On May 30, 1997, the Section submitted comments to the Department of Energy regarding its proposed revisions to DOE rights to data rules. The proposed rule sets out DOE policy on data rights in one regulation for the first time, and seeks to bring regulatory treatment of technical data rights into closer conformity with the Federal Acquisition Regulations (FAR).

The Section applauded DOE’s initiative to bring DOE practices more in line with the FAR, insofar as contracts other than Management & Operating (M&O) are concerned. The Section, however, expressed concern that the regulations, as presently drafted, continue to preserve a number of departures from the FAR and the DOD FAR Supplement (DFARS) in DOE treatment of data rights.

The Section recommended altering the following aspects of the proposed rule to bring it into conformance with the FAR and DFARS. First, the Department’s definition of “computer data base” is broad and should be narrowed to exclude nontechnical information. Second, the Department should consider whether it has a need for ownership of technical and computer software first produced in performance of M&O contracts, as opposed to unlimited rights over such data as provided in the FAR and DFARS. Third, the Department’s approach of allowing contractors to seek permission to assert copyright in computer software produced under DOE contracts should be altered to conform to the FAR, which grants the Government a license but does not interfere with the contractor’s ability to assert its rights under the copyright statute with respect to data and software. Fourth, the Department should delete language in the M&O clauses giving it unlimited rights to data “specifically used” in performance, regardless of origin, to conform with the FAR and DFARS, neither of which requires contractors to give up their existing rights in technical data as a condition of receiving a government contract. Finally, the Section recommended that when DOE intends to use nonfederal evaluators, the solicitation indicate the organization(s) with which the nonfederal evaluators are associated.

Dear Mr. Webb:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section notes that the proposed rule: (1) sets out DOE's technical data policy in one regulation for the first time; and (2) seeks to bring DOE's regulatory treatment of technical data rights into closer conformity with the Federal Acquisition Regulation ("FAR").

The Section applauds the Department's initiative to bring DOE practices more in line with the FAR, insofar as contracts other than Management & Operating ("M&O") are concerned. Nevertheless, the rule preserves a number of significant departures from the FAR.

First, the proposed rule includes a broadly defined "computer data base" in its definition of technical data. This is not consistent with existing FAR coverage (e.g., FAR 52.227-14), but is consistent with the DOD FAR Supplement (e.g., DFARS 252.227-7013). We believe that the Department has selected the appropriate substantive approach in following the DFARS instead of the FAR on this point. However, the varying definitions may cause confusion, particularly since DOE's definition of "computer data base" is broad and may include non-technical information.

Second, the Government is to own all technical data and computer software first produced in performance of M&O contracts. In contrast, the FAR and DFARS both give the Government unlimited rights in data without conveying an ownership interest. We suggest the DOE consider whether it has a need for ownership, as opposed to unlimited rights, that would justify this departure from the FAR and DFARS approaches. See also E.O. 12591. Further, although not referenced in this proposal, DOE issued a proposed rule on June 24, 1996, that includes a specific "ownership of records" clause. That clause would give DOE broad ownership rights in "records acquired or generated by the contractor in its performance of the contract," but would allow the M&O contractor to identify certain categories of records as its own. The ownership of records clause would be required to be flowed down to certain subcontractors. The Section notes that there could be inconsistencies in the treatment of records and data under the two different clauses and suggests that DOE clarify by, at a minimum, limiting the June 24, 1996, provisions to records generated by the contractor during performance and not include records acquired by the contractor.

Third, under the proposed rule, DOE would allow its contractors to seek permission to assert copyright in computer software produced under DOE contracts. Although this signals a change from historic DOE practice, it is different than the FAR coverage, FAR 27.404(f), which grants the Government a license but does not interfere with the contractor's ability to assert its rights under the copyright statute with respect to data and software.
Fourth, in contrast to the approach of the FAR and DFARS, the M&O clauses claim unlimited rights not only as to technology developed in the course of performance, but also as to data that is "specifically used" in performance, regardless of its origin. Unfortunately this concept is not defined in the proposed rule and runs against the view endorsed by Congress and reflected in the DFARS that contractors not be required to give up their existing rights in technical data as a condition of receiving a government contract. See 10 U.S.C. § 2320 and DFARS 227.7103-1(c). The Section suggests that the phrase be omitted or, at a minimum, defined so that contractors may understand the extent of the Government’s rights in previously developed data.

Finally, with respect to § 915.413-2, we recommend that when DOE intends to use non-federal evaluators, the solicitation indicate the organization(s) with which the non-federal evaluators are associated.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

John T. Kuelbs
Chair, Section of Public Contract Law

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