BRMC-87-01

TECHNICAL DATA RIGHTS HANDBOOK FOR CONTRACTING OFFICERS: A GUIDE FOR
ACQUIRING, ADMINISTERING, AND USING DATA FOR COMPETITION

Peter J. Perkowski, Lt Col, USAFR

DTIC
SELECTED
FEB 2 0 1987
D

21 January 1987

Final Report Ending January 1987

87   2 19 132

FOREWORD

It is the responsibility of each of us in the Air Force and Department of Defense acquisition community to improve our knowledge and understanding of data. Those involved with a system development must be farsighted enough to plan a strategy that will keep the system working for years into the future. The data acquisition strategy must be developed early enough to ensure that data is obtained competitively and used to foster competition. The Air Force must acquire the required data in a useable fashion, at the time required and at an affordable price. No simple "cookbook" or "checklist" approach is available that will ensure 100 percent success. Each approach must be tailored to the situation at hand. This handbook is designed to help assure we acquire all the data we need. This is essential so we can effectively meet our future weapon system requirements at the least possible cost.

Accesion For		
NTIS CRA&I	☑	
DTIC TAB	☐	
Unannounced	☐	
Justification		
By		
Distribution /		
Availability Codes		
Dist	Avail and/or Special	
A-1		

DTIC
COPY
INSPECTED
6

i

TABLE OF CONTENTS

I. INTRODUCTION

A. Purpose

This handbook was developed to assist Air Force and Department of Defense (DOD) Contracting and Acquisition personnel in planning for, contracting for, and using technical data to foster competition. If DOD contracting is to be successful in obtaining and utilizing contractor, subcontractor and vendor data in competitive acquisitions it must:

    1. Develop business strategies to acquire the data;

    2. Establish contractual requirements for delivery of acquisition data for those items the Government intends to acquire competitively;

    3. Obtain the rights to use the acquisition data;

    4. Assure the acceptability of the acquisition data; and

    5. Use the acquisition data in competitive acquisitions where it is economically and technically feasible.

B. Organization of the Handbook

The body of the handbook focuses on the planning (i.e., business strategy) and contractual aspects of acquiring data. Each topic within the body refers the reader to Federal Acquisition Regulation (FAR) and DOD FAR Supplement citations and appendicies for additional details or procedures to be followed. Where practical, topics are arranged within the acquisition/contracting life cycle in which they would normally be addressed. However, where deviations occur it is because aspects of the topic span more than one phase of the cycle.

C. Data Requirements and Clauses at a Glance

The following matrices provide the reader with a quick method of identifying technical data, computer software, copyright, and license requirements and associated FAR/DOD FAR SUPP citations and clauses. Requirements are listed within the following matrices by functional categories:

1

Matrix No.	Functional Category
1.	Copyrights and Acquisition of Rights in Technical Data
2.	Acquisition of Rights in Computer Software
3.	Rights in Data (Contracts for the Acquisition of Special and Existing Works, Research, Architectural Design, and Construction)
4.	Acquisition of Technical Data and Computer Software (Contracts with U.S. and Foreign Sources and Solicitation Provisions and Contract Clauses)
5.	Infringement Claims, Licenses, and Assignments (Inventions, Patents and Copyrights)

Copyrights And Acquisition of Rights in Technical Data

FAR/DOD FAR SUPP REQUIREMENTS/(CITATIONS)	52.227-7020	52.227-7018	52.227-7017	52.227-7015	52.227-7013	48.105	46.102	36.6	27.412	27.410-6	27.410-5	27.410-4	27.410-3	27.410-2	27.410-1	27.404-2	27.404-1	27.403-3	27.403-2	27.403-1	27.401	5.413	1.404	1.403
Definitions/(27.401)	X																				X			
Copyrights/(27.402)					X															X	X			
Acquisition of Rights in TECH DATA: BACKGROUND/(27.402-1)																					X			
Policy: Unlimited Rights Tech Data/(27.403-2(b))																			X		X			
Policy: Limited Rights TECH DATA/(27.403-2(c))					X				X										X		X			
Policy: Predetermination of Rights in Tech Data/(27.403-2(d))																			X		X			
Policy: Subcontracts/(27.403-(e))																			X					
Policy: Specific Acquisition of Unlimited Rights in Tech Data,/(27.403-2(f))			X	X	X			X											X		X			
Policy: Notice of Certain Limited Rights/(27.403-2(g))									X										X		X			
Procedures: Deviations/(27.403-3(a))									X									X					X	X
Procedures: Establishing the Government's Rights to Use Tech Data/(27.403-3(b))						X		X	X									X			X			
Procedures: Marking of Tech Data/(27.403-3(c))		X					X		X							X		X	X		X			
Procedures: Unmarked or Improperly Marked Tech Data/27.403-3(d)									X									X			X			
Procedures: Tech Data furnished on a Restricted Basis in Support of a Proposal/(27.403-3(e))									X	X	X	X	X	X	X			X	X		X	X		
Procedures: Delivery of Tech Data to Foreign Governments/(27.403-3(f))									X	X	X						X	X	X		X	X		

3

Acquisition of Rights in Computer Software

FAR/DOD FAR SUPP REQUIREMENTS (CITATIONS)	1.404	27.401	27.403-3	27.404-1	27.404-2	27.711	52.227-7013	52.227-7019	52.227-7031
Definitions/(27.401)		X							
Policy: Unlimited Rights in Computer Software/(27.404-1(a))		X		X		X	X		
Deviations: Computer Software/(27.404-2(a))	X	X			X				
General: Rights in Tech Data and Computer Software/(27.404-2(b))		X	X	X	X		X	X	X
Computer Software Subject to Restricted Rights/(27.404-2(c))		X			X		X		
Unmarked on Improperly Marked Computer Software/(d27.404-2(d))		X			X				

Rights In Data
Contracts for the Acquisition of Special and Existing Works, Research, Architectural Design, and Construction

FAR/DOD FAR SUPP REQUIREMENT/(CITATIONS)	27.405	27.406	27.407	27.408-2	27.408-3	27.408-4	27.408-5	27.409	27.412	52.227-7013	52.227-7020	52.227-7021	52.227-7022	52.227-7023	52.227-7024	52.227-7025
Contracts for the Acquisition of Special Works/(27.405)	X								X							
Contracts for the Acquisition of Existing Works/(27.406)		X							X		X	X				
Contracts Limiting Governments' Right of Publication for Sale to the General Public/(27.407)			X						X							
Architectural Designs and Data Clauses for A&E or Construction Contracts/ (27.408-2(a)				X					X				X	X		
Shop Drawings for Construction/ (27.408-2(a)(2)				X					X							
Construction Supplies and R&D Work (27.408-3)					X											
Mixed Contracts/(27.408-4)						X										
Approval of Rest-icted Designs/ (27.408-5)							X	X	X						X	
Small Business Innovation Research (SBIR) Program contracts/(27.409)								X	X	X						X

Acquisition of Technical Data and Computer Software Contracts with U.S. and Foreign Sources
and
Solicitation Provisions and Contract Clauses

FAR/DOD FAR SUPP REQUIREMENTS/(CITATIONS)	Policy: Acquisition of Tech Data and Computer Software/ (27.410-1)	Requirement for Tech Data Certification/(27.410-2)	Identification of Tech Data/(27.410-3)	Tech Data - Witholding of Payment/ (27.410-4)	Warranties of Tech Data/ (27.410-5)	Data Requirements/(27.410-6)	Contracts with Foreign Sources To Be Performed Outside the U.S./(27.411)	Solicitation Provision and Contract Clauses/(27.412)
15.406	X							
15.406-5	X X							
25.71						X		X X
27.403-2								X X
27.403-3								
27.404-1								X X X
27.404-2								
27.405						X X X		X X X X
27.406								
27.407								X X X X
27.408-2								
27.408-5	X							X X X
27.410-1	X							
27.410-2		X						
27.410-3			X					
27.410-4			X					
27.410-5				X				
27.410-6						X		
27.411	X	X	X	X		X		X X
27.412					X X			
46.703					X X			
46.710					X X			
52.223-3				X		X		X X
52.227-7013	X		X	X		X X		X X
52.227-7014								X X
52.227-7015								X X
52.227-7016								X X
52.227-7017								X X
52.227-7018								X X
52.227-7019								X X
52.227-7022								X X
52.227-7025								X X
52.227-7026								X X
52.227-7027	X							X X
52.227-7028		X						X X
52.227-7029			X					X X
52.227-7030				X				X X
52.227-7031						X		X X
52.227-7032							X	X X
52.227-7033								X X
52.246-7001						X		
53.270						X		

