

# **COUNCIL ON GOVERNMENTAL RELATIONS**

## **RIGHTS IN AND RESPONSIBILITIES FOR TECHNICAL DATA AND COMPUTER SOFTWARE UNDER FEDERAL AWARDS**

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## I. INTRODUCTION

**The federal government’s approach to rights in technical data and computer software in federal awards is marked by several paradoxes.** Many university administrators are familiar with the federal rules relating to managing inventions and patents that have been developed in the performance of federally funded research. The Bayh-Dole Act (35 USC Section 200—212) provides a uniform federal regime for rights to inventions under federally funded awards. Unlike rights to inventions, there is no controlling statutory authority for rights to technical data and computer software resulting from federal awards. In fact, the federal data rules and regulations (i.e. Federal Acquisition Regulations (FAR)) are to some extent inconsistent with the government’s approach to invention rights under Bayh-Dole. Generally under federal research contracts the government receives unlimited rights to technical data, as opposed to the far more limited “government use” license to inventions.

Nowhere is this paradox more evident than the anomalous situation with regard to computer software. For several decades the patentability of some elements of computer software has been well established legally. This implies that at least with respect to those potentially patentable elements, normal Bayh-Dole invention rights should apply. However, the FAR treats computer software only as technical data, making no allowance for the fact that a computer program may be patentable as well as copyrightable. (Although universities often tend not to patent software programs and the U.S. Patent and Trademark Office may from time to time invoke more rigorous standards for the patenting of computer software, understanding the apparent inconsistency between government rights in software patents and software copyrights is important to the ultimate disposition of university software developed with federal funds.)

Finally, the approach to rights in technical data under “assistance” awards (grants and agreements) is far different than that which applies to federal contracts. Generally non-profit recipients of federal assistance awards own property rights (including copyright where applicable) to any data or other work developed under the award, with the government receiving a license right more akin to the rights that it receives under Bayh-Dole.

The situation with regard to federal contracts is further complicated by differences in rules between the federal civilian agencies and the Department of Defense, which follows a different approach to allocating rights under defense contracts. In fact, even the definition of “data” varies between the civilian and defense agencies. (On the assistance side, there is no general definition of the term).

The purpose of this Guide is to help identify and explain the complex rights and responsibilities that may apply to data and technical data in different federal award situations. These complexities require that research administrators and technology transfer practitioners be familiar with the application of federal agencies’ rights in data, technical data, computer software, and copyrights. While the Guide discusses the government’s general approach, it is important to recognize that the particular terms and conditions of individual awards may vary. **These terms should be discussed with principal investigators before a response to a federal procurement solicitation or an unsolicited proposal is sent to a federal agency because it may be important to identify and protect the rights of the institution and the faculty at the proposal stage,** particularly with respect to existing software and data that may be used or further developed in the proposed project. Copyright and license rights to copyrighted material

developed under a federally sponsored project are important to the government, to the public's right to use federally funded research, to authors, and to universities.

## II. A. GENERAL

### 1. Federal Civilian Agency Contracts

The FAR (48 CFR Federal Acquisition Regulation System) is the primary body of regulations for all federal procurement contracts. Part 27.4 of the FAR, Rights in Data and Copyrights, prescribes policies, procedures, and directions for use of various contract clauses pertaining to data and copyrights. With regard to rights in data produced, furnished, acquired or used in meeting contract requirements, it directs agencies to include terms that delineate the respective rights and obligations of the government and the contractor regarding the use, reproduction, and disclosure of that data. The data rights clauses do not specify the type, quantity or quality of the data to be delivered, but only the respective rights of the contractor and the government. They apply to all agencies except the Department of Defense (DOD), although some agencies have their own agency-specific FAR Supplements that address these matters.

Part 52.227 of the FAR, Solicitation Provisions and Contract Clauses, contains the basic clauses described in Part 27. Under the authority of Part 27 some agencies e.g. the Department of Energy (DOE) and the National Aeronautics and Space Administration (NASA) have modified the clauses in Part 52.227 for use in their own contracts. These modified clauses appear in agency specific parts of the FAR. The current version of FAR Part 27.4 was issued on November 7, 2007 (*Fed.Reg.*, Vol. 72, No. 215, pp. 63045-63075). The new version was intended as a "plain language" rewrite, and contains few substantive changes from the previous version that was adopted in 1987. It did not correct the anomalies noted herein. (Note: the Federal Register version of the revised FAR Part 27.4 is incomplete; readers should refer to the published version of the FAR (available at <http://www.arnet.gov/far/>)).

Under the general FAR 27.4 provisions followed by the civilian agencies, the government receives an unlimited license to data produced under research contracts. As will be further explained later in this Guide, the term "data" is extremely broad and generally includes information that is recorded in any form of media. The government's unlimited license essentially enables the government to exercise all the rights of the owner of the data, including the right to use, disclose, and reproduce the data, to modify it and, if copyrightable to prepare derivative works, to distribute copies to the public, and to perform and display the data publicly. These broad rights contrast markedly with the far more limited "government use" license to inventions under the Bayh-Dole Act. Government approval is needed for funding recipients to claim copyright in the data unless Alternative IV is added to the basic clause. However, the FAR normally permits all contractors to assert copyright without government approval in technical or scientific articles published in academic, technical or professional journals, symposia proceedings, or similar works that are based on or contain data produced in the performance of the contract.

In most contracts for basic or applied research performed solely by universities or colleges, the FAR also allows universities and colleges to claim copyright in any copyrightable data (including computer software) produced under the contract. Exceptions are contracts whose purpose is development of computer software for distribution to the public, contracts for management or operation of government facilities (including contracts or subcontracts in support of programs being conducted at those facilities) or where international agreements require

otherwise. FAR 27.4 also includes a provision that is critical for universities which states that government agencies may place no restrictions upon the conduct of or the reporting on the results of unclassified research in contracts for basic or applied research with universities or colleges except as otherwise provided in U.S. statutes. This provision deserves more attention in light of the increasing proliferation of such restrictions in federal agency research contracts particularly from DOD (see COGR/AAU “Restrictions on Research Awards: Troublesome Clauses 2007/2008;” available at <http://www.cogr.edu/> ).

## **2. Defense, Energy, and NASA Contracts**

Unlike the civilian FAR which determines rights according to data produced or used in performance of a research contract, the Defense Federal Acquisition Regulations (DFARS) allocate rights and responsibilities for the use and protection of data produced under DOD contracts according to the source of funds used for data development. If developed exclusively with government funds, the government is entitled to unlimited rights to the data similar to the approach under the FAR. All DOD contractors acquire the same data rights and responsibilities; the DFARS makes no special provision for educational institutions. The Department of Energy (DOE) Acquisition Regulations distinguish legal rights in data under the FAR from DOE’s “contract rights.” Where DOE acquires contract rights to data, it requires DOE permission to claim copyright for any computer software produced under the contract. The National Aeronautics and Space Administration (NASA) has a restriction similar to DOE for computer software. Without the right to claim copyright, a non-patented computer program falls into the public domain unless the copyright is claimed by the federal sponsor (note that the government cannot hold domestic copyright to works created by government employees but that prohibition does not apply to copyright provided to the government in the works of others). This is important for considering the potential downstream commercialization of the software by the contractor (university).

## **3. Grants and Agreements**

In recent years there has been a trend toward greater uniformity among the agencies in rights to data under federal assistance awards (grants and agreements). Federal grant recipients generally may claim copyright in any copyrightable work developed under the award. The federal awarding agency reserves the right to reproduce, publish, or otherwise use the work for federal purposes, more similar to its license right to inventions under the Bayh-Dole Act. The standard research terms and conditions now followed by most federal agencies incorporate the general government grant approach to data under OMB Circular A-110 (codified at 2CFR215.36). Some agencies in their grant terms and conditions have specific requirements for the sharing and dissemination of data produced under their grants.

## **II. B. DEFINITION OF DATA**

For federal agency contracts governed by the FAR, the general definition of "data" is found in FAR 27.401 and 52.227-14(a): "recorded information, regardless of form or the media on which it may be recorded." ("FAR Data"). The terms "software" and "technical data" are broadly defined and are subsets of the term "data." The term includes information which may or may not be copyrightable. For DOD contracts the term “technical data” is defined as: "recorded

information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation)” (DFARS 252.227—7013(a)(14)), but does not include the computer software program itself. Both the FAR and DFARS define “computer software” as including programs, source code, source code listings, design details, algorithms, processes, flow charts, formulae and related material that enables the software to be reproduced, recreated, or recompiled, but not computer data bases or software documentation. The FAR incorporates computer software under the definition of “data.” The DFARS, however distinguishes computer software from “technical data.”

There is no counterpart federal-wide definition of “data” for grants. Nevertheless, 2 CFR215.36 (OMB Circular A-110.36) Intangible Property sets forth certain government rights to data (see Part IV below). It also has special provisions with regard to access to “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues.” Other exclusions from “research data” include physical objects, trade secrets, commercial information, confidential unpublished information, and personnel and medical information.

The individual federal research granting agencies define “data” in a variety of ways. For instance the National Science Foundation refers to “data” in terms of the dissemination of the results and accomplishments of the activities of the funded project. The National Institutes of Health’s definition of “data” incorporates copyright law and defines “data” as “recorded information, regardless of form or media on which it may be recorded, and includes writings, films, sound recordings, pictorial reproductions, drawings, designs, or other graphic representations, procedural manuals, forms, diagrams, work flow charts, equipment descriptions, data files, data processing or computer programs (software), statistical records, and other research data.” NIH also includes a definition of “Research Data” in their Data Sharing Regulations/Policy/Guidance Chart For NIH Awards as “Recorded factual material commonly accepted in the scientific community as necessary to validate research findings. It does not include preliminary analyses; drafts of scientific papers; plans for future research; peer reviews; communications with colleagues; physical objects (e.g., laboratory samples, audio or video tapes); trade secrets; commercial information; materials necessary to be held confidential by a researcher until publication in a peer-reviewed journal; information that is protected under the law (e.g., intellectual property); personnel and medical files and similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy; or information that could be used to identify a particular person in a research study.

