

Federal circuit confirms DoD contractor's expanded restrictions on non-government parties rights in data

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Last month, the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) opinion in *The Boeing Co. v. Secretary of the Air Force*¹ shed additional light on the technical data rights of contractors under defense contracts.

The decision hinges on the fact that technical data provided by a contractor to the government remains the property of the contractor. Additionally, contractors retain certain rights in connection with technical data even when the government has so-called "unlimited rights" to use it.

CASE BACKGROUND

In this case, Boeing held two contracts with the U.S. Air Force (USAF) for work on the F-15 Eagle Passive/Active Warning Survivability System.

The contracts included the requirement for delivery of technical data to the USAF with Unlimited Rights and the DFARS 252.227-7013, non-commercial technical data rights clause (Subsection 7013).

The parties did not dispute that Boeing retained ownership of technical data delivered to the USAF under the contracts, but Boeing contended that its legends on the technical data were intended to protect its rights as they pertained to third parties.

Namely, putting third parties on notice of the proprietary nature of the data and directing that "Non-US Government Entities May Use and Disclose Only As Permitted In Writing By Boeing Or By The US Government."

The USAF rejected the data deliverables marked in this manner, finding them nonconforming and Boeing requested a final Contracting Officer's decision on the matter.

The Contracting Officer's final decision confirmed that the USAF was correct in rejecting the legends and directed Boeing to correct them.

Boeing appealed the decision to the Armed Services Board of Contract Appeals (ASBCA) on the ground that Boeing's legend was "not nonconforming" under Subsection 7013(f) since its legend did not address restrictions on government rights, only third-party rights.

The ASBCA, ruling on the motion for summary judgment, disagreed, siding with the USAF's position that only the legends listed in Subsection 7013(f) are authorized and Boeing's legend was not one of those. Boeing appealed this decision to the Federal Circuit.

The court began by looking to the plain language of Subsection 7013(f).

The court explained that two sentences needed to be reconciled: one saying that the contractor "may only assert restrictions on the Government's rights" and another indicating that "only the following legends are authorized under this contract."

Boeing appealed the decision to the Armed Services Board of Contract Appeals (ASBCA) on the ground that Boeing's legend was "not nonconforming" under Subsection 7013(f) since its legend did not address restrictions on government rights, only third-party rights.

Boeing argued that the plain language meant Subsection 7013(f) applies in a situation in which a contractor seeks to restrict the government's rights in any way. The government, by contrast, asserted that the second sentence means "only the following legends" are permitted and no other legends.

The court concluded that the two sentences when read together are describing how a contractor "may assert restrictions on the Government's rights."

Thus, the Federal Circuit agreed with Boeing's interpretation "that Subsection 7013(f) is only applicable in that context, and it is silent on any legends that a contractor may mark on its data when it seeks to restrict only the rights of non-government third parties."

The court explained that under ASBCA's interpretation, the first sentence would be entirely unnecessary.

Further, the court maintained that Boeing's interpretation was faithful to the overall purpose of the 7013 clause in governing

the allocation of data rights between contractors and the government.

While the government asserted on appeal that Boeing's legends restrict the government's rights, the court found that the ASBCA did not resolve factual disputes between the parties regarding whether the legends do or do not restrict the government's rights.

The Federal Circuit left these disputes for ASBCA to resolve on remand.

TAKEAWAYS FOR GOVERNMENT CONTRACTORS

One lesson from this case is the importance of addressing data rights early-on with the government, especially when a contractor has specific concerns regarding its use.

This can include deciding from the beginning the respective data rights for each side and agreeing on the markings and legends to be used on data deliverables.

Note

¹ <https://bit.ly/3ahvdcn>

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