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TECHNICAL DATA IN GOVERNMENT CONTRACTS

JOHN B. FARMAKIDES*

I. INTELLECTUAL PROPERTY

Introduction

Intellectual property is a convenient term used to denote those areas of the law dealing with the protection of certain literary, artistic, commercial and industrial property rights. This field is further delineated into several categories or specialized fields including patents, copyrights, trademarks, trade secrets and data.

Patents

The patent right has been defined simply as an exclusive right granted by the Government for a limited time (17 years) to an inventor to make, use and sell his invention, in exchange for its full disclosure. Patents are granted for any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.¹

Copyrights

Copyright is the exclusive right of an author, artist or other creator of an original literary or artistic work to reproduce, publish, sell, perform and otherwise distribute the work. It has been noted often that a copyright does not protect the idea as such but merely the manner by which it is expressed. There are really two types of property, both of which are commonly referred to as copyright.

The most familiar is statutory copyright whereby the Government, in exchange for the publication of the work and the observance of certain formalities, grants certain exclusive rights to the author—again for a limited time (28 years, renewable for another 28 years).²

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1. 35 U.S.C. §§ 100-102 (1964). On March 22, 1967, the President sent his recommendations to the Congress for extensive amendment of Title 35. The Patent Reform Act of 1967 has been offered in the Senate as S. 1042 and in the House as H.R. 5924.

2. 17 U.S.C. § 1 (1964). Currently H.R. 2512 and S. 597 of the 90th Congress propose an extensive revision of the copyright law based on an excellent and comprehensive review of the subject by the Register of Copyrights.

The other is the common law copyright of first publication, which permits the creator of a work to be its first publisher or to keep it unpublished if he so desires.

Trademarks

A trademark is a right in an owner of a business to use a specific word, letter, device or symbol to identify the origin of his goods or product. Rights in trademarks are of common law origin, and arise as a result of use by an established business or trade.³ The right is not limited in time, as is the case with patents or copyrights, so long as the word, symbol, etc., continues to be used. Trademarks are registrable under the "Lanham Trademark Act of 1946."⁴

Trade Secrets

A trade secret, defined broadly, encompasses every kind of information that a firm would like to keep confidential.⁵ But the more commonly accepted definition, and the one adopted by the Government with respect to data, includes "that information relating to the confidential techniques and mechanics of manufacture such as manufacturing methods, treatment and composition of materials, plant layout, etc., so long as the manufacturer protects this information from the public." I might point out that in trade secret cases the courts have often relied on the theory of breach of confidence⁶ in order to provide a remedy. Recently serious questions have arisen as to the rights and obligations of the employee-employer relationship as they relate to the skill and knowledge acquired by the employee in the performance of work for his employer.⁷

Data

As used in ASPR,⁸ data is the term commonly applied to designate

3. *General Baking Co. v. Gorman*, 3 F.2d 891 (1st Cir. 1925).

4. Act of July 5, 1946, ch. 540, § 46(a), 60 Stat. 444.

5. *Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549 (D. Conn. 1964).

6. *E. I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917).

7. *B. F. Goodrich v. Wohlgemuth*, 117 O. A. 238, 192 N.E.2d 99 (1963). For an excellent recent discussion on the law of trade secrets see *National Rejectors et al. v. Trieman et al.*, 152 USPQ 120 (1963).

8. *Armed Services Procurement Regulations*, IX. Note: The procurement authority for the Armed Services is found in Title 10 of the United States Code, Chapter 137. The *Armed Services Procurement Act* enacted in 1948 also stimulated the establishment of the *Armed Service Procurement Regulations* in that year for the purpose of providing

information of a technical nature pertaining to a specific contract. It includes writings, sound recordings, pictorial reproductions, drawings and other graphic representations, and other works of any similar nature. It does not include financial reports, cost analysis records, and other information incidental to a contract. And it may or may not include information that would otherwise be considered as trade secrets or "proprietary data."

With respect to the Federal Government it is important to note that the federal courts do not have general jurisdiction to hear cases of improper disclosure of data by the Government unless the action is based on a contractual agreement between the Government and the contractor providing that the data would be held in confidence.⁹ The eminent domain authority of the United States under 28 U. S. C. 1498, and its right to be sued thereunder does not apply to unauthorized use of data.¹⁰

II. DATA

Technical Data

While the term "technical data" is not separately defined in ASPR 9-201, it means the same as "subject data" under the old regulations.¹¹ The word "technical" is substituted for "subject" to emphasize the technical nature of the data. It is defined as "technical data" in the basic clause, however.