[http://grants.nih.gov/grants/policy/data\\_sharing/index.htm](http://grants.nih.gov/grants/policy/data_sharing/index.htm)

### **III. RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE UNDER GOVERNMENT CONTRACTS**

#### **A. OVERVIEW**

The Federal Acquisition Regulations (FAR) provide the basic procurement contracting practices for all executive agencies. Rights in Technical Data and Copyrights (“RITD”) for civilian agencies contracts are prescribed in FAR Subpart 27.4 and implemented through clauses at FAR 52.227.14 through 52.227-23. The Department of Defense’s (“DOD”) has mission and procurement needs that often differ from the Government’s civilian agencies. The DOD RITD

are prescribed in the DOD's FAR Supplement ("DFARS") at DFAR Subpart 227.71 Rights in Technical Data and implemented at DFARS 252.227-7013 through 252.227-7033.

There are fundamental differences between the civilian and the defense agencies regarding implementation of provisions for RITD. FAR 27.402, the statement of Policy, is the only section applicable uniformly to all executive agencies. Other provisions in Part 27 provide a default when agencies have not adopted separate regulations and describe a basic scheme for use by contracting officers in deciding which clause or parts of clauses to apply in particular situations. Section 27.409, Solicitation Provisions and Contract Clauses, provides a summary of situations in which the contracting officer is required to include the Alternate provisions of Section 52.227-14 as well as Sections 52.227-15 through 52.227-23 in a contract.

As consideration for funding, the government may acquire or obtain access to many kinds of data produced during or used in the performance of a government contract. The government's rights may vary, depending either on the statement of work or if the data were developed with mixed government/non-government funding. Usually the government receives unlimited rights to use data along with a royalty-free, non-exclusive, irrevocable worldwide license to all of the "bundle" of rights to data protected by copyright. These include the right to use, reproduce, prepare derivative works, distribute copies to the public, and perform and display publicly the copyrighted data. This unlimited license enables the government to act on its own behalf and to authorize others to exercise the same rights, and essentially gives the government all of the use rights of the copyright owner.

Part 52 of the FAR classifies data into four categories reflecting the nature of data and restrictions that apply to them. The defense agencies have their own categories of data. This chapter describes first the basic FAR clauses; then the Defense Department (DOD) clauses. DOE and NASA follow the basic FAR clauses but each has its own individual variations discussed in each of its FAR supplements. The discussion on these variations follows the DOD discussion. Finally, this section concludes with discussion of a few special FAR clauses on data rights.

### **III B. FEDERAL ACQUISITION REGULATIONS- FAR 52.227.14**

#### **III B. 1. Rights in Data - General**

FAR Section 52.227-14 is the general rights in data clause. It contains nine sections comprising: Definitions; Allocation of rights; Copyrights; Release, publication and use of data; Unauthorized marking of data; Omitted or incorrect markings; Protection of limited rights data and restricted computer software; Subcontracting, and Relationship to patents or other rights. In addition, five Alternates follow the clause describing substitutions or additions to the general clause. Government contracts may cite 52.227-14 with any of the appropriate alternates. (Instructions to government contracting officers regarding use of these Alternates are found in FAR Section 27.409). Most contracts and subcontracts include only the citations of the applicable clauses without their actual text. Thus, it is important for university contract administrators to have ready access to the actual language so that they can carefully check the citations in the agreement of the included clauses and any designated Alternate against their needs and expectations. The FAR may be found online at <http://www.arnet.gov/far/>.

#### **III.B.2. Definition of Data Under the FAR**

Sections 27.401 and 52.227-14(a) define data, limited rights data, computer software and restricted computer software as follows:

- (1) Data is "recorded information, regardless of form or the media on which it may be recorded. The term "includes technical data and computer software." Technical data are defined as data which are "of a scientific or technical nature." 27.401 and 52.227-14(a) also define several categories of data including "form, fit and function" data (data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, and other characteristics).
- (2) Limited rights data (other than computer software) are those "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." Where the government does not intend to acquire the data, 27.401 has an alternate definition as "data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged."
- (3) Computer software means computer programs, algorithms, etc. that allow or cause a computer to perform a specific operation or series of operations. It does not include computer databases or software documentation (defined as owners' or users' manuals, etc. that explain the capabilities of or provide instructions for using the software).
- (4) Restricted computer software is computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is copyrighted, including minor modifications.

### **III. B. 3. Types of FAR Data Rights**

FAR 52.227-14(a) also identifies several types of Government data rights. These include:

- (1) *unlimited rights*, defined as 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;
- (2) *limited rights*, defined as the rights of the Government as set forth in a Limited Rights Notice included in paragraph (g)(3) of the clause; and
- (3) *restricted rights*, defined as the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice as set forth in paragraph (g)(4) of the clause, or as otherwise may be provided in a collateral agreement, including minor modifications of such computer software.

### **III. B.4. Nature of Rights to FAR Data**

According to Sections 27.404-1 and 52.227-14(b), the government receives unlimited rights to: (1) data first produced in the performance of the contract; (2) form, fit and function data delivered under the contract; (3) 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 the contract; and (4) all other data delivered under the contract and not marked with a limited rights or a restricted rights legend.

The contractor normally retains rights in the data to: (1) use; (2) reproduce; (3) publish; and (4) protect; (5) prepare derivative works from; and (6) may copyright some kinds of data first produced in the performance of a contract (see III.B.5. below).

The unlimited rights (see definition above) that are granted to the Government are not exclusive rights and therefore the contractor can assert ownership in any type of data if Alternate IV to 52.227-14 is included in the contract (Alternative IV is discussed further below) and license any or all of their rights to third parties as well. Research administrators and technology transfer specialists are reminded that the right to license third parties will always be subject to the Government's unlimited rights. In practice this means the contractor will be unable to grant exclusive rights to third parties.

### **III. B.5. Data First Produced or Delivered Under a Contract - FAR 52.227.14(c)**

Two FAR clauses are important for universities who wish to assert copyright ownership to copyrightable data first produced, used or delivered under a contract.

**a)** The general FAR policies and procedures (27.404—3(a)) and clause (FAR 52.227-14(c)) state that the contractor may assert, without prior approval from the federal government, copyright in scientific and technical articles if they contain "data first produced in the performance of the contract and [are] published in academic, technical or professional journals, symposia proceedings or similar works" but requires prior express written approval of the contracting officer to establish copyright in all other data "first produced" (meaning not previously existing in any form, i.e. written text or machine readable software). Agencies may require advance copies of articles intended for publication in academic, scientific, or technical journals or symposium proceedings or similar works for information purposes only. The FAR clause also provides that 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 the contract unless otherwise provided by law or expressly set forth in the contract.

**b)** The general FAR clause contains an Alternate IV, which the FAR indicates is to be used in contracts for basic or applied research to be performed solely (emphasis added) by universities and colleges (FAR 27.404-3(a)(3); 409(b)(5)). It provides blanket permission for universities and colleges to claim copyright without limitation in any copyrightable data first produced in the performance of the contract. When asserting copyright under Alternate IV, universities must acknowledge the government's sponsorship (including the contract number) on any data for which the university is claiming copyright, and provide the government broad license rights as expressed in the clause. Alternate IV (and the prescription clauses) also allows the contracting officer to include in the contract specific exceptions to this permission that are not otherwise already contained in the clause.

University administrators should be aware that the basic FAR rights in data clause together with Alternate IV is required to be used in contracts for basic or applied research to be performed solely by universities and colleges. However, it cannot be used if the purpose of the contract is



development of computer software for distribution to the public (27.404-3(a)(3)). Also, when an industrial prime contractor is subcontracting to a university or a university prime contractor is subcontracting to a commercial organization, contracting officer permission is required to utilize Alternate IV since the work then will not be solely performed by the university or college (the prescription is permissive allowing Alternative IV to be used in other types of contracts as well).

Despite claiming copyright ownership in data first produced and delivered to the government, the contractor still is obligated to provide the federal government with a paid-up, non-exclusive, 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. If a contractor claims copyright to software first produced and delivered to the government, the government does not have the right to distribute copies of the software to the public. Hence, using the proper clauses to establish copyright ownership, especially to computer software, should be a priority for any university wishing to commercially license its federally funded software. University contracting officers should review government research contracts involving production of software for their commercial potential and assure copyright ownership can be properly asserted by the university.

### **III. B. 6. Security Restrictions**

The contractor's rights to data as discussed above under the general FAR clause may be limited to the extent the data are subject to federal export control or national security laws or regulations, or unless otherwise provided in this paragraph or expressly set forth in the contract (FAR 52.227.14 (d)(1) and (2)). A critical provision for universities in this regard is FAR 27.404-4(a), which states that no restrictions may be placed upon the conduct of or the reporting on the results of unclassified basic or applied research in contracts with universities or colleges except as otherwise provided in U.S. statutes. This provision essentially implements National Security Decision Directive 189 (originally issued in 1985, and reaffirmed as official U.S. government policy in 2001 and 2005). That Directive provides that the products of fundamental research at universities and colleges shall remain unrestricted. Restrictions, however, may be placed on a university contractor's rights to use, distribute, and publish data first produced in performance of the contract in types of contracts for other than basic or applied research, and in contracts with contractors that are not colleges or universities. The exception thus may not apply to a federal contract with industry for R&D, even where some of the R&D work may be subcontracted by the company to a college or university. The exception also does not apply to certain computer software.

Universities should be careful to review the full text of the clauses included in their contracts to assure that they do not contain publication restrictions. Acceptance of such restrictions may not only violate the FAR prescription but may subject the university (and individual faculty) to export control regulations as the regulations provide that universities lose their exclusion from controls for fundamental research if they accept such restrictions on publications (15 CFR 734.8(b); 22 CFR 120.11(8)). Recent reports have indicated that clauses restricting publication have proliferated in agency research contracts with universities (see II.A.1 above).