6

Infringement Claims, Licenses, and Assignments
(Inventions, Patents and Copyrights)

FAR/DOD FAR SUPP REQUIREMENTS/(CITATIONS)	8.7002	27.7002	27.7004	27.7005	27.7006	27.7009-1	27.7009-3	27.7010	33.014	52.203-1	52.203-3	52.203-5	52.227-7001	52.227-7002	52.227-7003	52.227-7004	52.227-7005	52.227-7006	52.227-7007	52.227-7008	52.227-7009	52.227-7010	52.227-7011	52.233-1	52.246-7001
Filing an Administrative Claim For Patent Infringement/(27.7004)		X	X																						
Indirect Notice of Patent Infringement Claims/(27.7005)			X	X																					
Investigation and Administrative Disposition of Claims/(27.7006)	X				X																				
Patent Releases, License Agreements and Assignments Clauses (27.7009-27.7009-3)							X		X		X	X	X	X	X	X	X							X	X
Contracts Providing for Payments of a Running Royalty/(27.7009-4)																		X	X	X	X	X		X	
Assignment of Patent Rights to the Government/(27.7010)							X	X															X		
Procurement of Rights In Inventions, Patents and Copyrights/(27.7011)						X	X								X						X				

7

II. PLANNING FOR THE ACQUISITION OF DATA

A. Business Strategy Planning

At the outset of program and business strategy development the PCO, with the Program Manager, should determine specific contractual data provisions (including those to support competitive reprocurement of spare parts). These provisions should adequately cover the need for, and future use of, Acquisition Data Packages (ADP). Data requirements and tasks, including rights in data, should be tailored to each acquisition or modification program and listed in the program planning documents and the Contract Data Requirements List (CDRL), DD Form 1423.

DOD employs three business strategies, individually or in combination with each other, to acquire data. The strategies are component breakout, multiple sourcing, and competitive acquisition. Each of these strategies involves the acquisition and use of technical data and computer software, as well as rights in that data. Contractors and subcontractors prepare such data as an integral part of their design, development, and production effort. Therefore, contracting officers must, in business strategy planning, consider all phases of an acquisition or modification program to ensure that accurate and acceptable data, with appropriate rights, are delivered when ordered and needed.

Each strategy may be used in the acquisition of specific rights in technical data. However, there are alternative methods of creating competition without having to provide or obtain data from prime and subcontractors. These methods include:

1. **Competitive Copying**. A common method of obtaining competition of relatively simple items is to solicit bids or proposals for items without furnishing the offerors a technical data package disclosing proprietary data. Competitors may find it difficult, however, to create the necessary technical information to bid on more complex items.

2. **Form, Fit, or Function Specifications**. Competition may be obtained free of proprietary rights by contracting with performance or functional specifications. Limitations on this approach are:

8

a. Items obtained from a competitor may not be identical to the original, resulting in difficulties in repairing and stocking parts for different items.

b. Complex systems may be difficult to obtain by this method due to inability of competitors to match original systems.

3. **Directed Licensing.** This method obtains competition by directing the original development contractor, by authority of a contractual provision, to license technical data and provide technical assistance to competitors. Royalties are paid to the developing contractor by the competitors.

4. **Leader-Follower.** This method obtains competition by one of three procedures (see FAR SUBPART 17.4):

a. Requiring an established source (leader) to subcontract to a specified subcontractor (follower) a designated portion of the total number of end items purchased.

b. Requiring a prime contractor to assist the follower and awarding an additional prime contract to the follower.

c. Awarding a prime contract to a follower firm, requiring them to subcontract with a leader for assistance.

Limitations of the Leader-Follower approach are long lead times and cost of developing a second source.

5. **Reverse Engineering.** A competitive ADP may be developed through inspection of the end item. This may be done by the Government or by a contractor. This method is the least desired approach and is to be used only in case of significant projected savings. It requires approval by the head of the contracting agency. Care must be taken to avoid use of proprietary data in the reverse engineering effort. Items on "loan" or "leased" by the Government may have restrictions in the loan or lease agreement which prohibit reverse engineering.

9

Other References:

1. **APPENDIX A** - "Applicable Data Specifications, Standards, and Air Force Directives"

2. **DOD FAR SUPP 4.671-5(C)(5)(11)** - "Definition of the Extent of Competition..."

3. **DOD FAR SUPP 7.103(a)(5)(d)** - "Acquisition Plans-Agency-Head Responsibilities." Details Program Manager and Contracting Officer Responsibilities.

4. **DOD FAR SUPP 7.105 (vii) & (ix)** - "Contents of Written Acquisition Plans; Repurchase Data & Alternate Acquisition Approaches Considered"

5. **DOD FAR SUPP 8.7006-5** - "Specifications, Drawings, and Other Purchase Descriptions"

6. **DOD FAR SUPP PART 10** - "Specifications, Standards, and Other Purchase descriptions"

7. **DOD FAR SUPP 15.173** - "Negotiating of Initial Production Contracts for Technical or Specialized Military Supplies"

8. **DOD FAR SUPP 17.7201** - "Acquisition of Component Parts; Privately Developed Items"

9. **DOD FAR SUPP PART 35** - "Research and Development Contracting"

10. **"ACQUISITION STRATEGY GUIDE"** - Defense Systems Management College, First Edition, July 1984.

Military and civilian Government personnel may obtain the guide, free of charge but limited to one copy per person, by writing to the:

>Director of Publications
>Attn: DSMC-DRI-P
>Fort Belvoir, VA 22060-5426

The guide may be obtained by the non-government community through government catalog outlets or by writing to the:

>Superintendent of Documents
>U.S. Government Printing Office
>Washington, D.C 20402

Price: $6.50 per copy

B. Other Business Strategy Considerations

When preparing your business strategy consider the following:

1. The explosion of computer software program documentation has greatly increased industry's sensitivity to property rights, particularly technical data describing object and source codes for programs and manufacturing processes using CAD/CAM, etc. Public disclosure of such technical data can cause serious economic hardship to the originating or owning company (DOD FAR SUPP 27.403-1).

2. It may be difficult to balance the Government need for technical data with a company's desire not to release it. Due to the high value contractors place on private data, the Government, in many cases, has not purchased the rights to reprocure systems described by these data. The end result has been an inadequate acquisition data package for competitive procurement purposes.

3. When the Government's need for delivery of data, as positively determined by DOD FAR SUPP 27.410-1, conflicts with the contractor's need to preserve its competitive position, and the Government insists on

11

delivery, the differences center on rights; for example, competitive repro-
curement (DOD FAR SUPP 27.403-1) versus the contractor's rights to the
acquisition data package. In some cases the contractor may have no problem
with the unlimited rights demanded of inhouse work but may not be able to
impose or enforce such provisions with subcontractors and vendors not willing
to give up their rights, particularly those oriented to commercial markets.

4. "Predetermination of rights" is an optional procedure wherein
an offeror identifies in his proposal listed data to which, when delivered,
he intends to affix a limited rights legend. This procedure is commonly
used in R&D and weapon system acquisitions.

Agreement by the Government on the appropriateness of such
limited rights claims is a separate matter. Such agreements are rarely
made before contract award due to the time necessary to validate the claims,
i.e., to carry out a data rights investigation. It is more efficient, in
most cases, to reach agreement or challenge specific limited rights claims
during contract performance.

NOTE: An agreement or challenge is normally pursued only
when a competitive acquisition data package is to be delivered.
Furthermore, under the new DOD FAR SUPP 52.227-7037 challenge procedures,
the Government must consider the consequences associated with failing to
sustain a challenge. Such failure precludes all government agencies from
further challenges, absent any new evidence, and may expose the Government
to paying contractor costs incurred in defending the challenge.

5. DOD policy regarding technical data and computer software has
two main distinctions not necessarily found in Federal Civilian Agencies or
used in commercial practice in industry. One is the difference between
technical data (human readable) and computer software (machine readable).
In order to receive treatment as technical data under the "Rights in
Technical Data and Computer Software" clause, computer software documen-
tation must be in human readable form. The other is the link between
contract clauses defining rights and requirements for delivery. The DOD
only acquires rights to data that are delivered or are deliverable under any
future government contract.

12

6. Delivery requirements are the contractor's first line of defense against losing an "earned" competitive advantage. Contractors will try to limit what is delivered to exactly what is specified in the DD Form 1423 CDRL and will want the Data Requirements Clause DOD FAR SUPP 52.227-7031 in the contract.

