Subpart 927.4—Rights in Data and Copyrights

Parent topic: PART 927—PATENTS, DATA, AND COPYRIGHTS

927.400 Scope of subpart.

This subpart sets forth DOE's policy, procedures, and instructions for contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into, with or for the benefit of the Government.

927.401 Definitions.

Technical data means data (other than computer software) of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer database (see appendix A to subpart D of 2 CFR part 910).

927.402 Policy.

The technical data and scientific and technical information (STI) policies are directed toward achieving the following objectives:

(a) Making the benefits of the energy research, development and demonstration programs of DOE widely available to the public in the shortest practicable time;

(b) Promoting the commercial utilization of the technology developed under DOE programs;

(c) Encouraging participation by private persons in DOE energy research, development, and demonstration programs; and

(d) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

927.404-70 Rights in technical data in subcontracts.

(a) Prime contractors and higher-tier subcontractors, in meeting their obligations with respect to contract data, must obtain from their subcontractors the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in this subpart and subject to the approval of the Contracting Officer, where required, prime contractors or higher-tier subcontractors must select appropriate technical data provisions for their subcontracts.

(1) In many, but not all instances, use of the clause at FAR 52.227-14, Rights in Data—General, as

supplemented pursuant to this subpart, in a subcontract will provide for sufficient Government rights in and access to technical data. The inspection rights afforded in Alternate V to the clause at FAR 52.227-14 normally should be obtained only in first-tier subcontracts for research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract.

(2) If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the Contractor shall so inform the Contracting Officer in writing and not proceed with the subcontract award without written authorization of the Contracting Officer.

(3) In prime contracts or higher-tier subcontracts that contain the clause at FAR 52.227-16, Additional Data Requirements, the Contractor or higher-tier subcontractor must determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract or higher-tier subcontract.

(b) As is the case for DOE in its determination of technical data requirements, the clause at FAR 52.227-16, Additional Data Requirements, should not be used at any subcontracting tier where the technical data requirements are fully known. Normally, the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration work. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the subcontractor's limited rights data or restricted computer software for their private use, and they shall not acquire rights to limited rights data or restricted computer software on behalf of the Government for standard commercial items without the prior approval of Patent Counsel.

927.404-71 Statutory programs.

Occasionally, Congress enacts legislation that authorizes or requires the Department to protect from public disclosure specific data first produced in the performance of the contract. Examples of such programs are “the Metals Initiative” and section 3001(d) of the Energy Policy Act. In such cases DOE Patent Counsel is responsible for providing the appropriate contractual provisions for protecting the data in accordance with the statute. Generally, such clauses will be based upon the clause at FAR 52.227-14, Rights in Data-General, with appropriate modifications to define and protect the “protected data” in accordance with the applicable statute. When contracts under such statutes are to be awarded, contracting officers must acquire from Patent Counsel the appropriate contractual provisions. Additionally, the contracting officer must consult with DOE program personnel and Patent Counsel to identify data first produced in the performance of the contract that will be recognized by the parties as protected data and what data will be made available to the public notwithstanding the statutory authority to withhold the data from public dissemination.

927.406 Acquisition of data.

927.406-4 Acquisition and use of technical data.

To meet the objectives stated in 927.402, DOE has extensive technical data needs.

(a) Section 982 of the Energy Policy Act of 2005 (EPAct 2005, 42 U.S.C. 16352) mandates that the Secretary of Energy, through the Office of Scientific and Technical Information, shall maintain within the Department publicly available collections of STI resulting from research, development, demonstration, and commercial-applications activities supported by DOE.

(b) Section 105 of the DOE Energy Research and Innovation Act (Pub. L. 115-246) further mandates that DOE establish and maintain a public database populated with information on unclassified research and development projects, as well as relevant literature and patents.

(c) The legal rights in technical data acquired by the Government through DOE contracts, other than management and operating (M&O) contracts (*see* 970.2704), or contracts involving the production of data necessary for DOE sites/facilities management or operations, are set forth in the clause at FAR 52.227-14, Rights in Data—General, as supplemented in accordance with this subpart. However, those clauses do not obtain for the Government delivery of any data whatsoever. Rather, known technical data delivery requirements shall be set forth as part of the contract. For Research and Development contracting, requirements for results (conveyed as STI) are addressed in 935.010 and should be set forth in the contract.

(d) Contracting Officers shall contact Patent Counsel assisting their contracting activity or the Assistant General Counsel for Technology Transfer and Intellectual Property for assistance in selecting, negotiating, or approving appropriate data and copyright clauses in accordance with the procedures set forth in this subpart and FAR subpart 27.4. In particular, Contracting Officers shall seek the advice of Patent Counsel regarding any situation not in conformance with this subpart, including the inclusion or modification of alternate paragraphs of the clause at FAR 52.227-14, as supplemented pursuant to this subpart, the exclusion of specific items from that clause, the exclusion of the clause at FAR 52.227-16, Additional Data Requirements, and the inclusion of any special provisions in a particular contract. Deviations shall follow the requirements in FAR subpart 1.4 and subpart 901.4.

(e) Contractors are required by Alternate VIII of the clause at 952.227-14, as supplemented pursuant to this subpart, to acquire permission from DOE Patent Counsel to assert copyright in any data including computer software first produced in the performance of the contract. This requirement reflects DOE's established software distribution program, and DOE's statutory dissemination obligations. When a contractor requests permission to assert copyright, Patent Counsel shall predicate its decision on the considerations reflected in paragraph (e) of the clause at 970.5227-2, Rights in Data—Technology Transfer.