Also in the current ASPR, the term technical data designates *all* data pertaining to a contract, including that data developed under the contract as well as the data developed at private expense—and therein is the clue to the new ASPR policy of calling for the delivery of *all* data pertaining to a contract.

Protectible Data

Henceforth under the new ASPR policy, the only data that will be new procurement policies and practices under and in implementation of that statute. The ASPR was originally effective on May 19, 1948, and to the extent that any existing departmental procurement directive was inconsistent, the ASPR was the authority. The ASPR is categorized in parts and chapters. Our primary interest is in Section IX, Part 2.

9. *Aktiebolaget Bofars v. United States*, 194 F.2d 145 (D.C. Cir. 1951). See also: *Padbloc Co. v. United States*, 161 Ct. Cl. 369 (1963); *Nuss v. United States*, 127 Ct. Cl. 197 (1954).

10. *Patton v. United States*, 110 Ct. Cl. 195 (1948).

11. The ASPR policy on technical data was revised as of April 1, 1965. "Old regulations" refers to the 1957 version of ASPR IX, Part 2.

“protected,” in the sense that it will be accepted with limited rights and will not be used for manufacture or procurement outside the Government, is that data developed at private expense. All other data must be delivered with unlimited rights. This concept eliminates the need to differentiate between R&D or supply contracts, since it requires that data be delivered without regard to the type of contract involved. It abolishes the test of “proprietary data”, and resulted from an effort to resolve the controversy between the Government and the contractor on the issue of protecting commercially developed data.

III. BACKGROUND OF THE DATA PROBLEM

Need for Data by the Government

As we all know, the Government has extensive need for many kinds of technical data, and such need grows ever greater as modern equipment and manufacturing processes become more sophisticated and complex.

1. Technical data is needed to support the operation and maintenance of the equipment after it is manufactured. And the problem can be better appreciated when one realizes that data for millions of separate equipment and supply items must be acquired and maintained.

2. Technical data is also needed to support the manufacturing operation by allowing for inspection and testing of the equipment.

3. The Government needs data in order to evaluate the design of equipment before deciding whether to order the item manufactured for service use.

4. In accordance with the emphasis being placed on dissemination of information, data resulting from R&D contracts must be obtained, organized, and disseminated to the educational and industrial communities as well as to other governmental agencies.

5. The need which causes the major government-industry controversy is the desire of the Government to obtain competition in the manufacture of equipment.

Contractor Interest in Data

We can all appreciate the desire of the contractor to protect his trade secrets or proprietary data which may be vital to the success of his business, and his reluctance to release it for a number of reasons.

1. The contractor feels that once he releases it for a limited purpose,

in effect he has lost it since he no longer has sole control of the information.

2. The data may give the contractor a competitive advantage, and may be the basic reason for an established position in a commercial market.

3. Or it may support the reputation and preeminence of the contractor in a certain product area.

Opposing Positions

In order to serve all its needs for data, the Government generally will desire to obtain a complete package of data on the equipment it orders. Moreover, the Government desires to have the right to use the data as freely as possible in order to furnish it to other contractors, and in order to avoid the huge administrative burden of policing its use. We have previously noted the conflicting desires of the contractor: while generally he will be willing to supply the Government with most of the data it desires with unlimited rights to use, he will be extremely reluctant to give any data that might contain his secrets of manufacture, especially if they are to be used in such a way as to affect his competitive position. The contractor is also concerned that even where he discloses his trade secrets with limited rights in the Government, he may be causing injury to his hard-earned competitive position. He compares it to lighting a candle; once seen, it can never be erased from the minds of those who saw it.

This then is the heart of the government-contractor data problem. Its resolution must recognize both positions. If the Government effects a solution by insisting and obtaining complete rights to the data necessary to support the item of equipment being designed, it forces the contractor to either give up his rights or refuse to deal with the Government. This is hardly a desirable alternative. On the other hand, if the Government obtains the data, agreeing to hold it in confidence, a large and complex administrative problem is created with neither party confident that the contractual agreement of the Government can be effectively carried out. A third policy promulgated by ASPR prior to the current policy, prohibited the Government from obtaining certain kinds of data.¹² Evidently, this did not work because it deprived the Government of some data which it considered to be essential to its needs. While the positions of the Government and the contractor may

12. ASPR Section IX, Part 2, 1958 version.

never be completely reconcilable, there can be no criticism of the desire of each to solve this problem and their willingness to experiment with any alternative.