Even where there is no explicit provision in the contract restricting publication, publication may not be possible if the contractor is not able to perfect copyright in the data intended for publication. If the university anticipates publication of data that does not consist of scientific and technical articles based on data first produced in performance of the contract or is not intended

for publication in sources such as academic, professional or technical journals (examples might be the licensing of know-how or schematics for commercial use), a university should require inclusion of Alternate IV or seek permission to establish (i.e. perfect) copyright at the earliest opportunity. Also, government contracting officers occasionally will claim a broad scope for the Alternate IV exceptions set forth in the FAR, which may require much negotiation. Universities also need to watch for an addition ((d)(3)) to section (d) of the basic FAR data rights clause that requires government permission for a contractor to claim copyright in or publish computer software (see discussion of DOE and NASA clauses below).

### **III. B.7. Data Not First Produced in the Performance of the Contract - FAR 52.227-14(c)(2)**

**a) General Considerations** - The second major category of FAR Data includes items not first produced under the contract but used in the performance of the contract. Such data could have been created outside of federal sponsorship (e.g., under an industrial contract, university funds), may have been given to the contractor by a third party, or may have been created by a project participant who is not an employee of the contractor (e.g., a student as part of his/her course work.) If data other than FAR Data is delivered to the Government, copyright protection, ownership rights, and license rights need to be sorted out prior to the data being delivered to the Government. The rights of the contractor, the government, and the third party all must be considered.

Permission is needed from the government before a contractor delivers to the government data that are not first produced in the performance of the contract. With agreement from the government, the contractor may not be required to grant the government the unlimited license rights that are required to be granted to the government for data first produced in the performance of the contract. It is important for institutions that use pre-existing or third party data (including software) in contract research to ensure that they have the necessary rights to any data embedded in government deliverables. The government will acquire *negotiated rights* to such data.

**b) Limited Rights Data - 27.404-2 and 52.227.14(a)** - Limited rights data means data that either embody trade secrets or are commercial or financial in nature and are confidential or privileged, to the extent such data pertain to items, components or processes that were developed exclusively at private expense. Limited rights data do not include computer software. Normally the contractor is allowed to withhold limited rights data from the government, under 52.227-14(g)(1).

At first glance, it may appear that universities will rarely use or deliver limited rights data to the government, because of policies that promote open and unrestricted publication of research results. However, such situations may occur when the university is collaborating with, or has an industrial subcontractor who is required, by the terms of the contract, to provide the government with such limited rights data. It can also occur where the contract will require use of pre-existing data that is being held confidential for commercial reasons such as competitive advantage. Use of confidential data developed at private expense and a contract requirement for its delivery to the federal government will require the data to be protected under the limited rights data clauses of the FAR. University research administrators must remember this requirement in reviewing proposals and negotiating contracts.

Under 27.404-2(c), limited rights data should not be provided to the government unless Alternate II of 52.227-14 is cited. Limited rights under Alternate II allows the government to reproduce

and use the data within the government, but not the right to manufacture or disclose the data outside the government, except for the specific purposes stated in a “Limited Rights Notice” that must be affixed to the data or as may otherwise be agreed upon in the contract. However, an agency may adopt the alternate definition of limited rights data (see III.B.2.(2)) in which case Alternate I of the FAR clause should be used. (27.409(b)(2)). This Alternate I definition does not require that the data relate to items, processes or components developed at private expense; only that the data themselves have been developed at private expense. See also FAR 27.404-2(b), This is intended to apply to contracts that do not require the development, use or delivery of items, process or components by or for the government; for example, research contracts. It may enable the contractor to withhold data that otherwise might be required to be delivered to the government under the general 52.227-14 clause. If Alternate II is not cited and the contractor wishes to withhold data that would qualify as limited rights data, the contractor must identify the withheld data and deliver form, fit and function data (as defined in 52.227-14(a)) instead of the limited rights data (27.404-2(a)). 27.404-2(c)(1) indicates that the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified to be withheld. In addition, 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.

**c) Restricted Computer Software - 27.401 and 52.227.14(a)** - Restricted computer software is similar to limited rights data. The software must have been developed completely at private expense and must be held out by the contractor to be a trade secret or of a commercial or financial nature and confidential or privileged. Copyrighted computer software also qualifies as restricted computer software if developed at private expense. If the government wishes to obtain restricted computer software, Alternate III to FAR 52.227-14 is to be used (FAR 27.409(b)(4)). Alternate III requires use of a Restricted Rights Notice by the contractor. This notice substantially limits the government’s use of the software. Under Alternate III, software delivered to the government with a copyright notice will be presumed to be licensed to the government. with the restrictions set forth in the Notice. A Short Form version may be used if it is impractical to include the full Restricted Rights Notice on the software. Note that with regard to restricted copyrighted software, failure to include either the Restricted Rights Notice or a Short Form version as specified in Alternate III may result in the government obtaining the same broad license rights as with software first produced in the performance of the contract (see III.B.5. above). Computer databases are treated as limited rights data rather than restricted computer software.

Prior to delivery of any restricted rights software, the contractor should clearly determine the government’s restricted rights as set forth in the applicable FAR clause or in negotiation with the contracting officer. Proper use of the restricted rights clause becomes very important, if the statement of work requires the delivery of the industrial partner's copyrighted software, or if the university itself is required to deliver copyrighted software it has developed without government funding. The restricted rights notice required under Alternate III gives the government specific but more limited rights than the Limited Rights Notice discussed above.

The important point that university administrators should keep in mind is that if the data qualify as either limited rights data or restricted computer software, the contractor should do something to identify and protect them before delivering them to the government. Failure to identify and

protect limited rights data or restricted software may result in the government acquiring unlimited rights in such data.

**d) When Delivery of Limited Rights Data May Be Required** - Alternates II and III of FAR 52.227-14 enable the government to require delivery of a contractor's limited rights data rather than allowing the contractor to withhold such data. The government may justify disclosure of limited rights data outside the government, despite the limitation on government rights, by stating the purposes for such disclosure. Examples of such purposes are included in FAR 27—27.404(2)(c)(1). They include use (other than manufacture) by support service contractors, evaluation by non-government evaluators, use (except for manufacture) by other contractors participating in the government's program of which the specific contract is a part, emergency repair or overhaul, or release to a foreign government.

Minor modifications to limited rights data or restricted computer software will not necessarily subject these modifications to unlimited rights to the government even if they are first developed in performance of a government contract. Minor modifications are included in the definition of limited rights data and restricted computer software and therefore are subject only to the corresponding limited or restricted rights.

Since the basic Section 52.227-14(g)(1) allows the contractor to withhold delivery of limited rights data and restricted computer software, the contracting officer must initiate negotiation to include the appropriate Alternate or modified contract provision to require the contractor to deliver such data or software and to provide necessary rights to the government. Both Alternates II and III specify the minimum rights the government will normally obtain. Greater or lesser rights may be specified by the contracting officer or by agency regulations. Exclusion of Alternate or modified clauses at the initial signing of the contract does not preclude the contracting officer from adding them subsequently during performance by modification should it become necessary to require the delivery of limited rights data or restricted computer software. The point to remember is that Alternates II and III of FAR 52.227-14 enable the government to require delivery of a contractor's limited rights data rather than allowing the contractor to withhold such data as provided under the basic FAR clause.

### **III. B. 8. SPECIAL CLAUSES UNDER THE FAR**

There are several less frequently used FAR RITD clauses. Several of these clauses may be of general interest and/or of particular relevance to university contractors or subcontractors.

**a) Representation of Limited Rights Data and Restricted Computer Software - FAR 52.227-15** - Inclusion of Section 52.227-15 in a government solicitation is an indication that the government may anticipate the need for delivery of limited rights data or restricted computer software. The clause requests the offeror to identify such data or software in response to the solicitation. Failure to take advantage of this opportunity to protect such data or software at this stage may make it difficult to secure protections during negotiation or performance of the contract.

**b) Additional Data Requirements – FAR 52.227-16.** This clause allows the government to order additional data first produced or used under the contract during contract performance and for 3 years after acceptance of all deliverables. The General Rights in Data clause applies to such data. According to the prescription, this clause is to be used in

solicitations and contracts involving experimental, developmental, research, or demonstration work unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. Contracts under \$500,000 for basic or applied research performed solely by universities or colleges are exempted; however, the FAR prescription cites such contracts as examples of other contracts where the clause may be used if the contracting officer believes that in the future the contract effort will exceed \$500,000. See 27.409(d). The Department of Energy routinely inserts this clause in its research contracts except those under \$500,000 solely performed by universities or colleges. See III.D. below.

**b) Rights in Data - Special Works - FAR 52.227-17** - The Special Works clause at FAR 52.227-17 is required to be inserted in solicitations and contracts primarily intended 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 need to limit distribution or obtain indemnification for liabilities arising from the use, performance or disclosure of the data. (Section 27.409(e)). Examples are contracts requiring the production of audiovisual works, development of histories of agencies, surveys of government establishments, works for instructions of government officers, compilation of reports and studies that do not involve R&D work, collection of data containing personally identifiable information, investigatory reports, compilation of data other than that resulting from R&D whose early release could compromise follow-on acquisition activities or regulatory or enforcement activities, and development of computer software programs that might give a commercial advantage or whose release could prejudice agency programs. Section 27.405-1 includes a detailed discussion of the use of the clause in the acquisition of audiovisual and other special works, including authorization to modify the clause to protect free speech and freedom of expression.

The government acquires unlimited rights under the Special Works clause to data (including technical data and computer software) delivered under the contract and to data first produced under the contract. Release, distribution and publication of the data first produced under the contract by the contractor require the government's written permission. Contractors also may not claim copyright ownership to such data without government permission (although this part of the clause can be deleted by the contracting officer according to 27.405-1(c)). The Special Works clause requires the contractor to indemnify the government for liability that arises out of the government's publication or use of the data (though this provision also may be deleted or limited). These provisions are antithetical to the policies of most if not all universities, and as regards indemnification, often may be forbidden by state laws applicable to public institutions. University contract officers need to be particularly aware of the Special Works clause, and assure they do not inadvertently accept this clause.

