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Research and Development Data Policies
of Civilian Government Agencies

by

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Presented to

Third Annual Briefing Conference
on Government Procurement
Huntsville, Alabama
October 15, 1970



Overview of the Data Policies Used by
Civilian Agencies in R&D Contracting

The major elements of a data policy concern the right of the contractor, the Government and the public to use the data resulting from government research and development contracts. For the most part, the data clauses contained in many civilian agency contracts grant to the Government unlimited rights in the data first produced under the contract, which include the right in the Government to make the results of the contracted research and development available to the public. The rights-in-data provisions also cover copyrights and usually grant the Government a royalty-free license in pre-existing copyrighted material incorporated into the data delivered to the Government. Some agencies also permit their contractors to copyright the data generated and, if so, obtain a royalty-free license in this copyright for the benefit of the Government.

STANDARD FORM NO. 602

N71-14092
(ACCESSION NUMBER)

(THRU)

18
(PAGES)

63
(CODE)

IMX 66509

34

34

To a lesser extent, the rights-in-data provisions included in these agencies' contracts require the contractor to obtain clearance from the Government prior to the publication of data produced under the contract and, further, some agencies include acknowledgement of source or credit provisions in their data clauses.

Proprietary rights, such as trade secrets, are recognized, to some extent, by three civilian agencies, AEC, NASA and the Department of Interior. However, as a general rule, most civilian agencies do not permit a contractor to protect any data called for by the contract by restrictions placed on such data, as does the Department of Defense, or by withholding the delivery of proprietary data, as does NASA.

In this talk I will review some of the general data provisions used by various government agencies, but first it is necessary to define the word "data" as used by these agencies. We can equate the term "data" with the DOD definition of "technical data," with the understanding that this term generally includes computer programs and information data bases, but does not include business information. Also, in contrast to the complex DOD ASPR data provisions, I will not talk about such esoteric subjects as technical data warranty, data management, data quality, predetermination of rights, mixed data, removal of unauthorized markings, procurement data packages, and restraint of trade provisions.

What Should be the Data Policies
of the Civilian Agencies

Is it possible to develop one data policy which could be used by all these agencies? Is there any logical explanation for the difference in the data policies now used by the civilian agencies? Should the data policy recognize private rights such as proprietary data or unlimited rights data? What should be the copyright policy of these agencies? When should the data policy seek to control the publication of the results of the contracted research? What is the proper balance of interests between the Government and industry with regard to the publication of research results, the protection of proprietary rights and the commercialization of the data flowing from the Government's research efforts? Without being presumptuous and even attempting to answer these questions, it may be of value to make you aware of the range or the differences in the data policies of the major civilian agencies which contract for research and development, with the hope that it may give you a better perspective of your own data problems.

Notwithstanding the requirements of the so-called Freedom of Information Act, which requires agencies to publish policies affecting the public in the Federal Register, the Department of Transportation, the Department of Housing and Urban Development, the Department of Health, Education and Welfare, the National Science Foundation and the Department of Interior have

not published agency-wide data regulations or policies in the Federal Register. Also, there is no Federal Procurement Regulation data policy. However, of these agencies, the Department of Interior has recently published proposed regulations for the Office of Saline Water, the Federal Aviation Administration of DOT has published their data regulations, and the Department of Agriculture has also published their data policies to some extent. Of the civilian agencies, NASA has the most developed, published data policies, followed by AEC. The philosophy of the Freedom of Information Act is that the public has a right to know about the policies which will affect them. To a considerable extent, the civilian agencies have failed in notifying the public of their data policies. One must look to the contract general provisions of a particular agency to ascertain its data policies.

NASA's Data Regulations

Let us examine the data policies of the civilian agencies having the most developed policies, i.e. NASA's, to the recently proposed regulations for Interior's Office of Saline Water. NASA's basic data clauses are specified in Part 9.2 of the NASA Procurement Regulations.^{1/} The first clause listed therein is called Data Requirements and is, in effect, an option in the Contracting Officer to call for many general data items in the event he does not specify these items in the schedule of

the contract. The NASA Data Requirements clause is similar in effect to the proposed ASPR Deferred Ordering clause. It was promulgated because of our awareness that the schedules in NASA contracts were often incomplete in their data requirements.

