A Trap for the Unwary: Differing Methods of Protecting Data

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Every government contract includes clauses that provide the government with rights in a contractor’s delivered technical data and computer software. The breadth of the rights obtained by the government controls, as a practical matter, the future commerciality of the item described in the technical data and the computer software. Conventional wisdom dictates that protecting data or software to which a contractor believes the government should obtain rights other than unlimited rights (which permits the government to provide your data or software to any entity for any purpose) is accomplished by providing notice to the government and by marking the data and software with restrictive use legends.

However, there is a very important distinction between the Federal Acquisition Regulation (FAR) (which governs civilian agency contracts, including the newly formed Department of Homeland Security) and the Department of Defense FAR supplement (DFARS) in the way a contractor is required to protect its data and software from a government claim of “unlimited rights.” While DOD favors the “disclosure with markings” approach, the FAR demands the “withholding” of the information from the government. As discussed below, even experienced contractors may not be aware of the critical distinction between the agencies in how information must be protected from unlimited disclosure.

In a DOD contract, the conventional wisdom noted above holds true—the contractor is required to deliver data it seeks to protect with the requisite prior notice to the government and the inclusion of restrictive markings on the data and software. If done properly, the government will obtain only limited or restricted rights in the data and software.
In a civilian agency contract, however, the basic method of protecting data and software is to withhold the information from the government. Under the standard technical data rights clause (governing both technical data and computer software), if the contractor seeks to assert that the government should obtain only limited or restricted rights in the data or software in question, it must withhold the data or software and submit form, fit, or function data instead.

This is true even if the data or software in question is a deliverable under the contract. If the contractor provides the data or software to the government, even with restrictive markings, the government obtains unlimited rights in the data or software. A recent U.S. Court of Federal Claims decision illustrates how easily a contractor can lose its technical data rights if the appropriate method of protection is not followed.

In Erwin & Associates, Inc v. United States, 59 Fed. Cl. 267 (2004), the court ruled that the contractor failed to protect its technical data under the FAR, thereby granting the Department of Housing and Urban Development (HUD) unlimited rights in the data. The contractor had delivered technical data as required by a contract containing the FAR’s basic “Rights in Data – General” clause. HUD later provided the data to competitors and an internal data warehouse. The contractor claimed that HUD had breached its contract by disclosing the technical data, and argued that oral statements, letters, and e-mails to a variety of HUD offices constituted “limited rights” notice protecting the technical data. The court rejected the contractor’s argument indicating that the contractor was required under FAR to withhold the data after identifying it and submit form, fit, or function data instead.

The court’s ruling highlights the fact that a contractor needs to know and strictly follow the requirements for protecting its technical data under a government contract. As civilian agencies and DOD differ as to the basic way in which contractors can protect their data and software, even an “experienced and respected government contractor,” as the court described the contractor in Erwin, can unintentionally grant the government unlimited rights to its data.

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