Occasionally universities have inappropriately received this clause in research contracts. There is some evidence that federal agencies are increasingly likely to misuse this clause by including it in university research contracts. Also, the new FAR Part 27.405-1 expands the number of situations for use of the clause. Acceptance of the clause restrictions would compromise a university's fundamental research exclusion under the export control regulations because of the inclusion of the publication approval provision. Use of the clause also violates FAR 27.404-4(a), which states that no restrictions may be placed upon the conduct of or the reporting on the results of unclassified research in contracts for basic or applied research with universities or colleges.

**c) Rights in Data—Existing Works—FAR 52.227—18 and Commercial Computer Software—FAR 52.227—19** - These clauses are less frequently encountered by universities.

The FAR Existing Works clause is used by the government for acquisition without modification of existing audiovisual and similar works. It grants the government a nonexclusive worldwide license to reproduce, prepare derivatives, and perform and display publicly on behalf of the government all subject matter called for under the contract. The clause includes an indemnification provision similar to the Special Works clause, and thus is also inappropriate for universities.

FAR 52.227-19 is used by the government to acquire commercial computer software (other than from the General Services Administration's (GSA's) Multiple Award Schedule contracts). The clause does not need to be used for such acquisitions, but even without the clause, such contracts must address the government's rights to use, disclose, modify, distribute, and reproduce the acquired software (FAR 27.405-3). Normally the software should be acquired under the same licenses that are customarily provided to the public. The clause is to be used when there is any confusion as to whether a normal commercial license will meet the government's needs or is consistent with federal law. Generally, it gives the government the right to use, copy, reproduce, modify, adapt and disclose the software to support service contractors. Additional or lesser rights may be negotiated. If the software is available without disclosure restrictions, it is presumed licensed to the government without restrictions. A notice must be included referencing the government's rights.

**d) Small Business Innovation Research (SBIR) - FAR 52.227-20** - Since universities often participate as subcontractors to small businesses in phases I and II SBIR awards, faculty and administrators should be familiar with the special section of the FAR that pertains to rights in data under the SBIR programs. FAR 52.227-20 is designed for the SBIR programs where contracts are used by federal funding agencies (Section 27.409(h)].

The clause recognizes a category of "SBIR rights" in data, as set forth in an "SBIR Rights Notice." It specifically permits the SBIR funding recipient company to assert copyright ownership of FAR data created under the project, and to submit the data to the government labeled as SBIR data unless the contract specifically states that the data are to be delivered to the government without restriction. The government's rights in copyrighted data and computer software developed in performance of an SBIR program are similar to government rights in copyrighted data and computer programs under non-SBIR programs.

The delivery of data with the SBIR Rights Notice limits the government's use and disclosure rights in such data. The government's license is limited to a right to use the data for government purposes, but prohibits disclosure outside of the government, except for disclosure for use by support contractors, for a period of four years after government acceptance of all deliverables under the contract. The four-year period can be extended by negotiation with the contracting officer. After the protection period, the government is relieved of the non-disclosure requirements, but the data remain subject to the government's more limited right to use the data and to authorize others to use it only for government purposes.

The subcontracting provision in 52.227-20 is the same as the one in 52.227-14 and requires the contractor to secure rights from its subcontractors as necessary to provide any required rights to the government.

Five federal agencies currently participate in the closely-related Small Business Technology Transfer Program (STTR). These agencies are those with external R&D budgets over \$1 billion: NIH, NSF, DOD, DOE, and NASA. Award terms for STTR follow those for SBIR. NIH, NSF

and DOE award grants that generally follow the 2CFR215.36 approach to rights in data (see **IV.A.** below) but include a four-year limit on government disclosure similar to the FAR clause. NASA awards contracts for STTR that cite the FAR SBIR 52.227-20 clause. DOD also awards contracts for STTR. Its STTR contracts cite **DFARS clause 252.227-7018**, "Rights in Noncommercial Technical Data and Computer Software -- SBIR Program." That clause also recognizes "SBIR data rights," which are similar to DOD's "government purpose" rights (see **III.C.3.** below).

**e) Rights to Proposal Data (Technical)—FAR 52.227—23** - This clause gives the government unlimited rights to all technical data contained in the proposal upon which the contract is based. The contractor must specifically identify all pages that contain any confidential information to be exempt from these rights. It is interesting to contrast this approach with the DFARS approach discussed below (III.C.8.), which limits the government's rights.

### **III. C. DEPARTMENT OF DEFENSE ACQUISITION REGULATIONS ("DFARS")**

Unlike the civilian agencies, the DOD is given specific statutory authority to prescribe regulations for DOD and its contractors for rights in technical data (10 USC 2320). The Department of Defense (DOD) regulations regarding rights in technical data and computer software were substantially revised in 1995 and closely follow the statutory provisions. The current regulations went into effect in September 2007 but have relatively few differences from the previous 1995 version.

The Defense Acquisition Regulations (DFARS) distinguish between rights in technical data for non-commercial items (227.7103; 252.227-13) and commercial items (227.7102; 252.227-15), with a further distinction for noncommercial computer software and documentation (227.7203; 252.227.14) The DFARS are at [http://www.acq.osd.mil/dpap/dars/dfars/html/current/227\\_71.htm](http://www.acq.osd.mil/dpap/dars/dfars/html/current/227_71.htm). There are significant differences between the FAR and DFARS with regard to federal rights in data. The DFARS makes no distinction between a commercial organization and a nonprofit educational institution; all DOD contractors acquire the same data rights and responsibilities. Unlike the FAR, that determine the rights and responsibilities in contract data by the statement of work and deliverables, the DOD regulations allocate the rights and responsibilities for use and protection of the data by recognizing the source of funds for data development, consistent with the underlying statute. In addition, the DFARS provides that the standard license rights granted to the government may be modified through negotiations with DOD (227.7103-5). In such negotiations, however, the government cannot receive lesser rights than it would under Limited Rights, which is discussed below.

#### **III. C. 1. DOD's Definition and Allocation of Technical Data**

DOD procurement regulations, unlike the FAR data rights clauses, do not use the unmodified term "data." The DOD regulations use the term "technical data," which is defined as "recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation)" (DFARS 252.227—7013(a)(14)). For purposes

of this document, technical data developed under a DOD contract is referred to as DOD Technical Data.

DOD explicitly relates the allocation of rights to DOD Technical Data to the "source of funds" used for development of the data. The separate categories are described below. Any rights that have not been given specifically to DOD under the regulations are retained by the contractor. Like the FAR, the DFARS also states that the contractor cannot, without written approval, incorporate any third party-owned material into the data to be delivered to the government unless the government receives a license to use the material.

### **III.C.2. DOD Technical Data Developed Exclusively with Government Funds - DFARS 227.7103-5(a); 252.227-7013(b)(1)**

DOD Technical Data developed exclusively with government funds means that, in connection with an item, component, or process, the cost of development was paid for in whole by the government or created exclusively with government funds in the course of the performance of a government contract or subcontract. When DOD Technical Data are developed exclusively with government funds, the government is entitled to *unlimited rights*.

Unlimited rights are rights to use, modify, reproduce, perform, display, release or disclose DOD Technical Data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so (227.7013(a)(15)). Generally, the government's unlimited rights extend beyond DOD Technical Data that have been or will be developed exclusively with government funds. They also cover studies, analyses, test data, or similar data produced for the contract as an element of specific performance; corrections or changes to DOD Technical Data furnished to the contractor by the government; and publicly available data created by the contractor which contain no restrictions on their further use, release or disclosure.

In research contracts when DOD determines that public dissemination by the contractor is in the government's best interest, DOD can relinquish its right to publish the DOD Technical Data in order to permit public sale by the contractor through use of Alternate I of DFARS 252.227-7013(227.7103-6(b)). Under this clause, the government relinquishes its rights to publish the data if within twenty-four months after delivery the contractor publishes the data and promptly notifies the government.

### **III. C. 3. DOD Technical Data Developed with Mixed Funding - DFARS 227.7103-5(b); 252.227-7013(b)(2)**

When DOD Technical Data pertain to items, components or processes that have been developed partially with costs not funded by the government, DOD Technical Data are considered developed with mixed funding. The government has *government purpose rights* to such data (including data developed with mixed funding in the performance of a contract that does not require development or production of items, components or processes). Government purpose rights are less than unlimited rights and are the rights to "use, modify, reproduce, release, perform, display, or disclose technical data within the government without restriction" and outside the federal government for "government purposes" (227.7013(a)(12)). DOD Technical Data developed or created in part from indirect (facilities and administrative) cost pools are also considered to be developed with mixed funding.



It is important to note that these government purpose rights extend only for five years or such other period as negotiated between the government and the contractor. Government purpose rights begin at the execution of the contract or subcontract that requires the development of the DOD Technical Data. After the prescribed period, the government receives the broader unlimited rights in the DOD Technical Data. The government will not release the DOD Technical Data during the five year time period unless the recipient is a government contractor who requires the use of the DOD Technical Data and has received a contract with restrictive legends as set forth in 252.227-7025 or the recipient has executed a non-disclosure agreement with the government (227.7103-7(c)). In either case, the government contractor or recipient agree to release the government from liability and the owning party named in the restrictive legend or non-disclosure agreement is a third-party beneficiary. As such, that party agrees to seek relief solely from the party who has improperly used the contractor's DOD Technical Data.

Five years is not a very long time, considering it begins at the start of the contract rather than at the time the DOD Technical Data are created or disclosed to the government. Although the contractor has an exclusive right to use and license others for any commercial purposes during this initial five-year period, first commercialization of DOD Technical Data may well occur after this period has ended. Therefore, it is important that administrators discuss this provision with faculty. They might also try to extend the government purpose rights period when negotiating a prime federal contract or subcontract if they expect that a longer period may be necessary for the transfer and commercialization of the DOD Technical Data.

It also is important to recognize that government purpose rights, while more limited than unlimited rights, still give the government broad rights. They are not limited to DOD, but can extend to all other government agencies. Government purpose rights also extend to use in government contracts, as indicated above. Thus, while the rights cannot be used for commercial purposes, they can be used for a wide range of government and contractor activities.