NASA has two basic rights-in-data clauses. The first is used in most R&D contracts where data is a subsidiary or incidental item to the contract work effort. Here, the Government obtains the right to use the subject data for any purpose whatsoever unless the contractor copyrights this data. If he does, the Government obtains a royalty-free license to use the copyrighted data. The contractor is permitted to withhold data concerning standard commercial items or proprietary data concerning items developed at private expense and sold or offered for sale if, in lieu thereof, adequate identification of the item concerned in a form, fit and function format is delivered to NASA. Unlike the ASPR data provisions, a contractor may not place any restrictive marking on the data delivered to NASA. His option is to withhold proprietary data from delivery -- a practice that has resulted in what is known as "swiss cheese" drawings. The contractor does not have the option of delivering his proprietary data with restrictive markings.

The second data clause used by NASA is entitled Rights in Data--Special Situations and is used where the production

of data is (a) the primary object of the contract, (b) intended primarily for use by the Government alone, or (c) intended primarily for the general use by the public. In this clause, the Government obtains unlimited rights in the data first produced in the performance of the contract, which means that the contractor may not copyright this data. No withholding of any data specified in the contract schedule is permitted, nor are restrictive markings permitted on any such data. Both clauses contain provisions wherein the contractor must either grant the Government a license in pre-existing copyrighted data, incorporated into the data delivered under the contract, to the extent that he has authority to do so, or obtain the Contracting Officer's permission to purchase a license or to deliver such data without a copyright license.

AEC's Data Policies

AEC's data policy is found in their Procurement Regulation on patents and copyrights^{2/} and in their required clauses for research and development contracts. The AEC copyright regulations are framed in a permissive tone rather than in mandatory rules as to which copyright clause should be included in a particular contract.

Basically, the AEC Procurement Regulations require the use of their clauses entitled "Drawings, Designs, and Specifications" and "Private Use of Contract Information and Data" in

their research and development contracts.^{3/} These clauses state that the data (scientific and technical data, specifications, reports, papers, articles and R&D memoranda) relating to the work are the physical property of the Government and that the Government has a right to use such data for any purposes whatsoever without any claim for additional compensation by the contractor. The contractor may retain a copy of this data for its own use. However, such use is limited, without further permission, to performance of the particular AEC contract involved. These provisions do not, in AEC's view, destroy the copyright aspect of the data generated under their contracts and they, therefore, also include a copyright clause in their R&D contract.

Two different copyright clauses are provided.^{4/} In the first clause, the contractor holds the copyright to data produced under the contract in trust for AEC. AEC may then determine the disposition of the title to the copyright, subject to a royalty-free license in the Government to use, translate or reproduce the copyrighted material and to authorize others so to do. This provision is preferred for contracts containing the requirements that all papers or other similar materials are the property of the Government. The second copyright clause may be used in place of the first clause. In the second clause, the Government retains a royalty-free license in all copyrighted

material first produced or furnished under the contract to use, reproduce or dispose of such material, and to authorize others so to do. A similar copyright license is required for copyrighted material not first produced under the contract if the contractor has the right to grant such a license without the payment of compensation. In the event the license for pre-existing copyrighted material is not granted to the Government, the contractor is not to include this material into the contract work product without the Contracting Officer's approval.

The AEC "Drawings, Designs, and Specifications" and "Private Use of Contract Information and Data" clauses do not specifically give the Government rights in pre-existing proprietary information, trade secrets and know-how. If the Government needs such rights, contractual provisions are suggested in the AEC Procurement Patent Regulations, Subpart 9-9.5008-7, entitled "Background Technical Data." These provisions grant the Government a license to use any pre-existing secret process or know-how made, developed or acquired prior to the completion of the contract which is utilized, tested, or embodied in the contract work or technical reports. The license to use may be further limited to the Government and restrictive legends placed on the data disclosing the secret or know-how.

NSF's Data Policies

The National Science Foundation has no formally published data policy; however, its data provisions or policy may be obtained by reviewing its contract general provisions.^{5/} These provisions contain a rights-in-data clause which defines the terms "data" and "other data." Briefly, "data" are those writings, recordings, computer programs, etc., first generated in the performance of the contract work. The Government obtains sole property rights in "data" and the contractor may not publish or release "data" without permission of the Contracting Officer, at least until the Government has released this data to the public. "Other data" is defined as that data not first produced under the contract. As to "other data," the Government obtains a royalty-free license to use "other data" if the contractor has a copyright. If he does not have the right to grant a copyright license in "other data" to the Government, the contractor is not to include copyrighted material in "other data." The clauses used by NSF do not refer to restrictively marked data or proprietary data.

In contracts with other than educational institutions, NSF includes a data withholding provision similar to that in the ASPR where 10% of the contract price may be withheld until the contractor delivers all the data called for. Finally, in the scientific education area, a contractor may request

copyrights in the data developed under his contract or grant in much the same manner as provided for by the Office of Education, as will be discussed.