7. Contractors may not want the Deferred Ordering Clause DOD FAR SUPP 52.227-7027 (currently an optional clause) in the contract, because of the uncertainty of Government's action in the future.

Other References

1. <u>APPENDIX A</u> - "Applicable Data Specifications, Standards, and Air Force Directives"

2. <u>APPENDIX B</u> - "Commonly Used Data Solicitation and Contract Clauses"

3. <u>APPENDIX F</u> - "Challenging a Contractor's Assertion of Proprietary Rights"

4. <u>HANDBOOK PARAGRAPH III.B</u> - "Unlimited Rights - Factors to Consider"

5. <u>HANDBOOK PARAGRAPH III.C</u> - "License Rights in Lieu of Unlimited Rights"

6. <u>HANDBOOK PARAGRAPH IV.C</u> - "Data Delivery Methods"

III. SOLICITATION CONSIDERATIONS

A. Data Rights

Data rights (including those for software and patents) establish the extent to which the Government may use technical data delivery under a contract. Two basic forms of data rights are:

1. **Unlimited Rights.** The right to use duplicate, or disclose technical data in whole or in part in any manner and for any purpose whatsoever, and to direct or permit others to do so.

13

2. **Limited Rights.** The right of the Government, or others on behalf of the Government, for other than manufacturers to use, duplicate, or to disclose data; but not to disclose outside the Government without written permission.

3. **Restricted Rights** are a form of rights limitation that applies only to computer software developed at private expense; and includes, as a minimum, the right to:

(1) Use computer software for the computer for which it was acquired at any Government installation to which the computer may be transferred;

(2) Use computer software with a backup computer;

(3) Copy computer software for backup purposes; and

(4) Modify or combine computer software, subject to the contractor retaining his restrictions on the Government modified or incorporated restricted rights software.

Restricted rights include any other rights less than unlimited rights that are included in a license or agreement made a part of the contract. Computer software qualifying as commercial computer software under the "Rights in Technical Data and Computer Software" clause is specifically treated under the clause DOD FAR SUPP 52.227-7013 and a separate license agreement is not necessary. However, additional license provisions are not precluded. A separate license agreement is normally entered into when licensing other than commercial computer software. Specific legends and marking requirements on the software are required for the submitter to perfect a claim for Restricted Rights treatment.

It is Government policy to obtain unlimited rights when data results directly from work on a Government contract. Limited rights may apply when the data is developed at private expense. It is also DOD Policy to acquire only such technical data rights that are essential to meet Government needs.

Other References:

1. **DOD FAR SUPP 27.403**: "Acquisition of Rights in Technical Data"

2. **DOD FAR SUPP 27.404**: "Acquisition of Rights in Computer Software"

3. **DOD FAR SUPP 27.410**: "Acquisition of Technical Data and Computer Software"

4. **"ACQUISITION STRATEGY GUIDE,"** First Edition, July 1984, Defense Systems Management College. (NOTE: The information in Section III.A was obtained from this guide.)

B. Unlimited Rights - Factors to Consider

Unlimited rights in proprietary technical data necessary for a complete competitive ADP may be acquired from an individual contractor or subcontractor, or as a part of a competition among several contractors or subcontractors. Two key factors can make this a formidable process:

1. The difficulty in determining a fair price for the data.

2. Difficulties and expense in qualifying competition for highly complex end items.

Four questions must be considered before purchase of unlimited rights in technical data:

1. Is there a clear need for reprocurement of the item, component, or process to which the technical data pertain?

2. Is there a suitable item, component, or process of alternate design or availability?

3. Can other competent manufacturers produce the item or perform the process through the use of such technical data without the need for additional technical data which cannot be purchased reasonably or is not readily obtained by other economical means?

15

4. Will anticipated net savings in reprocurement exceed the acquisition cost of the technical data and rights therein?

Other References:

1. APPENDIX B - "Commonly Used Data Solicitation and Contract Clauses"

2. DOD FAR SUPP 5.102 - "Availability of Solicitation."

3. DOD FAR SUPP 8.7002 - "Responsibilities Under Coordinated Procurement" (Acquisition of Licenses or Other Proprietary Rights)

4. DOD FAR SUPP 15.613 - "Alternate Source Selection Procedures"

5. DOD FAR SUPP 16.104 - "Factors in Selecting Contract Types"

6. DOD FAR SUPP 25.7007 - "Restriction on R&D Contracting With Foreign Sources"

7. DOD FAR SUPP SUBPART 25.74 - "Purchases From NATO Participating Country Sources"

8. DOD FAR SUPP 27.403 - "Acquisition of Rights in Tehnical Data"

9. DOD FAR SUPP 27.404 - "Acquisition of Rights in Computer Software"

10. DOD FAR SUPP 27.410 - "Acquisition of Technical Data and Computer Software"

11. DOD FAR SUPP 27.412 - "Solicitation Provisions and Contract Clauses" (Technical Data, Computer Software, and Copyrights)

12. AFR 310-1 - "Management of Contractor Data," 8 March 1983

C. License Rights in Lieu of Unlimited Rights

License rights, in lieu of unlimited rights in technical data, is most useful in acquiring systems with high commercial potential or military systems adapted from commercial products, where the value of the data is very high compared with the savings projected from competitive acquisition. Licensing may be a necessary approach when dealing with foreign systems developers who are not accustomed to normal U.S. Government acquisition methods. Licensing from the data owner allows the Government to use the licensed limited rights technical data to manufacture the system and disclose the data to second source competitors for the limited purpose of manufacturing the system for sale to the Government. License agreements may also contain provisions for the transfer of "know how" and assistance from the data owner to the Government or the second source.

DOD has authority under 10 U.S.C. 2386 to obtain such a license to proprietary data for reprocurement purposes. This approach has the following drawbacks:

1. Terms of each license must be separately negotiated. No standardized clause or regulatory guidance exist.

2. Terms of the license normally require approval at a higher level than the acquiring command.

3. Air Force data handling systems are not specifically designed to handle data where the Government has only license rights as opposed to unlimited or limited rights data. Personnel are not accustomed to treating such data in a proper manner, with resulting risk of violating terms of the license.

4. Licensing of Technology is normally useful only for reprocurement purposes and this approach restricts the ability of the Government to transfer technology to research and development contractors for purposes of advancing the state of the art.

The recently introduced Small Business Innovative Research (SBIR) program provides for license rights to the Government. It is anticipated that the obtaining of license rights from other sources will increase in the future.

<u>Other References</u>:

1. <u>APPENDIX B</u> - "Commonly Used Data Solicitation and Contract Clauses"

2. <u>DOD FAR SUPP 8.7002</u> - "Responsibilities Under Coordinated Procurement"
   (Acquisition of Licenses or Other Proprietary
   Rights)

3. <u>DOD FAR SUPP SUBPART 27.6</u> - "Foreign License and Technical Assistance
   Agreements"

4. <u>DOD FAR SUPP 27.7009</u> - "Patent Releases, License Agreements, and
   Assignments"

5. <u>DOD FAR SUPP 27.7011</u> - "Procurement of Rights in Inventions,
   Patents, and Copyrights"

D. <u>Data Warranties</u>

Optional warranty clauses may be used in the acquisition of technical
data (DOD FAR SUPP 52.246-7001). Guidance is contained in FAR 46.703,
"<u>Criteria for Use</u>." The contracting officer should:

1. Consider the nature of the item and its end use to determine
whether a warranty is appropriate.

2. Outline benefits to be derived from a warranty and relate them
to the cost of the warranty.

3. Determine the Government's ability to enforce the warranty.

4. Decide whether there is an adequate administrative reporting
system for defective items or if such a system can be established. If a
warranty is appropriate, the contracting officer should ask for more than
three years of coverage (i.e., 5-7 years) in consideration of the reprocure-
ment time.

Other References:

1. **DOD FAR SUPP PART 46** - "Quality Assurance"

2. **DOD FAR SUPP SUBPART 46.7** -"Warranties"

3. **DOD FAR SUPP 52.270-7000** - "Warranty Exclusion and Limitation of
Damages"

IV. NEGOTIATING AND ADMINISTERING DATA

A. Pricing and Development of Acquisition Data Packages (ADP)

ADPs, for the most part, consist of Level 3 engineering data developed
and maintained by the contractor. These data can be priced up front.
However, in some cases, additional data such as testing and packaging infor-
matic may be needed to complete an ADP, but the specific data are not known
until the design becomes stable, usually well after contract award.
Similarly, items to be spared are not determined until Source, Maintain-
ability, and Recoverability (SMR) coding occurs, again, usually after
contract award. When the items for which spares will be maintained are
identified, and the design becomes stable, the contractor can then be
required to identify which spares require information in addition to Level 3
engineering data, what specific additional data are needed, and the price
for these data.