#### **III.C.4. DOD Technical Data Developed Exclusively at Private Expense - DFARS 227.7103-5(c); 252.227-7013(b)(3)**

The government has *limited rights* in DOD Technical Data pertaining to items, components or processes developed exclusively at private expense (or created exclusively at private expense when the contract does not involve production of items, components or processes), provided it is marked with the prescribed limited rights legend. According to the definition provided at 252.227-7013(a)(7), costs charged entirely to indirect cost pools are considered private support. The government is entitled to limited rights when the DOD Technical Data are delivered to it. The DOD Technical Data must be marked with the Limited Rights Legend (see V. C. below). Limited rights are narrower than both the unlimited and government purpose rights provided to the government when government support or mixed funding is used to create the data. Limited rights allow the government to "use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the government" (227.7013(a)(13)). The government cannot disclose the DOD Technical Data outside the government or use the DOD Technical Data for manufacture except in limited situations, for example emergency repairs.

#### **III. C. 5. Specifically Negotiated Rights—DFARS 227.7103-5(d); 252.227-7013(b)(4)**

Alternative *specifically negotiated license rights* for the government may be negotiated for any of the above three categories of DOD Technical Data (solely government, privately funded, or

developed with mixed funds). However, the government cannot receive lesser rights in such negotiation than it would receive under *limited rights*.

DOD is very prescriptive in its requirements for marking DOD Technical Data delivered to the government with government purpose rights, limited rights, or specifically negotiated rights. DFARS 252.227-7013(f) sets forth specific legends for each category. Contractors also are required to justify the validity of the restricted marking (252.227-7013(g)). This contrasts with the FAR, which prescribes the content of the Limited Rights Notice, but not its placement (FAR 52.227—14 Alternate II). See Section V. below for further discussion of marking requirements.

### **III. C. 6. Rights in Noncommercial (and Commercial) Computer Software and Computer Software Documentation - DFARS 227-7203; 252.227-7014**

As noted in II.B. above, the DFARS distinguish computer software from technical data and include a separate clause on rights in noncommercial computer software and software documentation. The DFARS define computer software as “computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled” (252.227-7014 (a)(4)).

Computer software does not include computer databases or documentation. Computer software documentation means owner’s manuals, user’s manuals, installation instructions, operating instructions and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

This clause generally provides the same mix of rights and obligations as with DOD Technical Data. However, it establishes a category of *restricted rights* specific to computer software (252.227-7014(a)(4)) that are narrower and more prescriptive than the *limited rights* to DOD Technical Data discussed above. Noncommercial computer software is defined as software that does not qualify as commercial computer software under paragraph (a)(1) of the clause. The clause defines commercial computer software and commercial software documentation as that which has been or will be at the time of delivery offered, sold, leased, or licensed to the public.

The category of noncommercial software and software documentation includes software and documentation that university contractors typically deliver to DOD. Universities need to be mindful of DOD’s distinction between commercially and non-commercially available software and documentation, when identifying restricted data and software in contract negotiations. The distinction becomes especially important if a university later desires to commercially license software and documentation that has previously been identified in a DOD contract and delivered to DOD as non-commercial. The current version of the DFARS regulations has not been substantively revised since 1995, which predates more recent court decisions expanding the patentability of most computer software. Universities normally now consider patent rights in software as subject to the Bayh-Dole Act. This creates a serious anomaly since DOD apparently continues to assume that software will not be patented and therefore applies the DFARS data rights clauses that grant very different rights than Bayh-Dole.

DOD expects to use and license commercially available software and documentation on the same terms and conditions as the general public. DFARS 227.7202—1 provides that commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with federal procurement law or do not otherwise satisfy user needs. It also provides that commercial

computer software and software documentation shall be obtained competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under available pricing schedules. Contractors are not required to furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made at government expense to such software or documentation to meet the requirements of a government solicitation. Contractors also are not required to relinquish to, or otherwise provide, the government with rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.

Unlike the FAR, there is no clause prescribed for acquisition of commercial computer software in the DFARS. The DFARS (227.7202-3) provides that the government shall have only the rights contained in the license under which the software was obtained. If the Government needs rights not conveyed under the public license, the Government must negotiate with the contractor to determine if such rights are available for transfer.

### **III. C. 7. Rights in Commercial Items - DFARS 227.7102; 252.227-7015**

It is sometimes required that a contractor deliver to the government commercially available items, components, or processes. The DFARS provides that the Government shall acquire only the technical data customarily provided to the public with such a commercial item or process, e.g. operations manuals. The clause sets forth the mutual rights and responsibilities that apply when the government requires and receives delivery of additional data pertaining to commercially available items. Delivery of such data can occur, for example, when a contractor is modifying or enhancing commercial data, i.e., the specifications of a machine. It is important to note that this section does not pertain to computer software (see discussion above).

The term "commercially available" means that the item, component or process, has been sold, leased, or licensed or has been offered for sale, lease, or license to the public. In such cases, the government obtains the rights to use, modify, reproduce, release, perform, display, or disclose such data only within the government. The government does not obtain the rights to manufacture additional quantities of the commercially available items, nor can the government, without the prior written permission of the contractor, disclose or permit use of the data outside the government except for emergency repairs or overhaul of the commercial items furnished under the contract (227.7102-2(a); 252.227-7015(b)).

For universities, these provisions are important when they negotiate DOD contracts or when they license to a third party data that were not previously developed with government funds and are considered commercially available contract data. When these data have either been licensed to a third party or if an offer has been made to license the data, and the data are a deliverable under a DOD contract, both the subsequent license agreement with the third party and the DOD contract need to identify DOD's rights to the commercially available contract data.

The contractor, subcontractor or suppliers are not required to provide the government with any additional rights beyond those identified above for commercially available contract data. However, if DOD desires enhanced rights, it may request that the contractor enter promptly into negotiation with the government to determine the transfer of such additional rights. After

agreement between the parties, a license agreement, enumerating the additional rights, will be made a part of the DOD research contract (227.7103-5; 252.227-7015(c)).

### **III. C. 8. Rights in Bid or Proposal Information - DFARS 252.227-7016**

In a proposal to the government, a contractor may disclose DOD Technical Data that is commercially important to it or one of its subcontractors. If this information is sensitive, steps need to be taken to limit the government's rights to use and disclose the proposal data. Proper protection of these data is essential if the proposal data are likely to be included in a future patent application. Unless the contractor takes affirmative steps to mark its proposal data, submission of the proposal or bid offer to the government could be considered a publication under U.S. and foreign patent laws.

When a contractor submits its proposal or bid offer to DOD, the contractor agrees that the government may reproduce the proposal to the extent necessary for evaluation. However, evaluation of a proposal or bid does not include the right of the government to disclose the proposal, directly or indirectly, to any person who has not been authorized by DOD to evaluate it. After the government makes an award to the contractor, the government obtains the rights to "use, modify, reproduce, release, perform, display, or disclose information contained in the contractor's bid or proposal within the government" but does not, without written permission from the contractor, have the right to disclose it outside the government.

If the contractor fails to correctly label restricted data or software described in the proposal or if the contractor has previously provided the government with the same data or has provided it to any other third party without restriction, the government acquires unlimited rights in the proposal data and can disclose the data outside of the government without the contractor's approval. The government's internal use or external transfer of the proposal data without restrictive markings also qualifies as a publication under U.S. patent law. Thus, proper marking of proposal data is extremely important if such data is to become a part of a patent application or is licensed as a trade secret. Note that this clause flows down to subcontractors.

It should also be noted that the Federal Freedom of Information Act may require the government to disclose parts of the proposal regardless of the provisions in the DFARS.

### **III.C.9 Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program. DFARS 227.7104; 252.227-7018**

Similar to the FAR, the DFARS includes a special clause on data rights under the SBIR Program that applies to technical data or computer software generated in performance of contracts under the SBIR Program. This clause establishes a category of "SBIR data rights," defined as a royalty-free license for the Government, including its support service contractors, to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated and delivered under the contract for any United States government purpose. Rather than government purpose rights, the government has SBIR data rights in all technical data or computer software generated under the contract during the period commencing with contract award and ending upon the date five years after completion of the project from which such data

were generated. The government has unlimited rights to SBIR data after expiration of this period. The clause also includes a number of prescriptive marking requirements.

### **III. D. DEPARTMENT OF ENERGY ACQUISITION REGULATIONS (DEAR)**

The Department of Energy (DOE) has traditionally taken the position that its legal rights to intellectual property and software are greater than those of other federal agencies because of DOE's unique mission under the Atomic Energy Act and later legislation. Several years ago DOE replaced its "long and short form" rights in data clauses with the general FAR Rights in Data Clause [52.227-14]. The DEAR provisions on technical data and copyright are set forth in DEAR Subpart 927.4 and are available at <http://www.management.energy.gov/DEAR.htm>.

The DEAR distinguish the delivery of technical data from rights in technical data. DOE generally follows the FAR with regard to legal rights in data. However, for contract rights the DEAR incorporates the FAR Additional Data Requirements clause (FAR 52.227-16). According to FAR 27.409(h) and its counterpart provision in the DEAR (927.409(h)), that clause is to be used for contracts involving experimental, 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 \$500,000 or less. This clause applies unless all the data requirements are known at the time of contracting and specified in the contract. The clause gives the government the right to order any data first produced or specifically used in the performance of the contract during contract performance or within 3 years of acceptance of all deliverables, subject to the contractor's rights to withhold limited rights data or restricted computer software. However, DOE also may include a requirement for contractors to license to the government and third parties any limited rights data or restricted computer software (at "reasonable royalties") unless commercial equivalents are readily available (DEAR 927.409—14 adds an Alternate VI to the general FAR clause that contains this requirement, with an extended discussion for DOE contracting officers of the use and scope of such a license at DEAR 927.404(l)).