IV. NEW ASPR DATA POLICY (APRIL 1, 1965)

Introduction

The data policy promulgated in the 1965 ASPR is a culmination of over 20 years' effort in recognizing and seeking to resolve the data problem. During World War II, the Government's rights to use contractor data were covered by a single sentence set out as paragraph (d) of the old ASPR 9-107.1 patent rights clause for R&D contracts. The first DOD clause as such appeared in the 1955 edition of the ASPR. The first comprehensive statement of data policy was published in ASPR in April 1957, and subsequently revised in October 1958. The current policy was first expressed in Defense Procurement Circular #6 on May 14, 1964, for use on an optional basis. It is now published in the ASPR for mandatory use in all procurements which call for data on and after April 1, 1965.

The 1965 ASPR policy provides that the contractor must grant full rights to all data ordered by the Government in the contract, except that "technical data pertaining to items, components or processes developed at private expense will be acquired with limited rights if ordered."¹³ As stated by the Assistant Secretary of Defense for Procurement, the concept is ". . . he who has paid the product development costs has the dominant interest in the rights in the technical data pertaining to that product." The policy enumerates in 9-202.2(b) six specific situations calling for data to be provided with unlimited rights, and then states in 9-202.2(c) that "except as provided in (b) above," data developed at private expense is to be furnished with limited rights. Thus, in cases of overlap, unlimited rights will be required. One should also note that the policy expressed relates only to the rights of the Government to data called for by the contract. It does not contain any requirements or criteria governing the amount and type of data to be ordered.¹⁴

Henceforth the data to be furnished with limitations will be delineated by means of an accounting test seeking to determine who paid for its development. In other words, data may be furnished with limited

13. ASPR 9-202.2.

14. See the explanatory material in ASPR 9-202.2(c).

rights if it pertains to items, components or processes that were developed at private expense. The old trade secret test for determining which data is "proprietary" was dropped because it created too many difficult legal problems.

The terms "private expense" and "developed at private expense" refer to products and data pertaining thereto which were developed by other than government funds. Development of products under IR&D funds or from capital contributions resulting from government business are considered as being at private expense.¹⁵

The new policy does not permit the contractor to refuse to furnish data in specific cases or under specific types of contracts as was the case in the former ASPR policy, but instead requires that all data pertaining to the contract be furnished subject to a negotiated determination as to whether it will be furnished with limited or unlimited rights. It can be readily seen that the critical factor in using this new policy is the determination of what data is to be furnished under the contract. The decisions to be made on determining what data is needed and with what rights, and once obtained how to properly manage it, are recognized by the DOD as the critical factors in the success of the new policy, and are discussed in some detail in a series of DOD Instructions.¹⁶

Another aspect of the new ASPR policy is a deferred ordering provision whereby the parties to a contract may permit the Government to order needed data during the performance of the contract, or within two years thereafter. The Government would thus pay only the administrative costs of preparation of the data in the form finally ordered.¹⁷ The advantages of this technique are many, but probably the most important is that it postpones the decision to to what is required until after there is an actual requirement.

Data Requirements

As stated in ASPR 9-202.2(a), it is the policy of the DOD to acquire only such data and rights therein as are essential to meet government needs. The concept of this policy not only looks to the balancing of

15. See Defense Procurement Circular #22, 29 June 1965.

16. DODT's 5010.11, 5010.12, 5010.13 (1964). The Military Departments have implemented enclosures 3 & 5 in DOD 1 5010.12 in: AR 700-51, Aug. 66; NAVMAT Inst. 4000.15, Dec. 65; AFR 310-1, May 66. Also DSAR 4185.8, Jan. 66, and NSAR 80-6, Jan. 66.