On those ADPs where the Government elects to exercise its option to
purchase additional data, the contractor must also be required to develop
and maintain the additional data, deferring delivery until requested by the
Air Force. A contract amendment and additional program dollars to prepare
the data for delivery (MIL-D-1000 and MIL-STD-100) would be necessary to
formalize these requirements after the spares determination is made. (See
procedure from DAR SUPP No. 6). This concept assures readily available,
complete, and updated ADPs at a known price, and also allows improved
planning and budgeting.

19

Other References:

1. APPENDIX A - "Applicable Data Specifications, Standards, and Air Force Directives"

2. APPENDIX C - "Structure of Data Items in Solicitations and Contracts"

3. APPENDIX D - "Data Pricing Decisions and Their Impact on Solicitations and Contracts"

4. APPENDIX E - "Estimating the Cost of Data - A Continuing Problem With Potential Solutions"

5. DOD FAR SUPP 25.7306 - "Recovery of Non Recurring Cost"

B. Challenging a Contractor's Assertion of Proprietary Rights

DOD FAR Sup 27.410-1 outlines two options for delivery of data: Deferred Ordering and Deferred Delivery. These options assume that the data will be delivered to the Air Force during the production phase of the program. The Air Force should establish an inspection system to assure that the data will be suitable for their intended use.

Furthermore, the Government never loses its right to require contractors to prove that their restrictive markings on data are valid. It is Air Force policy to challenge restrictive markings when the data are believed to fall within the unlimited rights categories in subsection (b) (1) of the data rights clause. This applies to existing Government documents as well as to those being delivered.

Prior to initiating a challenge, the Government agent reviewing the data should first check the contract files to see if the item, component, process, or computer software (ICPS) to which the data pertains is in the offeror/contractor's predetermination list or "Notice of Limited Rights" [See DOD and AF FAR SUPP 27.403-2(d)]. If such an agreement or notice does

20

not exist, the Government should challenge the restrictive marking. If a predetermination list exists, it should be reviewed to further determine if the government has agreed to the validity of the limited rights claimed for the items listed.

If such an agreement does not exist, the Government should challenge the restrictive markings, if warranted. If the limited rights data is not listed, the officer/contractor should be advised in writing of any failure to notify the Government under the predetermination or Notice of Limited Rights procedures (DOD FAR SUPP 52.227-7014 and 52.227-7013) and that such failure may violate the provisions of DOD FAR SUPP 52.227-7018, "Restrictive Markings on Technical Data."

Other References:

APPENDIX F - "Challenging a Contractor's Assertion of Proprietary Rights"

C. Data Delivery Methods

The delivery of engineering data packages sooner than needed, and at a time when designs are still unstable, can result in the maintenance and use of inaccurate data, and added cost to update the data.

DOD FAR SUPP 27.410-1 outlines two options for delivery of data -- Deferred Ordering and Deferred Delivery. These options assume that the data will be delivered to the Air Force during the production phase of the program. The Air Force should establish an inspection system to assure that the data will be suitable for their intended use.

However, production and post-production delivery of data is not appropriate for all programs. Near-term delivery of the total Level 3 package may be prudent when dealing with small, less stable contractors or with small programs of limited life expectancy. Acquisition activities must base the decision on delivery of engineering data and acquisition data packages on a thorough analysis of need. This decision should be made as early as practical in the development phases of a program; and the delivery strategy must be included in appropriate program management planning documentation.

21

Air Force delivery policy guidance is also furnished by AFR 800-34, "Engineering Data Acquisition," 11 April 1983. This regulation recommends a firm listing of data requirements with a specified delivery schedule, and the use of the Deferred Requisition of Engineering Data (DRED) technique. It indicates the Air Force should contract for contractor maintenance of the engineering data base during post production support, and should then requisition data based on specific needs. This appears particularly attractive for systems with long production runs, long term modification and upgrade potential, and those with high levels of contractor interest and involvement. This practice would assure that current data are used, and would eliminate the duplicate system data with their additional cost. Further, this procedure would permit the pricing of development and maintenance of the engineering data base as an option by the contractor, up front, as part of his proposal. It could then be made a subject of negotiation, especially during competition. Any costs the Air Force would incur later for delivery of specific engineering data would simply be administrative, reproduction, and mailing costs. This procedure would be applicable for all uses of data, not limited just to ADP for spare parts.

Other References:

1. <u>APPENDIX A</u> - "Applicable Data Specifications, Standards, and Air Force Directives."

2. <u>APPENDIX C</u> - "Structure of Data Items in Solicitations and Contracts."

3. <u>DOD FAR SUPP SUBPART 9.3</u> - "First Article Testing and Approval."

4. <u>DOD FAR SUPP 17.7202</u> - "Component Breakout."

5. <u>"ACQUISITION STRATEGY GUIDE"</u> - Defense Systems Management College, First Edition, July 1984.

V. APPENDICES

APPENDIX A

Applicable Data Specifications, Standards, and Air Force Directives

1.   MIL-STD-490, "Specification Practices," 30 October 1968, establishes the format and content of system specifications. These specifications, together with drawings, form the basis for a Type C Technical Data Package (TDP), now Acquisition Data Package (ADP), which can be used for competitive reprocurement. Type C Product Specifications are defined as specifications used in the production of a prime item of equipment and are essentially sufficient to serve as an ADP. For example, Type C1b Prime Item Product Fabrication Specifications contain all the information needed for competitive reprocurement when combined with the correct engineering drawings and associated lists.

2.   DOD-D-1000B, Paragraph 3.3.3, "Drawings, Engineering and Associated Lists," 31 October 1980, is the specification which defines different levels of drawings progressing from system inception to production. It describes the engineering drawing system as an evolutionary process proceeding in greater detail through concept (level 1), prototype production (level 2), and production (level 3) phases of a system development. Instead of ten separate data item descriptions as under the pre-1975 system, one data item description (Data Item Description DI-E-7031 which references DOD-D-1000B) may now be used to obtain drawings. Engineering drawings and associated lists are prepared to Level 3. They provide engineering definition sufficiently complete to enable a competent manufacturer to produce and maintain quality control of item(s). These engineering drawings shall:

   a.   Reflect the end-product,

   b.   Provide the engineering data for the support of quantity production, and

   c.   In conjunction with other related acquisition data, provide the necessary data to permit competitive procurement of items substantially identical to the original item(s).

Paragraph 3.3.3.1, of DOD-D-1000B requires that engineering drawings include details of unique processes. These details include: information not published or generally available to industry but essential to design and manufacture; performance ratings; dimensional and tolerance data; critical manufacturing assembly sequences; input and output characteristics including form and finish; details of material identification; inspection, test, and evaluation criteria; necessary calibration information; and quality control data.

3. MIL-STD-1388-1 and MIL-STD-1388-2, "Logistic Support Analysis," 11 April 1983, establish criteria for the development of a Logistic Support Analysis (LSA), to define system support requirements and to inject support criteria into system/equipment design and acquisition. The LSA is intended to be the integrating document for the processes of provisioning spare parts, Acquisition Method Coding (DAR SUPP NO. 6, 1 June 1983), and data acquisition.

4. DAR Supplement 6, "DOD Replenishment Parts Breakout Program," June 1983, establishes Department of Defense policies and procedures relating to the procurement of spares and repair parts. (See paragraph S6-101 of DAR SUPP NO.6 as to applicability.)

5. Air Force Regulation 310-1, "Management of Contractor Data," 8 March 1983, sets forth the procedures for managing the acquisition of data under Air Force contracts. It outlines Air Force policies for managing the acquisition of data from contractors. It also defines management responsibility for developing data requirements, and for acquiring, distributing, and using the data.

6. Air Force Regulation 800-34, "Engineering Data Acquisition," 11 April 1983, Paragraph 4c, requires the program manager to ensure that the contracting officer (PCO) includes the "Predetermination of Rights in Technical Data" clause (FAR 52.227-7013) in both solicitations and contracts.

7. AFLC/AFSC Pamphlet 800-34, "Acquisition Logistics Management," 12 August 1981, is a basic reference book for acquisition logistics. It helps the program manager and the Integrated Logistics Support Office (ILSO) identify and schedule the key tasks for logistics support of acquisition

programs. Chapter 25, Engineering Data, is an excellent presentation of how to get adequate, accurate, and complete engineering data.