Where DOE acquires contract rights to data, it substitutes its own definitions and modifies the FAR data rights clause to require DOE permission for the contractor to claim copyright ownership in any software first produced in the performance of the contract (see DEAR 927.409). DOE also adds (d)(3) to the general FAR data rights clause, specifying that the Contractor cannot assert copyright ownership in computer software first produced in the performance of the contract without prior written permission of the DOE Patent Counsel. When such permission is granted, the Patent Counsel must specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. Similar responsibility is given the Patent Counsel for protecting disclosure of data for certain statutory programs (DEAR 927.404—70). These provisions are to be flowed down through all subcontracting tiers (927.404(k)). The requirements must be used in conjunction with FAR 52.227-14 Alternative V, which authorizes federal inspection of contractor data for a period of up to 3 years after completion of the contract, to assure that the Government obtains its proper rights. However, the DEAR authorizes the use of Alternate IV in contracts for basic or applied research with educational institutions, except where software is specified for delivery or in other "special circumstances" (DEAR 927.409(a)(1)). While this "class deviation" is an important

concession to universities, use of the “special circumstances” exception is not quantified or further illustrated.

Several definitions unique to DOE expand its rights in data produced or acquired under DOE awards. At 927.409(a)(1)(a) DOE adds the term "Computer data bases" and defines it as "a collection of data in a form capable of...being operated on (or) by a computer." DOE also enhances the definition of "Computer software." Definitions of "Limited rights data" and "Restricted computer software" follow the general FAR definitions (DOE uses the alternate FAR definition of “limited rights data”). These terms define the rights DOE claims in data or software developed at private expense, which embody trade secrets and are commercial or financial, or confidential and privileged. DOE’s definition of "Unlimited Rights" includes the right to distribute, display and perform by electronic means.

DOE data rights clauses now are more consistent with those of other federal agencies and the existing FAR clauses. However, due to DOE’s insistence on greater rights under the Atomic Energy Act and later legislation, its contractors still face more restrictive provisions than under other agency contracts. The repeated references to FAR 52.227-14 mask the fact that DOE’s clause is substantially different, especially with regard to software.

Copyright ownership is obviously important to colleges and universities. If DOE approval for the contractor to claim copyright ownership is not granted, the work by default enters the public domain. Since DOE’s authorization to use FAR Alternate IV remains unpredictable, university negotiators need to be vigilant to assure that Alternate IV will be used whenever possible. A strong argument could be made that contracts should be governed by the (d)(3) addition to the basic FAR data rights clause only where development and delivery of software is the central purpose of the award, comparable in effect to work-for-hire contracts. All other awards, where software is merely an incidental product, should be governed by Alternate IV.

Without copyright ownership, universities may encounter problems. For example, universities could deliver to DOE a derivative of copyrighted software, or deliver software that has multiple purposes or uses, which require that it be protected. In those cases, the university is obligated to disclose the circumstances to DOE at the contracting stage in order to provide the government with the appropriate limited or restricted rights. It is also not unusual for universities to informally share software with each other, as under an academic license, and to provide each other the right to use the software in government contracts. When working with DOE, the university contractor may find that the rights it has obtained from third parties are not sufficient to meet the broad rights upon which DOE may insist.

Alternate VI of the DOE regulations at 952.227-14 provides the government with the appropriate rights should it, or a third party on its behalf, require license rights to any proprietary contract data. If such rights are needed by the government, the contractor agrees to provide to the government and responsible third parties, a nonexclusive license in any limited rights data or restricted computer software on terms and conditions reasonable under the circumstances. There are few circumstances under which the contractor will not have to provide the government with a non-exclusive license. The most common circumstances are: (1) the contractor can demonstrate to the satisfaction of DOE that the data are not essential to the design and fabrication of the processes developed under the contract; (2) such data have a commercially competitive alternative; (3) the contractor has already supplied the data in sufficient quantity to the

government; or (4) the data can be obtained from another firm skilled in the art of manufacturing items.

Universities may not need the benefit of these rights in data clauses as independent contractors. However, when they subcontract or do collaborative work with industry, proper use of these clauses will be very important to industrial partners.

### **III. E. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (NASA) FAR SUPPLEMENT**

The NASA rights in data provisions are set forth in NASA FAR Supplement (NFS) Part 1827.404 (<http://www.hq.nasa.gov/office/procurement/regs/nfstoc.htm>). NASA generally follows the FAR data rights concepts. However, NASA also adds to the general FAR Rights in Data clause a (d)(3) restriction similar to DOE requiring NASA permission to copyright, publish or release computer software first produced in the performance of the contract (NFS 1852.227—14). NASA cites as reason its intent is to ensure the most expeditious dissemination of computer software developed by it or its contractor (NFS 1827.404(g)).

Fortunately, the NASA FAR Supplement also states that the (d)(3) addition should not be used in contracts for basic or applied research with universities or colleges (NFS 1827.409(a)). It also indicates that FAR Alternate I for delivery of limited rights data may be appropriate for such contracts.

The contracting officer may grant permission for the contractor to copyright, publish, or release to others computer software first produced in the performance of a contract. However, certain specified conditions must exist, and the concurrence of the NASA Headquarters Office of Aerospace Technology, Commercial Technology Division (Code RC) must be obtained (NFS 1827.409(g)(B)(c)).

## **IV. RIGHTS IN DATA AND COMPUTER SOFTWARE UNDER GRANTS AND COOPERATIVE AGREEMENTS**

### **IV. A. General**

For the most part federal grant and cooperative agreement regulations and policies on RITD are fairly simple and straightforward when compared to the procurement regulations. In general, grant recipients may copyright any work developed under an award. The federal awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes, and to authorize others to do so. Absent, for the most part, are the detailed definitions of technical data and provisions regarding rights and deliverables.

Most agency grant policies or guidelines require that an awardee institution broadly disseminate the sponsored program's results and materials. This goal fits in well with universities' primary academic purposes. Even so, research administrators need to be familiar with some of the peculiarities in federal agency definitions of data and should remember that some agencies incorporate other language into grants or cooperative agreements. In essence, however, all

federal agencies must adhere to the intellectual property policy stated in 2 CFR 215.36 (OMB Circular A-110 (Section \_\_36 Intangible Property)), which includes data and copyrights.

2CFR215.36 (available at <http://www.whitehouse.gov/omb/circulars/a110/a110.html>) gives institutions of higher education and other nonprofit federal grant recipients the right to copyright any work developed under the award and provides the government with a license right (215.36(a)). The provision states “The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes and to authorize others to do so.”

An additional provision (215.36(c) states “the Federal Government has the right to:

- (1) Obtain, reproduce, publish or otherwise use the data first produced under an award.
- (2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.”

2 CFR 215.36 applies to all agencies unless different provisions are required by statute or approved by OMB.

215.36(d) implements the “Shelby Amendment” (P.L. 105-277), included in OMB’s FY ’99 appropriation. It gives the public the right to request data in published research findings that are used in developing agency regulations. It provides that, in response to a Freedom of Information Act (FOIA) request for such research data produced under an award and used by the federal government in developing an agency regulation, the federal awarding agency shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public under FOIA.

While no general definition of “data” is included in 215.36, for purposes of 36(d) “research data” are defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” Research Data does not include any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. It also does not include physical objects e.g. laboratory samples, trade secrets, commercial information, materials necessarily held confidential until published, or personnel, medical and similar information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

For purposes of this section, “published” is defined as either when research findings are published in a peer-reviewed scientific or technical journal or a Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law. “Used by the federal government in developing an agency action that has the force and effect of law” is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

A related statutory provision pertaining to data with implications for universities is the “Emerson Amendment” to the FY ’01 Treasury Appropriations Act (P.L. 106-554). Section 515 directed OMB to issue government-wide guidelines that provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of



information (including statistical information) disseminated by federal agencies. OMB published final guidelines on February 22, 2002 (67 FR 8452).

2CFR215 also contains a provision on a Property Trust Relationship (215.37) which provides that property including intangible property acquired with Federal funds shall be held in trust by the award recipient for the beneficiaries of the program or project under which the property was acquired. Agencies are authorized to require recipients to record liens or other notices indicating that use or disposition conditions apply to the property.

#### **IV. B. Standard Terms and Conditions for Research Grants**

A set of Standard Terms and Conditions was originally developed and demonstrated in 2000 by the Federal Demonstration Partnership (FDP; <http://thefdp.org/>), an association of federal agencies and academic research institutions with administrative, faculty and technical representation, and research policy organizations that work to streamline the administration of federally sponsored research. Effective January, 2008, the research agencies participating in the FDP were required to use the final version of the Research Terms and Conditions in research grants to organizations subject to OMB Circular A-110 (73 FR4563; 1/25/08; [http://nrc59.nas.edu/fr\\_notice\\_1\\_25\\_08.html](http://nrc59.nas.edu/fr_notice_1_25_08.html)). This applies to most agency research grants to COGR member institutions. The Research Terms and Conditions may be found at <http://www.nsf.gov/bfa/dias/policy/rtc/index.jsp>.

The Research Terms and Conditions on rights in data essentially follow 2CFR215.36 (OMB Circular A-110 \_\_36). They do not waive the federal government's license rights to data first produced under the award. Those agencies that participate in the FDP are required to use the core administrative requirements of 215.36 and may supplement the core set with agency, program or award specific requirements. Agencies that do not participate in FDP are encouraged to use the core set of administrative requirements. Agencies may include additional agency-specific terms and conditions for RITD. However, as noted in II.A. above, there has been a trend toward greater uniformity among the agencies in rights to data under federal grants. This applies particularly to RITD among the participating FDP federal agencies. (The Research Terms and Conditions also essentially incorporate 2CFR215.37 with no changes).