17. ASPR 9-202.2(f).

the interests of the Government and the contractors, but also to recognizing the tremendous administrative burden inherent in handling the huge volumes of data submitted under contracts.¹⁸

The data requirement decision must be made prior to the procurement and communicated to the contractor who must then include a factor in the contract price to cover his cost for such data. As you may know, data requirements provisions describe the types or kinds of data that are required, or may be required, to be delivered under the contract. They should not be interpreted so as to describe the extent of the Government's rights to use the data, although they are sometimes written in such a way as to raise a question of conflict with the rights in data provisions of the contract. When the Armed Services order engineering drawings, the contract will specify that such drawings be prepared in accordance with Military Specification MIL-D-1000 entitled "Engineering Drawings and Associates Lists." Other types of data, such as handbooks, have their particular specifications on how they shall be prepared. We might also point out that requirements for data are listed on a DOD form 1423 and selected from a departmental "Authorized Data List."¹⁹

In order for the prime to fulfill his contract responsibility for data, he must, of course, pass the requirement down to all subcontractors, and obtain some enforceable commitment from them to the effect that they will furnish the data necessary for the prime to meet the contract requirements. This may present some knotty legal problems. The policy does, however, recognize the reluctance of some subcontractors to deliver data to the prime, and, therefore, permits the subs to deliver the data directly to the Government.²⁰

Subcontractors object to giving their data to prime contractors because too frequently they are actual or potential competitors, as well as customers. Subparagraphs (1) and (3) of the ASPR "Rights in Technical Data" clause²¹ prohibits two methods of obtaining unlimited rights to subcontractors' data. Subparagraph (2) of this clause pertains to access to subcontractors' data. It states that subcontractors' data

18. See also DOD Instruction No. 5010.12 at Section V.

19. See DOD Instruction 5010.12. Note that any change to the DD Form 1423 after contract award will require a revised estimate and a negotiated price adjustment as appropriate. However, failure of the Government to list on the DD Form 1423 any item of data required under any clause included in the contract resulting from this solicitation will not relieve the contractor of his obligation under such clause.

20. ASPR 9-202.2(e).

21. ASPR 9-203(b).

should normally be delivered to the next higher contractor. This provision was added at the urging of certain prime contractors who stated that they needed subcontract data to monitor the subcontract and properly perform their own obligations under the prime contract. The DIAC subgroup compromised this issue by permitting technical data submitted with unlimited rights to be delivered directly to the prime contractor, on the theory that there was nothing in the data to protect. Data subject to limited rights, on the other hand, was to be delivered directly to the Government since its use was generally limited to government in-house purposes. This provision runs counter to the long-established practice of subcontractors of delivering all their technical data directly to the Government and sending a form DD 250 to the prime contractor or next higher-tier contractor as a means of notice that the shipment has been made.

It is the position of subcontractors that there is no necessity to deliver to the prime contractor all data intended for the Government, or even all unlimited rights data, on the grounds that it is not needed by the prime contractor, that it gives the prime contractor an opportunity to "pick the brains" of the subcontractor, and that it involves unnecessary expense due to additional handling. Whether, and how much, data a prime contractor requires of a subcontractor depends upon the subcontract. The data that is actually needed is a matter which can be negotiated between the prime contractor and the subcontractor with appropriate restrictions to protect the subcontractor's interests.

The new policy also contemplates that data will be ordered in the future in packages intended for a designated use. MIL-D-1000 is set out in use categories, and Enclosure 1 of DOD Instruction No. 5010.12 also separates data into intended use categories. This policy permits assembly of large amounts of data into useful packages by the contractor who is best able to do so in most cases. The responsibility of submitting a complete package is with the contractor, and the rights to the data are governed by the data rights clause of ASPR 9-203(b).

The need for obtaining a package consisting entirely of data submitted with unlimited rights can be seen when the package is intended to be used for competitive procurement. In such cases, in order to satisfy the interests of both parties, ASPR 9-202.2(b)(4) may be used whereby unlimited rights may be given in "form, fit or function" data describing those items, components or processes which were developed at private expense.

Purchase of Data

Under certain specified conditions, ASPR 9-202.2(g) provides that the DOD may purchase rights to data separately if the contractor agrees. The head of the procuring activity, or his designee, however, must make documented findings justifying the decision to purchase the data as being in the best interests of the Government economically.

V. NASA DATA POLICY

Introduction

The data policy of the National Aeronautics and Space Administration is essentially the "old" DOD data policy. It recognizes the contractor's "proprietary data" and the need to protect such data from unauthorized disclosure, and will not require the contractor to furnish such data in the normal situation. Where a contractor's proprietary data is necessary and desired it is obtained by purchase through negotiation.