APPENDIX B

Commonly Used Data Solicitation and Contract Clauses

1. DOD FAR SUPP 52.227-7013 "Rights in Technical Data and Computer Software", is the basic data rights clause. It expresses the rights and obligations of both the Contractor and the Government with respect to technical data and computer software. It is a required clause in all contracts in which technical data or computer software may be generated, developed or delivered. The provisions are applicable to both the contractor and sub-contractors.

2. DOD FAR SUPP 52.227-7014, "Predetermination of Rights in Technical Data." It identifies in the proposal which data the contractor intends to deliver with limited rights. This does not mean the Government agrees with the contractor over limited rights data items.

3. DOD FAR SUPP 52.27-7015, "Rights in Technical Data--Specific Acquisition." This clause is used when purchasing unlimited rights in contractor owned (limited rights) data.

4. DOD FAR SUPP 52.227-7018, "Restrictive Markings on Technical Data." When the clause 52.227-7013, "Rights in Technical Data and Computer Software" is used, clause 52.227-7018 should also be included. Unmarked technical data is presumed to be furnished with unlimited rights. In any event, the contractor's restrictive markings procedures shall be reviewed periodically by the contracting administrator. In the event of improper use of restrictive markings, the following actions are available:

   a. The FAR clause 52.227-7013, "Removal of Unauthorized Markings," may be invoked.

   b. Payments may be withheld under "Technical Data Withholding of Payments" clause.

c. During a pre-award survey, have Quality Assurance examine the prospective contractor's marking procedure.

d. Notify the contractor that he shall have six (6) months after delivery to request permission to place restrictive markings on such data at their own expense if they:

      (1) Demonstrate the omission was inadvertent,

      (2) Establish the validity of the markings,

      (3) Relieve the Government of any liability.

e. Technical data having restrictive markings will be used with limited rights pending written inquiry to the contractor. Refer to the challenge procedures contained in **Appendix F.**

5. **DOD FAR SUPP 52.227-7019, "Identification of Restrictive Rights Computer Software."** In any negotiated contract containing clause 52.227-7013, the provision at clause 52.227-7019 shall be included in the solicitation. This clause requires the contractor to disclose any Government restriction on the use or disclosure of software developed at private expense. If no computer software is identified, it will be assumed that all delivered software is subject to limited rights.

<u>Other References:</u>

    a. <u>**DOD FAR SUPP 27.412**</u> - "Solicitation Provisions and Contract Clauses" (Technical Data, Other Data, Computer Software, and Copyrights)

    b. <u>**DOD FAR SUPP 52.236-7002**</u> - "Contract Drawings, Maps and Specifications (Construction and A&E Contracts)

    c. <u>**DOD FAR SUPP 52.236-7003**</u> - "Shop Drawings" (Construction and A&E Contracts)

APPENDIX C

Structure cf Data Items in Solicitations and Contracts

1. Data requirements and tests should be tailored to the objectives and circumstances of each acquisition program utilizing the Contract Statement of Work, the Contract Data Requirements List (CDRL, DD Form 1423, Data Item Description) and the inclusion of appropriate solicitation provisions and contract clauses from **DOD FAR SUPP 52.227** and supplements thereto. This policy is detailed in **DOD FAR SUPP 27.410-6**, and implemented by use of the clause at **DOD FAR SUPP 52.227-7031**, Data Requirements, in solicitations and contracts.

2. The acquisition of data and data rights should be structured as contract options with input from project engineers and logisticians to ensure that future program needs will be met. These options enable the Government to achieve minimum life cycle costs by pricing a wide range of efforts during competition and then implementing those which are determined to be in the Government's best interest.

3. Options may be structured by using any of the techniques for obtaining competition listed in **DOD FAR SUPP 17.7201-2**, "Specific Procurement Methods," and include:

   a. For the production of identical items--multiple sourcing, licensing, leader-follower procurement, contractor teaming, developing acquisition data packages by purchasing data and data rights or by reverse engineering an item produced from restricted data, etc.

   b. For the production of substitute, non-identical items--form, fit and function specifications, "brand name or equal" purchase descriptions, performance specifications, etc.

4. A useful variation, in structuring production options, is to have an offeror recommend two or more manufacturers who are capable of producing the desired item. Then, the offeror should price the option (data, data

28

rights, or manufacturing technical assistance) based upon the Government selecting a source from among the recommended manufacturers. The advantage of this approach is that it is likely to reduce Government risk and cost for establishing an alternative source since it identifies manufacturers who have the ability to fabricate an item.

5.   In addition to structuring options, the acquisition activity should use the "Deferred Delivery" and "Deferred Ordering" of data clauses (DOD FAR SUPP 52.227-7026 and -7027, respectively). These clauses enable the Government to minimize data acquisition costs by deferring a data require- ment until stability of item design has been reached and also to allow purchase of data at a later date to meet some unforeseen need.

6.   Experience has shown that deficiencies in data are often discovered after formal acceptance. Consequently, contracting officers should insert the "Warranty of Data" clause at <u>DOD FAR SUPP 52.246-7001 with the appropriate alternate ending in contracts requiring delivery of data for manufacturing or modification purposes.</u>

<u>Other References:</u>

  <u>DOD FAR SUPP SUBPART 4.71</u> - "Uniform Contract Line Item Numbering
                     System"

APPENDIX D

Data Pricing Decisions and Their Impact on Solicitations and Contracts

Data pricing decisions affect the way solicitations and contracts are structured and the visibility into how data is priced. Data items are usually: (1) Not Separately Priced (NSP) but included in the price of what is being procured; (2) included in the lot price of the DD Forms 1423, Contract Data Requirements List (CDRL); and (3) separately priced. Each of these approaches and their impact are summarized below:

29

a. **NSP Data**

(1) <u>Solicitation</u>: Separate pricing of data is not required by the solicitation and the proposed price of the data is consequently included in the price of the hardware.

(2) <u>Contract</u>: The contract includes an unpriced Contract Line Item Number (CLIN) for delivery of data in accordance with the CDRL. For example, the solicitation for the B-1B did not require separate pricing of data, and data pricing was not addressed during negotiations. One unpriced CLIN was established for data delivery in accordance with CDRL and all cost of the data was included in another CLIN wnich is associated with the equipment.

(3) <u>Effect</u>: When data is NSP, its cost becomes buried in the hardware CLIN. The data cost is then pro-rated across hardware items often causing the individual hardware item cost to be artificially inflated.

b. **Lot Pricing**

(1) <u>Solicitation</u>: Separate pricing (hardware vs. CDRL) is required by the solicitation. The proposed price for the CDRL (all data) is one "lot price."

(2) <u>Contract</u>: The contract includes a priced CLIN for all data at a "lot price." For example, all data is lot priced in the contractor's proposal and appears as one CLIN, lot priced, on the contract.

(3) <u>Effect</u>: When data is separately priced by this method (total CDRL data cost segregated from hardware cost), total data is frequently used as a negotiation tool (i.e., if the overall price quoted for the CDRL appears too high, agreements between the Government and the contractor may be made to reduce the overall price by reducing data quantity, quality, or format) without regard to the individual data items or an agreement may be made to delete single data categories (such as engineering data) to reduce the overall CDRL price.

c. **Separately Priced Data**

(1) <u>Solicitation</u>: Separate pricing of specific groups of each CDRL data item is required by the solicitation. In this method a separate price would be proposed for each category (e.g., DI-E-7031). Engineering data usually are defined in the solicitation statement of work (SOW) and specific categories of data using DI-E-7031/M. For example, engineering data was defined in Statement of Work tasks and DI-E-7031/M for the NGT (T-46) Request for Proposal. The proposal instructions contained a requirement for each DD Form 1423 to be separately priced. However, certain items were subject to fact finding and negotiations. Data as a whole (including design and parts control drawings, levels 1 and 2; technical orders and level 3 drawings) may be separately priced under individual CDRL's, as a lot, or under one or more Contract Line Items (CLINS).

(2) <u>Contract</u>: Since there is no industry-wide standardized system to address the cost of data, or engineering data, development of an overall government standard for data pricing is not feasible. However, it <u>is</u> feasible to separately price data for individual acquisition programs using criteria or rationale for its pricing based on certain known factors. For instance, it is possible to solicit and obtain separate pricing for individual or contract line items for Technical Orders (TO) and Engineering Drawings. Therefore, the contract may contain one or more priced CLINS using lot prices for each category of data.

(3) <u>Effect</u>: It is rare for individual data items to be separately priced by segregating data from hardware and further segregating data by categories. However, this approach could increase the visibility of engineering data and, as a consequence, assist in the analysis of out-year support and spares acquisition forecasts.