HEW's Data Policies

The Department of Health, Education and Welfare does not have a published data policy. The rights-in-data policy for HEW is contained in Clause 12 of their general provisions.^{6/} This policy is used by all agencies of HEW except the Office of Education. Clause 12 of HEW's boilerplate general provisions, Rights-in-Data, defines "subject data" as writings, sound recordings, pictorial reproductions, etc., specified to be delivered under a contract. The Government obtains the right to use, duplicate and dispose, for any purpose whatsoever, all subject data. This right is limited by the fact that the contractor is permitted to copyright subject data first produced under the contract, subject to a royalty-free license in the Government to use such data throughout the world. Whenever subject data is copyrighted and is not first produced under the contract, either a broad royalty-free license must be granted to the Government, or contractor is required to notify the Contracting Officer of all data which was not first composed or produced in the performance of the contract and, therefore, which is not licensed under this clause, and also

of all invasions of the right of privacy that may be contained in subject data.

Finally, the contractor agrees that he will not publish or disseminate any information resulting from the work under the contract without the approval of the Project Officer. The last provision is now omitted unless the Project Officer determines that the information resulting from the contract performance should not, in fact, be published without prior approval.

The Office of Education of HEW has a developed, published data policy which has an interesting twist to it. This office has its own data provisions which it uses instead of the standard HEW clause. This provision, entitled "Copyrights in Publications," defines the word "materials" instead of the word "data." In effect, the word "materials" is the same as the word "subject data" in the HEW clause, but it does specifically include computer programs. It is slightly broader than the HEW clause since it includes both material specified to be delivered, as well as the material produced under an Office of Education contract. The contractor is not permitted to assert any rights in OE material and all such material is to be made freely available to the Government and the general public, i.e. referred to as the public domain policy. However, the contractor may, upon request, obtain the copyright to the

material for a limited period of time upon a showing that copyright protection will result in a more effective development or dissemination of the material and would be in the public interest. If the contractor obtains such copyright protection, the Government is granted a royalty-free license to publish, translate, etc. all OE material. Further, the contractor grants to the Government a royalty-free license in all copyrighted material not first produced in the performance of the contract, but which is incorporated into the contract material. If the contractor cannot grant such a license, he should so advise the Contracting Officer. The Office of Education Copyright Guidelines regarding the commercialization of OE material were published in 35 F.R. 7317, May 9, 1970.

Agriculture's Data Policies

The Department of Agriculture's data provisions are found in their clause entitled "Patent Provision and Publication of Results." This clause was published in 35 F.R. 12602, August 7, 1970, insofar as it deals with educational institutions. As to other contracts, one needs to look to the Agriculture general provisions to their clause entitled "Patent Provision and Publication of Results" to determine its data policy.^{7/} Both of these clauses basically provide that the public shall be granted all benefits of the results of research through

dedication, assignment to the Secretary, publication or such other means as may be determined by the Contracting Officer. The differences in Agriculture's Patent Provision and Publication of Results clauses are merely dependent upon whether the contractor may publish the results of the research with or without permission of the Department of Agriculture. Generally speaking, in contracts with educational institutions, either party may publish the results of the research after giving the other party due notice and with the inclusion of proper credit and recognition as is mutually agreed upon. Copyrights are not permitted in any such publication.

DOT's Data Policies

Only the Federal Aviation Administration of the Department of Transportation has a published data policy.^{8/} FAA has two data provisions, one entitled "Rights in Data--Unlimited" which is used whenever data is incidental to or a by-product of a contract work effort, and a second clause entitled "Rights in Data--Title" used whenever the data is a primary object of the contract work effort. In the FAA "Rights in Data--Unlimited" clause, the Government obtains the right to use the data in any manner it desires and, further, the contractor agrees not to place any restrictive marking on subject data. The "Rights in Data--Title" provision provides that all data first produced under the contract shall be the sole property of the Government

and that the contractor will not release any such data without the written consent of the Government until such time as the Government publishes the data itself. This clause also provides an indemnity to the Government arising out of invasion of the right of privacy, copyright or other infringement.

Interior's Data Policies

As previously noted, the Department of Interior does not have a published data policy; however, it has proposed a data policy for the Office of Saline Water (OSW) which may become the format for all of the research and development contracts. This proposed policy was published in 35 F.R. 11694, July 22, 1970. A simple data clause is prescribed for all OSW contracts. This clause defines the word "data" rather broadly, very much as in the NASA and DOD definition; however, it specifically states that the word "data" includes computer information stored on tapes, discs, etc. Proprietary data is defined, as this term was previously used by ASPR, and is presently found in the NASA Procurement Regulations, to be essentially equivalent to trade secret information. Finally, "other data" is defined to mean all data other than proprietary data, and includes such things as operational data and descriptive data.