Proprietary data is defined as "data providing information concerning details of the contractor's secrets of manufacture, such as may be contained in, but not limited to his manufacture methods or processes, treatment and chemical composition of materials, plant layout, and tooling, to the extent that such information is not readily disclosed by inspection or analysis of the product itself and to the extent that the contractor has protected such information from unrestricted use by others."²² Let us briefly review this concept upon which the NASA policy and the old DOD policy (still found in many contracts—especially subcontracts) is based.

Analysis of "Proprietary Data"

The most basic element of the definition of proprietary data requires that it be information concerning the details of the contractor's "secrets of manufacture"—which the contractor has in fact protected from unrestricted use by others. The definition further limits "proprietary data" to that information which is not readily disclosed by inspection or analysis of the product itself.

While under the law of trade secrets, anyone may copy another's product, he must of course actually undertake the labor and expense of copying or "reverse engineering" the product itself. However, in-

22. NASA PR 9.203.1.

formation which is completely disclosed by the product or ascertained by simple inspection is not a trade secret.²³

If the contractor's designation of material as being proprietary is challenged, the question as to whether the information could have been obtained by inspection or analysis of the product itself will probably be a point of sharp disagreement. The test is what could "reasonably" or "readily" be discovered by inspection or analysis.²⁴

It is also worthwhile to mention, in this brief review, that the Comptroller General and the courts have become more stringent in prohibiting uses of proprietary-type data by the Government in a manner not authorized by the contractor.²⁵

Data Requirements

While the NASA data policy is essentially the one expressed in the "old" ASPR we might point out one fundamental difference; NASA uses a "Data Requirements" clause²⁶ to order delivery of data under the contract. The clause gives the contracting officer the option to order data at any time within one year after final payment under the contract. The types of data which may be so ordered cover virtually every form of data that can be generated under the contract.

VI. AEC DATA POLICY

The data policy used by the Atomic Energy Commission in their standard research and development contracts requires that the government obtain an irrevocable license and right to use any of the contractor's proprietary data which is utilized or embodied in the work of the contract. In certain other cases the policy recognizes the need to obtain the contractor's proprietary data with less than the above irrevocable right to use, and provides for acquiring data with limited rights. In this latter situation the data obtained "shall not be used by

23. ELLIS, TRADE SECRETS (1953) see chapter 2.

24. See Williamson and Munves, MAPI 45 (1960).

25. See, for example, Comptroller General's decision B-150369, August 22, 1963. In *Padbloc Co., Inc. v. United States*, 161 Ct. Cl. 369 (1963), the court held that the Government "impliedly" promised to adhere to the contractor's restriction that certain proprietary data could be used "for inspection purposes" only. The court did not rely on any express contract clause but said that a promise by a representative of the Government together with reasonable reliance by the contractor was sufficient ground to find for the contractor. See also the Gayston decision, Comp. Gen. B-143711, December 22, 1960 (unpublished); Barish Associates decision, 42 Comp. Gen. 346.

26. NASA PR 9.202-1(e).

the Government except in the performance of other contracts or sub-contracts with or for the benefit of the Government.”²⁷

VII. DATA POLICY OF OTHER GOVERNMENT AGENCIES

We might also briefly mention the data policy adopted by some of the other government agencies whose procurement effort, while not as large or of the type discussed above with respect to DOD, NASA and AEC, is growing and diversifying into new programs.

The Federal Aviation Agency does not have special provisions dealing with a contractor's "proprietary data." Under its "rights in data clause,"²⁸ subject data is defined as that data "which is specified to be delivered under the contract." Thus under this policy a contractor's claim to proprietary data is not recognized if it is specified to be delivered under the contract.

The Department of the Interior, and the Department of Health, Education and Welfare generally use the same policy as that adopted by the FAA. The contractor must deliver all data specified for delivery under the contract without any opportunity to withhold. Thus, once the contract specifies the need for certain data, such data must be delivered without limitation.

The Department of Agriculture has adopted a policy of obtaining a license for the Government to use and disclose proprietary "data" for all governmental purposes, and to permit others so to do for all other governmental purposes.