<u>Other Reference</u>:

<u>DOD FAR SUPP SUBPART 4.71</u> - "Uniform Contract Line Item Numbering System"

APPENDIX E

Estimating the Cost of Data - A Continuing Problem With Potential Solutions

1. A contractor's proposal should include the cost of technical data, should define appropriate rights, and should be submitted while competition exists. Proposal evaluation should take into account the total price of an option to acquire rights in technical data and computer software, and the availability of technical assistance to meet life cycle needs for operation, maintenance and competitive acquisition of the entire weapon system.

2. DOD FAR SUPP 15.871 stipulates that "DOD requires estimates of the prices of data in order to evaluate the cost to the Government of data items in terms of their management, product or engineering value." However, there are no formal guidelines on how to estimate or negotiate data prices. There are at least four reasons why:

    a. Historical information with which to estimate and evaluate data costs is limited. Actual records are few and inaccessible. Historically, any data pricing information received in response to a solicitation is regarded as sensitive and is included in Source Selection files and stored in a controlled environment, thus discouraging subsequent programs from using the information to formulate cost estimating factors. However, a document compiled by the Air Force Institute of Technology (AFIT), "Understanding and Evaluating Technical Data Prices" (LS-24), contains variables which could be applied for analyzing the cost of technical data.

    b. Data is not a major competition consideration for contract award. AFR 310-1, "Management of Contractor Data," 8 march 1983, provides a standard AF Form 585, "Contractor Data Requirement Substantiation," which is used to substantiate user's data requirements. However, there are no set rules for evaluating data management requirements nor any requirements to separately price data during competition. Data management is usually included as a factor (and sometimes as an item) under the more general heading of "Management" in Source Selection Criteria and is rarely a primary consideration for contract award.

c.   Industry standards for estimating costs vary. There are differences in business practices, in accounting systems, in use of factors or rates of application where effort is common to more than one proposed task, and differences in data preparation methods.

(1) The lack of a standardized industry procedure obscures the cost of data. For example, some companies absorb the cost of drawing preparation in cost areas such as Engineering, General and Administrative, and Overhead and only show the costs of reproduction as the total cost for the delivery of data to the Government. Other companies include the cost of drawing preparation, and meticulously estimate according to the size and number of drawings to be generated and changed, and the number of drawings that need to be redrawn.

(2) The key is to determine what method is being used. Once it is understood how the data is being priced, it is possible to estimate data cost. There is evidence available to substantiate that on a case-by-case basis, criteria rationale or standards for the separate pricing of data can be devised. Industry can and does respond to an Air Force request for separate pricing of individual data items, and data prices can be segregated, at least by groups.

d.   Experienced, trained personnel for estimating and evaluating data prices are limited. There is no systematic way of applying skilled personnel for source selection. In some instances, the cost of data will be addressed by the data manager or by individuals from Comptroller or Pricing organizations, and at other times by the Principle Contracting Officer. Experience is essential since no specific formal training is available. The System PPM 370 Data Management course at AFIT does provide limited instruction, but no comprehensive insight into pricing of technical data.

Other References:

DOD FAR SUBPART 35.71 - "Recovery of Nonrecurring Costs on Commercial Sales of Defense Products and Technology"

33

Challenging a Contractor's Assertion of Proprietary Rights

There are two sets of rules which govern questioning contractor's claims of rights in technical data and computer software. The first set of rules, entitled "Removal of Unauthorized Markings," was set out in the Rights in Technical Data and Computer Software, DOD FAR SUPP 52.227-7013, clause at paragraph (d). This rule holds that the Government could correct, cancel or ignore any unauthorized markings provided the contractor failed to respond or substantiate its claim within sixty days of the Government's written inquiry into the matter. The second set of rules results from the enactment of 10 U.S.C. 2321, entitled "Validation of Proprietary Data Restrictions". These procedures apply only to technical data (not computer software) delivered under contracts solicited on, or after, 18 October 1985. These contracts contain the provision entitled "Validation of Restrictive Markings on Technical Data," DOD FAR SUPP 52.227-7037. The validation provision establishes an extremely complex challenge procedure that can involve a contract dispute which is fully litigated and appealed through the federal courts.

I. Challenging restrictive markings for contracts awarded after 18 October 1985 if the solicitation is issued prior to 18 October 1985.

1. Challenges of specific restrictive markings on technical data and computer software are made pursuant to section (d) of the data rights clause DOD FAR SUPP 52.227-7013, while challenges of restrictive markings on commercial computer software are made pursuant to subsection (b)(3)(ii)(E). The challenge is initiated by sending a certified written inquiry via registered mail to the contractor. This inquiry requests the contractor to provide clear and convincing evidence to substantiate: (a) that the questioned data pertains to an item, component, or process developed at private expense and (b) that the contractor has never disclosed the data without placing restrictions on its further disclosure. Additionally, for commercial computer software, the contractor must provide clear and convincing evidence to substantiate that such software is used regularly for other than government purposes and is sold, licensed or leased in signifi-

34

cant quantities to the general public at established market or catalog prices.

2.   Section (d) and subsection (b)(3)(ii)(E) require the contractor to provide this evidence to the contracting officer within 60 days (or state when they can) after receiving written notice. This period is defined as 60 days after receipt of the registered letter from the contracting office. Upon receipt of this evidence, the contracting officer assesses it against several tests:

    a.   If the contractor fails to provide evidence by the stated time period, or

    b.   If the evidence fails to satisfy the contracting officer that the development was accomplished without direct payment by the Government and at a time when no government contract required performance of the development effort (the private expense test). Independent research and development costs should be considered as private funds, or

    c.   For commercial computer software, if the evidence provide clear and convincing evidence to substantiate: (a) that the questioned data pertains to an item, component, or process developed at private expense and (b) that the contractor has never disclosed the data without placing restrictions on its further disclosure. Additionally, for commercial computer software, the contractor must provide clear and convincing evidence to substantiate that such software is used regularly for other than government purposes and is sold, licensed or leased in significant quantities to the general public at established market or catalog prices.

    If the contractor cannot subsequently refute evidence asserted by the Government as a basis that the data or commercial computer software falls within subsection (b)(1) of DOD FAR SUPP 52.227-7013; then, the restrictive marking is found to be unauthorized by the data rights clause and the Government may cancel or ignore the marking. This action should by held in abeyance pending adjudication of any appeal.

3. The Government may, alternatively, withhold up to ten (10) percent of the contract price until the contractor resubmits the data in question without the unauthorized legends. If the contractor fails to provide evidence by the stated time period, the restrictive legends may be struck or ignored upon the contractor being notified of the action taken.

4. A final decision by the contracting officer under the contract "Disputes" clause is to be issued after the filing of any claim submitted by the contractor. In no case shall legends be struck or ignored by the contracting officer before review and concurrence of the proposed action by the local Staff/Judge Advocate.

Other References:

    a. **DOD FAR SUPP SUBPART 27.70**: "INFRINGEMENT CLAIMS, LICENSES, AND ASSIGNMENTS"

    b. **DOD FAR SUPP PART 33**: "DISPUTES AND APPEALS"

II. Challenging restrictive markings for solicitations issued and contracts awarded after 18 October 1985.

Specific procedures may be used to question and challenge a contractor's claim regarding restrictive rights in technical data and computer software. The appropriate Government official should select the specific procedure which, if not mandated by law, best meets the Government's needs. In brief, these procedures include:

    (i) Informal Request. This is an optional procedure to be used, if appropriate. It is not part of the formal challenge procedure.

    (ii) Prechallenge Review. This is an optional procedure which was established by DOD FAR SUPP 52.227-7037, and may be made part of a formal challenge.

    (iii) Formal Challenge. This is a mandatory procedure for technical data delivered under contracts which contain the validation, DOD FAR SUPP 52.227-7037, provision. It can be adopted for use

in challenges of restrictive legends placed on both computer
software and technical data delivered under a contract which
does not contain DOD FAR SUPP 52.227-7037. It must be noted
however, that where the procedure is not mandatory, the tech-
nical data or computer software being challenged may be used by
the Government after the contracting officer issues his final
decision. There is no need to wait for a contractor to appeal.
See subparagraph (e)(3) below.

a.   Informal Request (Optional)

(1) Initial Letter. This procedure has been called the Postage
Stamp Persuasion Program. This letter may be used prior to any challenges
when it is determined that limited or restricted rights legends are an imped-
iment to breakout. The competition advocate (or the Program Office) will
issue a letter to the contractor advising that the items in question are
considered candidates for competitive requirement. The letter will ask the
contractor to voluntarily remove the limited or restricted rights legend.
(See Figure F-1 for example.)

