

10. Unlimited Rights

Eleven comments dealt with this topic. A commentator suggests the Government have unlimited rights in technical data only when work was exclusively funded with direct Government contract funds. The suggestion is inconsistent with 10 U.S.C. 2320 and not adopted.

A commentator suggests that the term "publicly available" in 252.227-7014(b)(1)(iv) and 227.7203-5(a)(4) might provide the Government unlimited rights in commercial computer software. The suggestion is not adopted. Those portions of the regulations only apply to non-commercial computer software.

A commentator expresses concern that 252.227-7013(b)(1)(ii) might provide the Government unlimited rights in third party material. The third party copyright owner is not required to grant a license. Paragraph 252.227-7013(d) prohibits the use of third party copyrighted data in deliverable technical data unless the contracting officer's approval to do so has been obtained and the contractor has obtained from the copyright owner a license of appropriate scope.

A commentator suggests expanding 227.7103-5(a)(3) to provide unlimited rights in all data created exclusively with government funds whether or not the contract requires development, manufacture, construction, or production of items, components, or processes. For technical data that pertain to items or processes, the suggestion is inconsistent with 10 U.S.C. 2320 and, consequently, not adopted.

A commentator suggests that government purpose rights convey all rights needed by the Government and unlimited rights should be eliminated because they have an adverse affect on businesses, including small businesses, that are data or software creators. The suggestion is not adopted. When the taxpayer exclusively funds development of an item or process, it is difficult to appreciate the suggested adverse affect on data or software creators.

A commentator suggests that there is no affirmative guidance encouraging contractors to commercialize technology it develops with federal funds. The contractor also suggests that when the Government has unlimited rights in technical data or computer software, the data or software might be lost to foreign competition. The suggestions are not adopted. Many other commentators observed that opportunities to commercialize federally funded technologies are maximized when the Government has unlimited rights in

technical data. The fact that data or software might be available, if otherwise properly releasable, to foreign governments, foreign nationals, or international organizations does not diminish domestic commercialization opportunities.

A commentator suggests modifying 227.7103-5(a)(2) and 252.227-7013(b)(1)(ii) to permit the Government to obtain unlimited rights in the identified data only when the data will be developed exclusively with Government funds. The suggestions are not adopted. Those paragraphs provide the Government unlimited rights in studies, analyses, test data, or similar data produced in the performance of a contract and specified as an element of performance. The "produced in" and "specified as" criteria clearly indicate that the Government intends to exclusively fund development of the data. The commentator suggests 227.7103-5(a)(3) and 227.7103-5(b)(1)(ii) are not clear because they convey rights based upon specific contractual situations. The suggestion is not adopted. Except for 227.7103-5(a)(1) and 227.7103(b)(1)(i), all other circumstances in which the Government will be granted unlimited or government purpose rights address specific situations or types of data. The commentator also recommends deleting 227.7103-5(a)(9). The recommendation is not adopted. When restrictions on the Government's rights have expired, the Government has unlimited rights in the data.

A commentator recommends changing 227.7103-4(b) to permit a contractor to assert limited rights in data that otherwise qualify for unlimited rights. The recommendation is not adopted. It is inconsistent with 10 U.S.C. 2320 and would result in unnecessary, burdensome, and costly data challenges.

11. Use and Non-disclosure Agreements

Ten comments were received in this area. A commentator suggests the indemnification liabilities under 252.227-7025 should be shifted from the contractor who has been provided the information to the third party who has improperly used, released, or disclosed the information. The suggestion is not adopted. The contractor faces similar liabilities in nongovernmental transactions.

A commentator suggests: (i) The requirement at 227.7103-5(b)(4)(i) to provide prior notification, other than in emergency situations, of an intended release or disclosure of its limited rights data is not necessary; (ii) the format prescribed at 227.7103-7(c) for non-disclosure agreements is not appropriate

for foreign governments; (iii) a contractor's permission should not be required to release or disclose limited rights data; (iv) deleting the requirements at 227.7103-16 and 227.7203-16 for foreign governments, foreign contractors, and international organizations to have executed a use and non-disclosure agreement containing the provisions included in 227.7103-7(c), and the requirements in 252.227-7013 satisfied, prior to a release or disclosure to a foreign entity; (v) it is impossible for contractors needing access to the major data bases to notify all persons asserting restrictions; (vi) in 227.7103-7(c)(8), the specific ending date for the non-disclosure agreement should be replaced with "at such time as the data are no longer required for the performance of work under the contract, the contract is completed or terminated, or access is terminated for cause."; and, (vii) the clause at 252.227-7025 should be expanded to require contractors to sign any non-disclosure agreement that is required by a Government agency. The suggestions are not adopted. The reasons are keyed to the comment number: (i) The Government, with two exceptions, is required by 10 U.S.C. 2320 to obtain a contractor's permission prior to releasing or disclosing the contractor's limited rights data. Except in emergency situations, there is no logical reason to not provide prior notification of an intended release of limited rights data; (ii) 227.7103-16 permits the use of the non-disclosure agreements with foreign governments, foreign contractors, or international organizations that are not in the prescribed format; (iii) The suggestion is inconsistent with 10 U.S.C. 2320; (iv) The suggested revisions to 227.7103-16(b) and 227.7203-16(b) do not adequately address constraints on the recipient regarding further release or disclosure of information in which the U.S. Government has limited rights in data or restricted rights in software; (v) Paragraph (a) of the prescribed non-disclosure agreement requires a contractor to specifically identify the data it needs. If the Government agrees to provide that data, it is listed in an attachment to the agreement. Therefore, the notification requirements in paragraphs (b) and (c) should not be difficult to comply with. Furthermore, information provided to the Government with asserted restrictions should not be included in a generally accessible database. Such data must be protected in accordance with 252.227-7013, 252.227-7014, and 252.227-7018; (vi) The prescribed non-disclosure