VIII. DATA POLICY ON PROPOSALS

Solicited Proposals

The DOD has recently revised its policy on data "such as a technical design or concept or financial or management plan," submitted to the Department with a proposal—whether *solicited* or *unsolicited*—to require that if the offeror wishes to restrict the use of the data in his proposal, he must mark the pages with a specific legend.²⁹

27. AEC 9-9.5008-7.

28. FAA PM 2-9.5302.

29. The legend reads: "This data, furnished in connection with Request for Proposals No. _____, shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; *provided*, that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does

The NASA policy on data in solicited proposals was revised about this time last year³⁰ to express the concept that unmarked technical data submitted in response to an RFP or an RFQ may be used for any purpose. Where the offeror wishes to restrict the uses of such data, he must mark with a specific legend.³¹

Proposals submitted to NASA with restrictive legends or statements differing from the above legend will be treated under the terms of the above legend.

Unsolicited Proposals

While DOD expresses a single policy on data submitted with either a solicited or unsolicited proposal,³² the contracting officer who receives an unmarked, unsolicited proposal must place a cover sheet on the proposal and mark it with a restrictive legend.³³

NASA has expressed its policy of using technical data included in unsolicited proposals for evaluation purposes only.³⁴ However, it proceeds to state its position:

not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction is contained in Sheets _____ (Dec. 1966)"

The offeror shall mark each sheet of data which he wishes to restrict with the following legend:

Use or disclosure of proposal data is subject to the restriction on the Title page of this Proposal. (Dec. 1966)."

30. NASA PRD 66-3.

31. This legend reads: "Technical data contained in pages _____ of this proposal furnished in connection with RFP No. _____ shall not be used or disclosed, except for evaluation purposes, *provided* that if a contract is awarded to this offeror as a result of or in connection with the submission of this proposal, the Government shall have the right to use or disclose this technical data to the extent provided in the contract. This restriction does not limit the Government's right to use or disclose any technical data obtained from another source without restriction." NASA PR 3.109(a), Feb. 1966.

32. See ASPR 3-507.

33. See ASPR 4-205.1(e)(4) The legend reads as follows:

All Government personnel handling this proposal shall exercise EXTREME CARE to insure that the information contained herein is NOT DISCLOSED outside the Government and is NOT DUPLICATED, USED, OR DISCLOSED in whole or part for any purpose other than to evaluate the proposal, without the written permission of the submitter (except that if a contract is awarded on the basis of this proposal, the terms of the contract shall control disclosure and use). This notice does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction. This is a Government notice, and shall not by itself be construed to impose any liability upon the Government or Government personnel for any disclosure or use of data contained in this proposal.

34. NASA PRD 66-3.

. . . due to the administrative problems involved in handling the large number of unsolicited proposals received, the Government cannot assume liability for disclosure or use of such technical data unless it is marked by the submitter in accordance with the following provisions. Each proposal containing technical data, which the submitter intends to be used by NASA for evaluation purposes only, should be marked on the cover sheet with the following legend and shall specify the pages of the proposal which are to be restricted in accordance with the conditions of the legend:

Technical data contained in papers ----- of this proposal shall not be used or disclosed, except for evaluation purposes, *provided* that if a contract is awarded to this submitter as a result of or in connection with the submission of this proposal, the Government shall have the right to use or disclose any technical data obtained from another source without restriction. (February 1966)³⁵

SUMMARY

The growing interest in intellectual property may arise from the fact that business and industry are becoming more aware of the importance of the intangible property rights as they influence the conduct of commercial operations. The role of the Government in this area, and its rights to intellectual property generated or used in the performance of government contracts is currently under active Congressional debate as it pertains to patents, copyrights, trademarks and industrial designs. Likewise, the increasing importance of, and requirements for, data demanded an enlightened inquiry and action on the part of both the suppliers and the users of such data. It is in this context that DOD issued its revised data policy seeking to balance the interests of the contractor and those of the Government, while attempting at the same time to lessen the administrative burden of handling the ever-growing volume of technical data.

The "gist" of the new DOD policy is that all technical data called for by the contract must be delivered with unlimited rights except that data "developed at private expense," must also be delivered, but with limited rights. The NASA policy, which reflects the "old" DOD policy, recognizes the "proprietary" data of the contractor, and permits the contractor to withhold such proprietary data from delivery except in special cases where it may be purchased through negotiation.

35. NASA PR 1.304-2(d).

Other government agencies require that all data to be furnished under a contract must be delivered, and can be used by the government for all of its purposes.

In the submission of proposals, both solicited and unsolicited, we have noted that the data should be appropriately marked if the contractor wishes to restrict its use by the Government.