(2) Follow-up Letter. If the contractor fails to positively
respond to the initial letter, a follow-up letter may be appropriate. This
letter is similar to the initial letter, except it is worded a little
stronger and it advises the contractor of the Government's rights to
challenge. An example "follow-up" letter is contained in Figure F-2.

b.   Prechallenge Review

(1) The contracting officer may request the contractor to furnish
to the contracting officer a written justification for any restrictions
asserted by the contractor or subcontractor on the right of the United Sates
or others to use technical data. (Figure F-3 contains a sample letter for
this purpose.) The contractor or subcontractor shall furnish such written
justification to the contracting officer within 30 days after receipt of a
written request or within such longer period as may be authorized in writing
by the contracting officer. If the contracting officer receives advice
(from any source) that the validity of restrictive markings on technical

data is questionable, the contracting officer shall request that the individual raising the question provide written rationale for the assertion. The contracting officer should also request information and advice on the validity of the markings from the cognizant Government activity having control of the data.

(2) The contracting officer shall review the contractor's written and other available information pertaining to the validity of a restrictive marking. The contracting officer shall further review the validity of the marking if he determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item.

(3) The contracting officer may then request the contractor to furnish information which substantiates the validity of any restrictive marking on technical data delivered or required to be delivered under the contract or subcontract. The contracting officer may also request the contractor to furnish additional information such as a statement of facts accompanied by supporting documentation adequate to justify the validity of the marking. The contractor shall furnish such information to the contracting officer within 30 days after receipt of a written request or within such longer period as may be authorized in writing by the contracting officer. If the contractor fails to provide the requested information, within 30 days after receipt of the contracting officer's written request or within such longer period as may be authorized in writing by the contracting officer, the contracting officer shall proceed in accordance with this chapter.

c. Formal Challenge

(1) If after completion of the review, the contracting officer determines that a challenge to the restrictive marking is warranted, the contracting officer shall send a written challenge notice to the contractor. Such notice shall include:

(i) the grounds for challenging the restrictive marking,

38

(ii) a requirement for a written response within 60 days
after receipt of the written notice justifying by
clear and convincing evidence the current validity of
the restrictive markings,

(iii) a notice that a response will be considered a claim
within the meaning of the Contract Disputes act of
1978 and must be certified in the form prescribed in
FAR 33.207, regardless of dollar amount, and

(iv) a notice that failure to respond to the challenge
notice will constitute agreement by the contractor or
subcontractor with Government action to strike or
ignore the restrictive legends. (Figure F-4 contains
a sample letter.)

(2) The contracting officer shall extend the time for response as
appropriate if the contractor or subcontractor submits a written request
showing the need for additional time to prepare for a response.

(3) Any written response from the contractor or subcontractor
shall be considered a claim within the meaning of the Contract Act of 1978
(41 U.S.C. 601 et seq:), and must be certified in the form prescribed by DOD
FAR SUPP 33.207, regardless of dollar amount.

(4) If the contractor or subcontractor has received challenges to
the same restrictive markings from more than one contracting officer, the
contractor or subcontractor is to notify each contracting officer of the
existence of more than one challenge. The notice shall also indicate which
unanswered challenge was received first by the contractor or subcontractor.
The contracting officer who initiated the first unanswered challenge is the
contracting officer who will take the lead in establishing a schedule for
the resolution of the challenges to the restrictive markings. This lead
contracting officer shall coordinate with all other contracting officers,
formulate a schedule for responding to each of the challenge notices, and
distribute such schedule to all interested parties. The schedule shall pro-
vide to the contractor or subcontractor a reasonable opportunity to respond
to each challenge notice. All parties must agree to be bound by this sched-
ule.

(5) The Government will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the contracting officer within 90 days from the issuance of the final decision. The Government will no longer be bound and may strike or ignore the restrictive markings if the contractor or subcontractor fails to file its suit within one year after issuance of the final decision. Notwithstanding the foregoing, where the head of any agency determines, on a nondelegable basis, the urgent or compelling circumstances significantly affecting the interest of the United States, the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure pending filing of the suit. However, such agency head determination does not affect the contractor's or subcontractor's right to damage against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

d. Final Decision When Contractor Fails to Respond

If the contractor or subcontractor fails to respond to the challenge notice within 60 days, the contracting officer will then issue a final decision that the restrictive markings are not valid and that the Government will correct, cancel or ignore the invalid restrictive markings. The failure of the contractor or subcontractor to respond to the challenge notice constitutes agreement with the Government action to strike or ignore the restrictive legends. The final decision shall be issued as a final decision under the Disputes clause at FAR SUPP 52.233-1. The final decision is to be issued within 60 days after the expiration of the time. Following the issuance of the final decision, the contracting officer may then strike or ignore the invalid restrictive markings.

e. Final Decision When Contractor or Subcontractor Responds

(1) If the contracting officer determines that the contractor or subcontractor has justified the validity of the restrictive marking, the contracting officer shall issue a final decision to the contractor or subcontractor sustaining the validity of the restrictive marking, and stating that

40

the Government will continue to be bound by the restrictive markings. Prior to making the final decision the contracting officer is obligated to verify the contractor's claim that the development of the item, component, or process was not an element of performance of any Government contract. In this regard, the contracting officer shall check with other Government agencies (e.g. NASA, Army, Air Force, Navy etc.) which have developed or are developing similar items, components, or processes. The final decision recognizing the contractor's claim shall not be issued until such actions have been taken. The final decision shall be issued within 60 days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period if the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within 60 days after receipt of the response to the challenge notice.

(2) If the contracting officer determines that the validity of the restrictive marking is not justified, the contracting officer shall issue a final decision to the contractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within 60 days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision shall advise the contractor or subcontractor of the rights of appeal under the Contract Disputes Act.

(3) NOTE. In contracts which were solicited prior to 18 October 1985 and which do not contain the DOD FAR SUPP 52.227-7037 clause, restrictive markings may be removed after the final decision of the PCO considers it to be in the best interests of the Government.

(4) In contracts which were solicited after 18 October 1985 and which contain DOD FAR SUPP 52.227-7037, the Government will continue to be bound by the restrictive marking for a period of 90 days from the issuance of the contracting officer's final decision. If the contractor or subcontractor intends to file suit in the United States Claims Court, he also must provide a notice of such intent to the contracting officer within 90 days from the

issuance of the contracting officer's final decision. If the contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the contracting officer within the 90 day period, the Government may cancel or ignore the restrictive markings. The failure of the contractor or subcontractor to take the required action constitutes agreement with such Government action.

(5) The Government will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, the head of an agency may determine on a non-delegable basis, (1) that the contractor or subcontractor has failed to diligently prosecute its appeal; or (2) that urgent or compelling circumstances significantly affecting the interest of the United States will not permit waiting for such disposition; upon such a determination the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure pending final adjudication. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

f. **Appeal or Suit**

(1) If the contractor or subcontractor appeals or files suit and if upon final disposition the contracting officer's decision is sustained, the restrictive markings on the technical data shall be cancelled, corrected, or ignored. If upon final disposition it is found that the restrictive marking was not substantially justified, the contracting officer shall determine the cost of review, fees and other expenses incurred by the Government in challenging the marking. The contractor is then liable to the Government for payment of these costs unless the contracting officer determines that special circumstances would make such payment unjust.

(2) If the contractor or subcontractor appeals or files suit and if upon final disposition the contracting officer's decision is not sustained, the Government shall continue to be bound by the restrictive markings. Additionally, if the challenge by the Government is found not to have been made

in good faith, the Government shall be liable to the contractor or subcontractor in defending the validity of the marking.

g. The Government's right to challenge the validity of a restrictive marking is without limitation as to time and without regard as to final payment under the contract under which the data was delivered. However, if the contracting officer issues a decision sustaining the validity of a restrictive marking, the validity of a restrictive marking shall not again be challenged unless additional evidence not originally available to the contracting officer becomes available that would indicate the restrictive marking is invalid. The technical data and computer software will be marked to indicate that a final challenge has been made and that the technical data and computer software will be marked to indicate that a final challenge has been made and that the Limited Rights Legend for technical data and Restricted Rights Legend for computer software have been challenged by the Government.

Other References:

a. DOD FAR SUPP SUBPART 27.70 - "Infringement Claims, Licenses, and Assignments"

b. DOD FAR SUPP PART 33 - "Disputes and Appeals"

c. JOINT LOGISTICS COMMANDERS (JLC) Draft - "Handbook for the Management Technical Data and Computer Software, 21 July 1986"

Figure F-1

Informal Request: Initial Letter

FROM:

SUBJECT: Removal of Restrictive Markings on Engineering Data

TO: Company XYZ

1. _____ has in its possession drawings prepared by your company which
contain limited rights legends. The drawing numbers are listed on the attached
sheet.