(f) In many situations the achievement of DOE's objectives would be frustrated if the Government, at time of award, did not obtain on behalf of responsible third parties and itself limited license rights in and to limited rights data or restricted computer software, or both. Such rights are necessary for the practice of subject inventions or data first produced or delivered under the contract. When the contract is for research, development, or demonstration, Contracting Officers should consult with program officials and Patent Counsel to determine whether such rights should be acquired. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of such organizations have been authorized in accordance with 35 U.S.C. 202(f). In all cases when the Contractor has agreed to include a provision assuring commercial availability of background patents, consideration should be given to securing for the Government and responsible third parties at reasonable royalties and under appropriate restrictions, co-extensive license rights for data, which are limited rights data and restricted computer software.

927.408 Cosponsored research and development activities.

Because of the Department of Energy's statutory duties to disseminate data first produced under its contracts for research, development, and demonstration, the provisions of FAR 27.408 do not apply to cosponsored or cost shared contracts.

927.409 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at FAR 52.227-14, Rights in Data-General, and supplement it with Alternates I and V of FAR 52.227-14 and Alternate VIII of FAR 952.227-14, Rights in Data-General, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract. Generally, a contract should contain only one data rights clause. However, where more than one is needed as prescribed in paragraph (b) of this section, the contact should distinguish the portion of contract performance to which each pertains.

(b)

(1) However, the rights in data in specific situations will be treated as described, where the contract is—

(i) For the production of special works of the type set forth in FAR 27.405-1, the Patent Counsel shall insert the clause at FAR 52.227-17, Rights in Data-Special Works, including Alternate I. The clause at FAR 52.227-14, Rights in Data-General, may be included in the contract and made applicable to data other than special works, as appropriate (see paragraph (e) of FAR 27.409);

(ii) For the acquisition of existing data works, as described in FAR 27.405-2 (see paragraph (f) of FAR 27.409);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (see paragraph (i) of FAR 27.409);

(iv) For architect-engineer services or construction work, in which case the Patent Counsel shall utilize the clause at FAR 52.227-17, Rights in Data-Special Works, including Alternate I;

(v) A Small Business Innovation Research contract (see paragraph (h) of FAR 27.409);

(vi) For management and operation of a DOE facility (see 970.2704) or other contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, certain decontamination and decommissioning activities, or the building and/or operation of other DOE facilities, after consultation with Patent Counsel (see 927.402-1(b));

(vii) Awarded pursuant to a statute expressly providing authority for the protection of data first produced thereunder from disclosure or dissemination. (see 927.404-70);

(viii) For basic or applied research with educational institutions (other than those in which software is specified for delivery unless the software will be released as open source software or other special circumstances exist), the Patent Counsel may use the clause at FAR 52.227-14 with its Alternate IV instead of Alternate VIII of the clause at FAR 952.227-14, Rights in Data-General;

(ix)

(A) Requiring license rights that are deemed necessary, the Patent Counsel should supplement the clause at FAR 52.227-14, Rights in Data—General, with Alternate VI, as provided at 952.227-14, Rights in Data—General, which will normally be sufficient to cover limited rights data and restricted computer software for items and processes used in the contract and necessary to ensure widespread commercial use or practical utilization of a subject of the contract. The phrase “subject of the contract” in Alternate VI is intended to limit licensing to the fields of technology specifically contemplated under the contract; the phrase may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in the clause at 952.227-13, Patent Rights—Ownership by the Government.

(B) Where limited rights data and restricted computer software are the main purpose or basic technology of the research, development, or demonstration effort of the contract (rather than subcomponents, products, or processes ancillary to the contract effort), the limitations in paragraphs (k)

(*1*) through (4) of Alternate VI of the clause at 952.227-14 should be supplemented or deleted. Paragraph (k) of Alternate VI further provides that limited rights data or restricted computer software may be specified in the contract as being excluded from or not subject to the licensing requirements. This exclusion is implemented by limiting the applicability of the provisions of paragraph (k) of Alternate VI to only those classes or categories of limited rights data and restricted computer software determined essential for licensing. Although contractor licensing may be required under paragraph (k) of Alternate VI, the final resolution of questions regarding the scope of such licenses and the terms thereof, including provisions for confidentiality, and reasonable royalties, is left to the negotiation between the contractor and the Contracting Officer; or

(x) Where the contractor has access to certain categories of DOE-owned Category C-24 restricted data, as set forth in 10 CFR part 725, Alternate VII of 952.227-14, Rights in Data-General, shall be used. DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. In addition, in any other types of contracting situations in which the contractor may be given access to restricted data owned by DOE, appropriate limitations on the use of such data must be specified.

(d) The contracting officer shall insert the clause at FAR 52.227-16, Additional Data Requirements, in solicitations and 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.) See FAR 27.406-2. Patent Counsel may use the clause at FAR 52.227-16, Additional Data Requirements, along with the clause at FAR 52.227-14, Rights in Data—General, to require the contractor to furnish additional technical data, in instances where technical data requirements were not known at the time of award. There is, however, a built-in limitation on the kind of technical data that a contractor may be required to deliver under either the contract or the Additional Data Requirements clause. This limitation is in the withholding provision of paragraph (g) of FAR 52.227-14, Rights in Data—General, which provides that the contractor need not furnish limited rights data or restricted computer software. Unless Alternate II or III to the clause at FAR 52.227-14 is used, the Additional Data Rights clause is specifically intended that the contractor may withhold limited rights data or restricted computer software even though a requirement for technical data specified in the contract or called for delivery (pursuant to the clause at FAR 52.227-16) would otherwise require the delivery of such data.

(m) Contracting officers shall incorporate the solicitation provision at FAR 52.227-23, Rights to Proposal Data (Technical), in all requests for proposals.

(n) Contracting officers shall include the solicitation provision at 952.227-84 in all solicitations

involving research, developmental, or demonstration work.