#### **IV. C. National Institutes of Health (NIH)**

NIH policy as set forth in the NIH Grant Policy Statement (GPS; [http://grants1.nih.gov/grants/policy/nihgps\\_2003/NIHGPS\\_Part7.htm#\\_Toc54600131](http://grants1.nih.gov/grants/policy/nihgps_2003/NIHGPS_Part7.htm#_Toc54600131)) provides that in general, grantees own the rights in data resulting from a grant-supported project. Special terms and conditions of the award may indicate alternative rights. Except as otherwise provided in the terms and conditions of an award, any publications, data or other copyrightable works developed under an NIH grant may be copyrighted without NIH approval. Rights in data also extend to students, fellows, or trainees under awards whose primary purpose is educational, with the authors free to copyright works without NIH approval. In all cases, NIH must be given a royalty-free, nonexclusive, and irrevocable license for the Federal government to reproduce, publish, or otherwise use the material and to authorize others to do so for Federal purposes. Data developed by a consortium participant also is subject to this policy.

NIH also participates in the FDP, and follows the Research Terms and Conditions on RITD. Interestingly, the NIH Grant Policy Statement includes a definition of data. For NIH purposes, “data” means recorded information, regardless of the form or media on which it may be recorded, and includes writings, films, sound recordings, pictorial reproductions, drawings, designs, or other graphic representations, procedural manuals, forms, diagrams, work flow charts, equipment descriptions, data files, data processing or computer programs (software), statistical records, and other research data.

As a means of sharing knowledge, NIH encourages grantees to arrange for publication of NIH-supported original research in primary scientific journals. Grantees also should assert copyright in scientific and technical articles based on data produced under the grant where necessary to effect journal publication or inclusion in proceedings associated with professional activities.

In addition, NIH requires all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine’s PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication. Previously NIH’s policy encouraged but did not require submission to PubMed Central. The NIH Public Access Policy applies to all peer-reviewed articles that arise, in whole or in part, from direct costs funded by NIH, or from NIH staff, that are accepted for publication on or after April 7, 2008. Institutions and investigators are responsible for ensuring that any publishing or copyright agreements concerning submitted articles fully comply with this Policy. For more information see <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>

NIH endorses the sharing of final research data to expedite translation of research results into knowledge, products, and procedures to improve human health. Its policy encourages the timely release and sharing of final research data from NIH-supported studies for use by other researchers. “Timely release and sharing” is defined as no later than the acceptance for publication of the main findings from the final data set. Effective with the October 1, 2003 receipt date, investigators submitting an NIH application seeking \$500,000 or more in direct costs in any single budget period are expected to include a plan for data sharing or state why data sharing is not possible. In addition, specific NSF programs may have their own data sharing requirements. One example is the program for Genome-Wide Association Studies (GWAS; see <http://grants.nih.gov/grants/gwas/>). These may include requirements for submission of detailed data sharing plans. The GWAS Policy Statement (NIH/NOT-OD-07-088) discourages assertion of any intellectual property claims to GWAS datasets.

NIH also considers the sharing of unique research resources (also called research tools) an important means to enhance the value of NIH-sponsored research. To provide further clarification of the NIH policy on disseminating unique research resources, NIH published *Principles and Guidelines for Recipients of NIH Research Grants and Contracts on Obtaining and Disseminating Biomedical Research Resources* (64 FR 72090, December 23, 1999), which is available on the NIH website ([http://ott.od.nih.gov/policy/rt\\_guide\\_final.aspx](http://ott.od.nih.gov/policy/rt_guide_final.aspx) ). These guidelines are incorporated in the NIH Grant Policy Statement, and should be viewed as a grant condition. On May 7, 2004, NIH published a new policy on sharing and distributing unique model organism research resources generated through the use of NIH funds (available at

<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-04-042.html> (NOT-OD-04-042)). NIH characterized this policy as an extension of the Research Tools policy. It requires that plans for sharing and distributing unique model organism research resources be included in NIH grant applications or contract proposals beginning with the October 1, 2004 receipt date.

#### **IV. D. National Science Foundation (NSF)**

NSF's policy is to encourage open scientific and engineering communication. NSF normally allows grantees to retain principal legal rights to intellectual property developed under NSF grants to provide incentives for development and dissemination of inventions, software and publications that can enhance their usefulness, accessibility and upkeep. Such incentives do not, however, reduce the responsibility that investigators and organizations have as members of the scientific and engineering community, to make results, data and collections available to other researchers.

NSF states in its Award and Administration Guide VI.D.2.a.; available at [http://www.nsf.gov/pubs/policydocs/pappguide/nsf09\\_29/aag\\_index.jsp](http://www.nsf.gov/pubs/policydocs/pappguide/nsf09_29/aag_index.jsp) that NSF normally will acquire only such rights to copyrightable material as are needed to achieve its purposes or to comply with the requirements of any applicable government-wide policy or international agreement. To preserve incentives for private dissemination and development, NSF normally will not restrict, or take any part of income earned from, copyrightable material except as necessary to comply with the requirements of any applicable government-wide policy or international agreement. In exceptional circumstances, NSF may restrict or eliminate a grantee's control of NSF-supported copyrightable material and of income earned from it, if NSF determines that this would best serve the purposes of a particular program or grant.

NSF's standard copyright clause (#18 in NSF's Grant General Conditions) states that except as otherwise specified in the grant or in the clause, the grantee may own or permit others to own copyright in all subject writings. The grantee agrees that if it or anyone else does own copyright in a subject writing, the federal government will have a non-exclusive, nontransferable, irrevocable, royalty-free license to exercise or have exercised for or on behalf of the U.S. throughout the world all the exclusive rights provided by copyright. Special copyright provisions may be negotiated in specific situations, such as grants affected by international agreements (see below).

NSF has a specific policy on the dissemination and sharing of research results (Award and Administration Guide VI.D.4.)). This policy states that investigators are expected to promptly prepare and submit for publication, with authorship that accurately reflects the contributions of those involved, all significant findings from work conducted under NSF grants. Grantees are expected to permit and encourage such publication by those actually performing that work, unless a grantee intends to publish or disseminate such findings itself. Investigators also are expected to share with other researchers, at no more than incremental cost and within a reasonable time, the primary data, samples, physical collections and other supporting materials created or gathered in the course of work under NSF grants. Grantees are expected to encourage and facilitate such sharing. Privileged or confidential information should be released only in a form that protects the privacy of individuals and subjects involved. Investigators and grantees are encouraged to share software and inventions created under the grant or otherwise make them or their products widely available and usable.

NSF also participates in the FDP, and has a similar provision on data sharing and dissemination in its FDP agency specific requirements (Article 20. a.). It also adds provisions (20 e. and f.) similar to its Grant General Conditions allowing it to direct a grantee to convey such rights in subject writings as may be required to comply with an international agreement, including requiring the grantee to acquire the ability to convey such rights, and that any transfer of copyright will be subject to the government license. It otherwise follows the Research Terms and Conditions with regard to RITD.

#### **IV. E. Department of Defense (DOD)**

The DOD Grant and Agreement Regulations (DODGARS) follow 2CFR215.36 (OMB Circular A-110) with regard to rights in data (see DODGARS Section 32.36; available at <http://www.dtic.mil/whs/directives/corres/html/321006r.htm>). The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. DOD components reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes, and to authorize others to do so. The federal government has the right to obtain, reproduce, publish or otherwise use the data first produced under an award; and to authorize others to receive, reproduce, publish, or otherwise use such data for federal purposes. The DODGARS also set forth the “Shelby Amendment” provisions, and define “research data” for these purposes (32.36(d)(2)(i)).

Several DOD research agencies participate in the Federal Demonstration Partnership, and follow the Research Terms and Conditions for grants to A-110 organizations.. These agencies include the Air Force Office of Scientific Research (AFOSR), the Army Medical Research Acquisition Activity (USAMRAA), the Army Research Office (ARO), and the Office of Naval Research (ONR). None of these DOD components currently have agency-specific conditions pertaining to rights in data.

#### **IV. F. Department of Energy (DOE)**

DOE permits institutions of higher education and other nonprofit organizations that receive DOE assistance awards to claim copyright with a license reserved to DOE to use the work for federal purposes. Its provisions (10CFR600.136) closely follow 2CFR215.36. Formerly DOE had migrated its approach to rights in data under contracts to its approach under grants. It has a long history of linking the treatment of data first produced under contracts with the treatment of data first produced under assistance agreements, incorporating DEAR policies, procedures and clauses into its grant terms and conditions. However, given DOE’s participation in the Federal Demonstration Partnership (FDP), this created a substantial dichotomy between FDP and non-FDP institutions with regard to the terms and conditions governing RITD under DOE awards. DOE’s FDP agency-specific conditions do not address RITD or other intellectual property rights. This dichotomy now has disappeared, and DOE follows the general A-110 approach for all grantees.

#### **IV. G. Other Agencies**

##### **IV. G. 1. National Aeronautics and Space Administration (NASA)**

NASA also follows 2CFR215.36 with regard to rights in data. According to the NASA Grants Handbook (Section 1260.136; available at [http://prod.nais.nasa.gov/pub/pub\\_library/grcover.htm](http://prod.nais.nasa.gov/pub/pub_library/grcover.htm)) the recipient may assert copyright in any work that is copyrightable and was created, or for which copyright ownership was purchased, under an award. NASA is granted a royalty-free, nonexclusive and irrevocable right to reproduce, publish, prepare derivative works or otherwise use the work for federal purposes, and to authorize others to do so. NASA has the right to obtain, reproduce, publish, or otherwise use the data first produced under an award, and to authorize others to receive, reproduce, publish, or otherwise use such data for federal purposes.

NASA also is a member of the FDP. Its agency-specific requirements do not address copyright or RITD.

#### **IV. G. 2. Environmental Protection Agency (EPA)**

EPA also follows 2CFR215.36 with regard to data. The EPA grant regulations (Section 30.36; available at [http://www.access.gpo.gov/nara/cfr/waisidx\\_00/40cfr30\\_00.html](http://www.access.gpo.gov/nara/cfr/waisidx_00/40cfr30_00.html)) provide that grant recipients may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. EPA reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so. The federal government has the right to obtain, reproduce, publish or otherwise use the data first produced under an award, and to authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

EPA also participates in FDP. It has no agency-specific requirements for rights in data or copyright. The EPA agency-specifics do require recipients to provide copies of peer reviewed journal articles or other papers or publications resulting from the research to EPA, and to acknowledge EPA support.