2. We have reviewed the drawings and believe that they contain adequate tech-
nical information to permit a new source to manufacture the items depicted. As
part of our ongoing efforts to improve the Government's manufacturing support
base, we would like to distribute the drawings to prospective bidders under a
formal procurement.

3. Because of the restrictive legends, however, we request your written
authorization to use the drawings for that purpose. This is not a challenge to
the propriety of your legends, but merely a request that the legends be removed
at no cost or obligation to the Government.

4. Your expeditious reply will be appreciated.

(End of Figure F-1)

44

From:

Subject: Removal of Restrictive Markings on Engineering Data

TO: Company XYZ

1. Reference is made to _____ letter of _____, which requested that your company authorize removing the limited rights legends from drawings listed as an attachment to the letter. We also reference your negative reply of _____. Copies of this correspondence are attached.

2. The purpose of this letter is to emphasize the fact that to retain limited rights legends on these drawings is costly to the United States and to your company. As you know, a restrictive marking is authorized only on data which pertains to items, components, or processes developed at private expense, which are not already in the public domain, and which are not required for emergency maintenance of the system supported by your product.

3. The Government requests that you review the desireability of retaining limited rights markings noted on Drawing _____, Revision _____. If you decide that the restrictive markings may be cancelled please so advise in writing. If you decide that the restrictive markings should remain in whole or in part on the drawings, you are requested to identify by circling (or by providing a note regarding) those portions of the drawing to which you claim limited rights.

4. If the Government formally challenges these legends, your company will have to furnish the necessary financial information to show that no Government funds were used in your product's development and that it was not developed under any other Government contract. In addition, clear and convincing evidence will have to be provided to the Government to show that your product was made before the specific contract, which called for delivery of the drawings, was awarded. Further, evidence will then be required to show that the product was actually made and was successfully used in the environment for which it was intended.

5. If you have any questions concerning this matter do not hesitate to contact _____ on (XXX) XXX-XXXX.

(End of Figure F-2)

45

Figure F-3
Prechallenge Letter

FROM:

Subject: Removal of Restrictive Marking on Engineering Data

TO: Company XYZ

1. The following engineering drawings/specifications contain a limited rights legend. These documents were furnished on contract_____ and are applicable to the _____ System/Aircraft.

Document Number No.   Revision   Date   Nomenclature

2. Please advise the undersigned if limited rights are still claimed by your company or if the limited rights legend can be removed. If rights are still claimed, please furnish, in accordance with the provisions of the (Rights in Technical Data and Computer Software Clause (insert clause no.) (or) (a previous clause) (or) (Validation of Unauthorized Restrictive Markings on Technical Data Clause) (insert clause no.)), a written statement of the facts justifying the restrictions asserted on the right of the United States Government to use the aforementioned data. Please furnish this justification within 30 days.

3. Submit an organized package with all documentation pertaining to an item, component, or process being separated from documentation for other items, components, or processes. Identify each area that justifies your position that the items, components, or processes were developed at private expense. All development efforts must be directly traceable to private funding or IR & D with no infusion of other government funds.

4. Send the name, phone number, and address of your focal point for this evaluation along with the justification. Should you require additional information, please contact the undersigned at _____, telephone number _____.

(End of Figure F-3)
46

Figure F-4
Formal Challenge Letter

FROM:

SUBJECT: Removal of Unauthorized Restrictive Markings on Technical Data;
Contract (insert contract no.)

TO: Company XYZ

1. Pursuant to the provisions of Contract Number _____, I hereby
challenge the propriety of the restrictive legends that you have placed on
the technical data listed below:

Document Number   Revision   Date   Nomenclature
(insert doc. number) (insert revision) (insert date) (insert nomenclature)

2. These technical data were delivered to the Government under the above
noted contract. The restrictive legends are being challenged for the following
reason:

   Note: In this section list the contracting officer's grounds for
challenging the restrictive markings. These grounds may fall into one, or both,
of the following classifications.

   Classification I: "Non-Protectable Technical Data". The grounds for
challenging technical data which falls into this classification are that the
technical data falls into one, or more, of non-protectable categories of tech-
nical data listed in paragraph (b)(1) of the Rights in Technical Data and
Computer Software clause, DOD FAR SUPP 52.227-7013.

   Classification II: "Not developed at Private Expense". The grounds for
challenging data which falls into this category are that the data was not
developed at private expense.

3. You are required to respond to this challenge, in writing, within sixty
calendar days after receipt. You are required to justify the validity of
the restrictive markings by clear and convincing evidence.

47

4. Your response to this challenge will be considered a claim within the meaning of the Contract Disputes Act of 1978 and must be certified in the form prescribed in Federal Acquisition Regulation 33.207, regardless of dollar amount. Failure to respond to this challenge notice will constitute an agreement by you with the Government's actions to strike or ignore the restrictive legends.

5. Should you require additional information in this matter, please contact the undersigned at _____.

(End of Figure F-4)

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION	1b. RESTRICTIVE MARKINGS
Unclassified	

2a. SECURITY CLASSIFICATION AUTHORITY	3. DISTRIBUTION/AVAILABILITY OF REPORT
2b. DECLASSIFICATION/DOWNGRADING SCHEDULE	Unlimited

4. PERFORMING ORGANIZATION REPORT NUMBER(S)	5. MONITORING ORGANIZATION REPORT NUMBER(S)
BRMC-87-01	

6a. NAME OF PERFORMING ORGANIZATION	6b. OFFICE SYMBOL (If applicable)	7a. NAME OF MONITORING ORGANIZATION
Air Force Business Research Management Center	RDCB	

6c. ADDRESS (City, State and ZIP Code)	7b. ADDRESS (City, State and ZIP Code)
WPAFB OHIO 45433-6583	

8a. NAME OF FUNDING/SPONSORING ORGANIZATION	8b. OFFICE SYMBOL (If applicable)	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER

8c. ADDRESS (City, State and ZIP Code)	10. SOURCE OF FUNDING NOS.			
	PROGRAM ELEMENT NO.	PROJECT NO.	TASK NO.	WORK UNIT NO.
	71113F	02	00	00

11. TITLE (Include Security Classification)
Technical Data Rights Handbook For Contracting Officers(U)

12. PERSONAL AUTHOR(S)
Perkowski, Peter J., Lt Col, USAFR

13a. TYPE OF REPORT	13b. TIME COVERED	14. DATE OF REPORT (Yr., Mo., Day)	15. PAGE COUNT
Final	FROM _____ TO _____	1987 Jan 21	56

16. SUPPLEMENTARY NOTATION

17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)		
FIELD	GROUP	SUB. GR.	Data Rights	Computer Software	Competition
05	04		Technical Data	Copyrights	FAR
15	05		Acquisition	Data acquisition	

19. ABSTRACT (Continue on reverse if necessary and identify by block number)
This handbook was developed to assist Air Force and Department of Defense (DOD) Contracting and Acquisition personnel in planning for, contracting for, and using technical data to foster competition. If DOD contracting is to be successful in obtaining and utilizing contractor, subcontractor and vendor data in competitive acquisitions it must develop business strategies to acquire the data, establish contractual requirements for delivery of acquisition data for those items the Government intends to acquire competitively, obtain the rights to use the acquisition data, assure the acceptability of the acquisition data, and use the acquisition data in competitive acquisitions where it is economically and technically feasible. The body of the handbook focuses on the planning (i.e., business strategy) and contractual aspects of acquiring data. Each topic within the body refers the reader to Federal Acquisition Regulation (FAR) and DOD FAR Supplement citations and appendicies for additional details or procedures to be followed. Topics are arranged within the acquisition/contracting life cycle in which they would normally be addressed.

20. DISTRIBUTION/AVAILABILITY OF ABSTRACT	21. ABSTRACT SECURITY CLASSIFICATION
UNCLASSIFIED/UNLIMITED ☒ SAME AS RPT. ☐ OTIC USERS ☐	UNCLASSIFIED

22a. NAME OF RESPONSIBLE INDIVIDUAL	22b. TELEPHONE NUMBER (Include Area Code)	22c. OFFICE SYMBOL
RICHARD C. COLLINS, Maj, USAF	(513) 255-6221	AFBRMC/RDCB

DD FORM 1473, 83 APR   EDITION OF 1 JAN 73 IS OBSOLETE.