The Interior clause is both a data requirements clause and a rights-in-data clause. As to the data requirements aspect, the contractor is required by this clause to furnish progress

reports, final technical reports and intermediate reports, except that the contractor need not furnish data for standard commercial items or proprietary data for an item which was previously sold or offered for sale. The contractor, however, is required to also deliver some background information regarding background research work, very much as is presently required by the NASA Data Requirements clause.

The rights-in-data provisions of the proposed OSW data clause state that the physical embodiment by which the data is presented under an OSW contract, such as the research reports, notebooks, recordings, photographs or computer storage means, are the property of the Government and are to be delivered to the Government on the Contracting Officer's request. This provision is patterned after AEC. The Government has the right to use subject data, that is, data specified to be delivered, for any purpose whatsoever and the contractor agrees not to assert any rights in this data. Further, the contractor agrees not to publish or disclose subject data without the permission of the Contracting Officer until the data is released by the Government. However, the contractor is permitted to maintain a copy of this data and to use this data for its own internal operations.

The unique feature of the Department of Interior's data provisions is with regard to the directed licensing of proprietary data. In this provision, the contractor agrees to license

responsible applicants to use his proprietary data in the field of technology investigated under the contract. The contractor is entitled to a reasonable royalty for such licensing and must comply with requests from responsible applicants if the proprietary data, at the time of the request, concerns an item which has not become a standard commercial item.

HUD's Data Policies

The requirement to license proprietary or background data is also found in HUD's contracts for Operation Breakthrough. The theory of the provisions regarding directed licensing is that the purpose of the government research is to make certain products and processes available to the general public. In the case of Operation Breakthrough, the product is a mass housing system. The publication of research results by the Government may not accomplish this goal as certain background data and proprietary data may be necessary to comprehend or practice the results of the research developed for the Government. The directed licensing technique is used to force the contractor to license other parties to use his technology in the event he has not adequately met the needs of the particular field of technology of concern to the agency.^{9/}

Conclusion

While the data policies of civilian agencies are very similar in their definitions and with regard to provisions

in the copyright area, differences in policies seem to have grown based on a lack of guidelines or communications among the various agencies. There is no logical reason for these differences -- statutory or otherwise. An attempt was made to provide a framework for use by the government agencies in the copyright area. The Bureau of the Budget sent copyright guidelines to the heads of government agencies by memorandum in 1964.^{10/} NASA adopted the BOB guidelines in 1968, but most civilian agencies do not follow the policy specified by these guidelines.

There appears to be no need for different data policies for each civilian agency based on their mission or statutory requirements. Why can't there be some consistency here?

The publication or promulgation of a government-wide data policy in, say the Federal Procurement Regulations (FPR), would go a long way in accomplishing some consistency here. Why this area has not been covered by the FPR is unknown to me. For the most part, civilian agencies do not have fully developed data policies or, it is believed, could well fit their existing data policies into an overall framework. While, at this time, achieving consistency in government policies seems to be difficult, a similar task was undertaken in 1963 in the patent area^{11/} and has been successful in making the patent policies of government agencies somewhat more consistent. A similar approach should now be undertaken in the data area.

FOOTNOTES

1. 41 C.F.R. Subpart 18-9.1 and 18-9.2
2. 41 C.F.R. Subpart 9-9.50 and 9-9.51.
3. 41 C.F.R. Subpart 9-7.5006-13 and 9-7.5006-59.
4. 41 C.F.R. Subpart 9-9.5103.
5. NSF General Provisions.
6. HEW General Provisions 313, 314, 315, 316 (8/64).
7. U.S. Department of Agriculture General Provisions AD-264 (Rev. 9/67), Clause 13 entitled "Patent Provisions and Publication of Results"
8. 41 C.F.R. Subpart 2-9.53.
9. HUD General Provisions 747 (2/70), Clause 29 "Publications," and modifications thereto in Operation Breakthrough contracts entitled "Privately Developed Data and Background Patents.
10. Bureau of the Budget Memorandum to Heads of Departments and Agencies, December 4, 1964.
11. Presidential Memorandum and Statement of Government Patent Policy, issued October 10, 1963, 28 F.R. 10943-46, 3 C.F.R. 1959-1963 comp. page 861.