#### **IV. G. 3. Department of Agriculture (USDA)**

The USDA agency with which universities most frequently deal is the Cooperative State Research, Education and Extension Service (CSREES). CSREES award terms and conditions also follow 2CFR215.36 with regard to rights in data and copyright (7CFR3019.36). However, CSREES has a special grant condition that if genome sequence data have been obtained, the sequence **must** be submitted to GenBank. The date of submission to GenBank must be on the same date as the Government's right to publish as indicated in the terms and conditions (basically the date of grantee public disclosure or patent application). Submission of data to GenBank is without charge. Information concerning GenBank protocols may be obtained via <http://www.ncbi.nlm.nih.gov/>, or by contacting the National Center for Biotechnology Information. CSREES also has a data sharing requirement, and requirements for submission of plant and animal genomic data to GenBank or other repositories. See <http://www.csrees.usda.gov/business/awards/awardterms.html>.

CSREES also is an FDP member agency. Their agency specific conditions contain requirements pertaining to submission of animal or plant genome and protein sequence data, and sharing and distribution of such data that are similar to the requirements in the CREES General Terms and Conditions.

#### **IV. G. 4. Department of Education (ED)**

The Department of Education General Administrative Regulations (EDGAR) provide guidance for the administration of grants to universities, hospitals and other nonprofit organizations; The regulations (Section 74.36; available at <http://www.ed.gov/policy/fund/reg/edgarReg/edgar.html>) follow 2CFR215.36 and state that universities are free to assert copyright ownership in material developed under the grant. The Department of Education and other agencies receive a royalty-free, nonexclusive, and irrevocable right to reproduce, publish or otherwise use, and to authorize others to use the work for federal government purposes. ED is not a member of the FDP.

#### **IV. G. 5. National Foundations on the Arts and Humanities (NEA/NEH)**

Copyright ownership and rights to the federal government are the same as the other agencies above. Both agencies receive a royalty-free, non-exclusive and irrevocable license to reproduce, publish, and to authorize others to use, for federal government purposes the copyright in any work developed under a grant, cooperative agreement or subaward. NEH states that "federal purposes" include the use of grant products in activities or programs undertaken by the federal government, in response to a governmental request, or as otherwise required by federal law. However, the federal government's use of copyrighted materials is not intended to interfere with or disadvantage the grantee or assignee in the sale and distribution of the grant product (<http://www.neh.gov/manage/gtcao.html#intangible>). The NEA Grant and Cooperative Agreements General Terms and Conditions simply state that grantees may copyright any materials (#20) and refer to the A-110 administrative requirements (#25). NEA/NEH do not participate in the FDP.

#### **IV. G. 6. Department of Transportation (DOT)**

The Department of Transportation also follows 2 CFR215.36. Its grant regulations (49 CFR19) incorporate 2CFR215.36 (49CFR19.36) <http://www.dot.gov/ost/m60/grant/49cfr19.htm#19.36>). DOT does not participate in the FDP.

### **V. PROTECTION and MARKING OF DATA, and SOFTWARE**

#### **V. A. General Considerations**

One of the most important responsibilities of an institution with respect to data produced or delivered to the government is to protect the institution's and government rights appropriately. Federal contract regulations, especially those of DOD, rigorously require that technical data or computer software be marked with a proper notice identifying all sections where the government has limited rights. If the restricted data or computer software is not appropriately marked in accordance with the contract regulations, the government by default obtains unlimited rights. Simply stated: the potential commercial value of proprietary data that are not marked properly is lost.

There are other traps for the unwary. If an institution marks the technical data and computer software, but the marking is done incorrectly, i.e. not in accordance with agency regulations, the government may also obtain unlimited rights. Protection and marking requirements vary among agencies and are different under contracts and grants. The following discussion provides information about some of the intricacies in marking data and software and the consequences of not doing it properly.

#### **V. B. FAR Marking Requirements**

The FAR clauses state precisely what a limited or restricted rights notice or legend must say when it is placed on data and software. Generally, the statement should provide notice to the government that it may reproduce the data for government purposes only but that the government may not use it for manufacturing purposes or disclose the data outside the government. See FAR 27.404-2(c).

Unlike the DFARS, the FAR clauses do not state where to place the notice on the data and computer software. For instance, they are silent as to whether each page of the data should be marked as opposed to marking the first page or first screen on the software or marking just the software packaging.

If data (including software) are delivered without either the limited or restricted rights legend or copyright notice where appropriate, the FAR presumes that the institution provided the government with unlimited rights. See 27.404-5(b)(1).

The government has several options if the data or software is incorrectly marked. The government has the right to ignore the markings, cancel the markings, or to return the data to the contractor as non-acceptable. Written notice to the contractor is required and the contractor is given 60 days to provide a written justification for the markings (27.404-5(a)(2)). In the event the contractor has delivered data and inadvertently omitted the notice, the contractor within 6 months of delivery may request adding the notice, if the data has not been disclosed outside the government. Alternately, the government may allow the remarking of the data and software at the contractor's expense. (27.404-5(b)).

When research administrators know that a contract, regulated by FAR clauses, produces deliverable data, it is critically important for them to work with faculty and members of the research program to educate them on the appropriate way to mark their deliverables to the government. This is particularly needed if it is likely that a corporate subcontractor or corporate collaborator will be involved; if there are already existing copyrighted data or software that will be delivered; or if there is any opportunity to transfer or commercialize the data or software. Since the FAR does not provide as much guidance in marking and protecting data and software, it is recommended that universities incorporate the DFARS standards, which are discussed below, into their procedures and policies for protecting data and software.

### **V. C. DFARS Marking Requirements (DFARS 252.227-7103-10; 7013 (f) and 14(f))**

When DOD revised its rights in technical data and computer software clauses in 1995, it also developed much clearer instructions to contractors for the marking and delivery of data and software to the government. Unfortunately, this precision is a two-edged sword. While the DOD regulations provide more information for marking, they also make it mandatory to mark, in a very prescriptive manner, all restricted data and software delivered to DOD. The primary reason for the greater attention to marking was the new government purpose rights category for data and computer software developed with mixed funding.

In addition to correctly marking the data and software, the contractor must maintain written records sufficient to justify the validity of any restrictive markings on technical data and software delivered to DOD. DFARS 227.7103-11; 227.7013(g); 7014(g). While marking data may be part of the corporate environment, it is not part of the daily life of many universities and requires an education process for administrators and faculty. The DFARS state that the contractor must have written procedures sufficient to assure that the restrictive markings are used only when authorized. Universities may be well advised to develop a policy or, at a minimum, a written

statement explaining the requirements and processes they employ to mark and protect their technical data and software.

After developing a written policy or statement, the next step is to ensure that during the negotiation processes the university identifies, in an attachment to the contract, all technical data and computer software that will be delivered to the government with restrictive rights. If during the progress of the research, additional restrictive technical data or computer software is required to be delivered to the government, the university may negotiate with the government to modify the attachment by providing the government with a special form that identifies the additional restricted technical data and computer software. (7013&14 (e)(3)).

Once an institution has determined what restrictive data it will deliver to the government, the marking process begins. DFARS 252.227-7013&14(f) prescribe that one of three allowed markings or legends must be used on the technical data and software. The three allowed markings each apply to one of the three categories of government rights: government purpose rights, limited rights, and special (specifically negotiated) license rights. The notice or legend must contain the identification of the appropriate restrictive rights, contract number, contractor's name, contractor's address, definition of the government rights and restrictions and, for government purpose rights, expiration date of the restrictive rights.

The DFARS provides the specific language (see DFARS 252.227-7013&14 (f)(1),(2)(3)&(4)) that needs to be included in the restricted rights legend or notice, and also states how and where the legend should appear on the technical data or software. Legends or notices on the restricted technical or computer software need to be accurate, conspicuous, and legible. In addition, the legend must be placed on the transmittal document or storage container and on each page of the printed material. DOD also requires that the delivered restricted data be highlighted, underscored, or identified with marks that separate them from the technical data or software that is being delivered to the government without restrictive rights. Technical data transmitted directly from one computer or computer terminal to another must also contain a notice of restrictive use.

#### **V. D. DEPARTMENT OF ENERGY MARKING REQUIREMENTS**

While DOE generally has a more restrictive approach than other civilian agencies to rights in data, as discussed in Part III.D. above, DOE uses FAR clauses for marking restricted data delivered to it by a contractor. DOE's regulations follow the FAR clauses and require that the restricted data be marked with the legend that notifies the government that it has no rights to commercially disclose the restricted data outside of the government.

#### **V. E. Marking Requirements for Grants**

Generally, grants do not have requirements for the marking and protection of data and software created or delivered under a grant project. In fact, as stated earlier, the primary goal of the granting agencies is to disseminate the research results. However, institutions and faculty do have to take affirmative steps in identifying data and software that were created under the sponsored program and they must correctly mark restricted rights data that are delivered to the government.

NSF guidelines illustrate basic grant requirements for marking publications that are based on or developed under federal financial support. All such publications are required to include an acknowledgment of the financial assistance. The required acknowledgment states "This material



is based on work supported by the National Science Foundation under Grant No.\_\_\_\_." Disclaimers are also required on all publications that are not published as scientific articles or papers appearing in scientific, technical or professional journals. The disclaimer should read "Any opinions, findings and conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect those of the National Science Foundation."

Most grant guidelines are silent on how to mark restricted data delivered to the government. However, most grant guidelines clearly state that if unmarked data or software are delivered to the government without restrictive markings, the government obtains an unlimited license for any use in the delivered data. By using the DFARS marking requirements an institution will be assured of correctly marking and retaining their own or their subcontractor's rights to the delivered restricted data.

## **VI. CONCLUSION**

Users are cautioned that the federal policies and regulations cited in this document are subject to change. When dealing with specific issues and requirements users should consult the original source material. Also, as discussed above, the treatment of rights in data in the federal regulations, particularly with regard to copyright and computer software, does not necessarily reflect the current status of the law in these areas. It is unfortunate that the most recent revision of FAR Part 27 did not address this issue.