of Data Deliverables (The Rights in Data Clause Does Not Get Delivery of Data; You MUST SPECIFY THE DELIVERABLES)
- If It's and R&D Contract, DON'T FORGET THE ADDITIONAL DATA REQUIREMENTS CLAUSE!!
- Even Purchase Orders May Need a Rights in Data Clause

SOME QUESTIONS AND ANSWERS

Deliverables

Who owns them?

Answer: Depends on what the contract says. Generally the Government will own the deliverables, i.e. the medium on which data are recorded. Generally it will have UNLIMITED RIGHTS, LIMITED RIGHTS, or RESTRICTED RIGHTS in the data delivered.

Who can use them?

Answer: Again, it depends on what the contract says. For example certain data deliverables may be delivered with limited or restricted rights.

Deliverables

Aren't we supposed to keep the deliverables vague so we can have more flexibility to ask for a range of things as the need arises?

Answer: Have a well defined list of deliverables, especially data deliverables, so you are more certain as to the content. If the definition of the deliverable is vague, you may not get what you want or it may cost you more to get what you want.

Deliverables

Some of our contracts are for the production of tangible materials like vaccine and therapeutic candidates; what if the contract does not describe any deliverables at all?

Answer: If it is not clear from the contract that the materials are Government property and are to be delivered the contractor may argue that it owns the materials without an obligation to deliver them to the Government. The contract should be very clear on these points.

Software

What are the different types? (e.g. commercial, used under the contract, first produced under the contract)

Answer: Computer software under the FAR rewrite means computer programs. Computer software is also data under the FAR. The Government normally gets unlimited rights in data, including computer software, first produced in the performance of a contract. See: FAR 52.227-14. If the contract will use privately developed software under the contract, the clause should be used with Alternate III Restricted Rights.

Types of Software (Continued)

The Government may also purchase commercial computer software, in which case the clause at FAR 52.227-19 Commercial Computer Software License should be used. If software is to be developed under the contract for wide distribution, then the Special Works clause at FAR 52.227-17 should be used.

Software

How does ownership/use differ between the Rights in Data clauses?

Answer: The Government may obtain copyright ownership under the Special Works clause of FAR 52.227-17. However, under the clause at FAR 52.227-14, while the Government may own a copy of the delivered data and may have unlimited rights to it, the Government's rights are more like license rights since the contractor has unlimited rights as well. Some contractors argue that they still “own” the data and have only given the Government a license. Note that ownership of copyright and ownership of a tangible copy are not the same thing.

Software

What clauses should be in the contract to allow:

1) Ownership 2) Distribution 3) Use of Software?

Answer: Every contract for the production of data should have the Rights in Data General clause of FAR 52.227-14 or, if appropriate, the Special Works clause of FAR 52.227-17. Both clauses provide the Government with use and distribution rights. The Special Works clause may provide for copyright ownership and thus give the Government greater control over the data.

Data

What rights can we get to data produced by contractors?

Answer: It depends on what the contract says. Simply paying for the development of data does NOT provide the Government with rights in that data. Neither does it obligate the contractor to deliver that data.

Data

What kinds of rights in data are available to the Government?

Answer: The Government normally obtains unlimited rights in data first produced under the contract if FAR 52.227-14 is used. The contractor can withhold its privately developed data and provide form, fit and function data. The use of Alternates II and III may require delivery of marked copies of data that would have been withheld. The Government's rights are subject to the markings.

The Government can obtain assignment of rights in data and copyright if FAR 52.227-17, Special Works is used. This clause should NOT be used if the contractor will be using proprietary data under the contract.

Data

Which clauses should we use in the contract to make sure we get those rights?

Answer: The contract **MUST** include terms addressing rights in data. (see FAR 27.403) But use of a rights in data clause is not enough; the clauses define the rights in data but do **NOT** require delivery. The contract should also include a detailed list of data deliverables. If you don't ask for it, you don't get it!

Data

What clause should ALWAYS be in a contract and why?

Answer: It is always good to include FAR 52.227-16 Additional Data Requirements. This can be a lifesaver. It allows the Contracting Officer at any time during the contract performance or within 3 years after acceptance of all items to be delivered under the contract, to call up any data first produced or specifically used under the contract. This is your safety net in the event you forgot to ask for certain data.

FINALLY

- Every contract should have a well thought out list of data deliverables. IF YOU DON'T REQUIRE DELIVERY OF A SPECIFIC ITEM YOU MAY NOT GET IT! This requires close consideration and input from the PROGRAM PEOPLE, since they, not the C.O should know what they want. They should be able to tell you what data they want and what they want to do with it.
- Any contract involving the generation or delivery of information or data should have a Rights in Data clause.

Finally (Continued)

- Use FAR 52.227-14, Rights in Data- General in all R&D and most other contracts. If you are not sure, include it.
- Under this clause, the Government gets unlimited rights in all data first produced or delivered under the contract, EXCEPT for the contractor's proprietary data (Limited Rights data and Restricted Computer Software). Contractor may withhold proprietary data and only has to deliver form fit and function information about the withheld data UNLESS Alternate II (Limited Rights) or Alt. III (Restricted Computer Software) are included in the contract. THEN the contractor must deliver the proprietary data with the legend required by the alternate. The legend in the FAR alternates only provides general use terms and should be modified to include more specific terms if needed. E.g. to specify that the data may be shared or used for particular purposes. Generally you do not need to use Alts I or IV.

Finally(continued)

- FAR 52.227-15 Representation of Limited Rights Data and Restricted Computer Software IS A SOLICITATION PROVISION that requires the offeror to identify data it intends to withhold or deliver with Limited or Restricted Rights.
- Generally you should include FAR 52.227-16, Additional Data Requirements because it lets you require delivery of data you didn't specify for delivery in the contract
- If you are acquiring commercial computer software, use the clause at FAR 52.227-19, "Commercial Computer Software License"

ANY QUESTIONS?