



Protecting Federal Contracting Data Through Proper Marking

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Introduction



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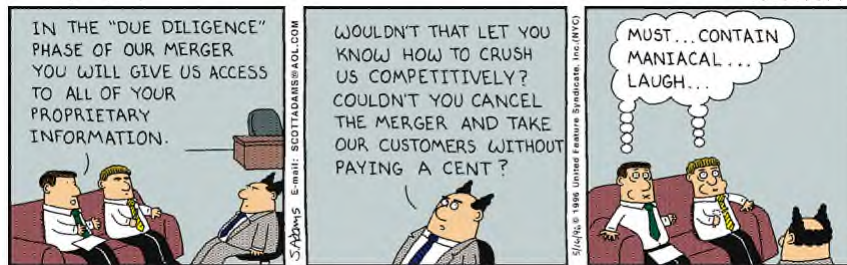


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Why Care About Data Marking?

- 2 main reasons we mark data:
 1. Protect the Contractor
 2. Protect the Government

- 3 main things we are protecting:
 1. Proprietary/Competition Sensitive/Personal Information
 2. Intellectual Property
 3. National Security



The Only Foolproof Method

- The best way to protect your information is to not share it with anyone!
 - Definition of a “Trade Secret”
 - “Need to Know”

BUT

- Proposals, pre-proposal interchanges, deliverables, intellectual property, M&A



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Today's Topics

- Freedom of Information Act (FOIA)
- Protecting the Contractor
 - Proprietary Information
 - Source Selection Information (SSI) / Proposal Protection
 - Data Rights
- Protecting the Government
 - Export Controls
 - For Official Use Only (FOUO)
 - Distribution Statements
- Bringing it all together
 - CDRLs and Non-deliverables



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The Freedom of Information Act (FOIA)

Freedom of Information Act (FOIA)

- Federal statute granting the public a right to obtain access to federal agency records or information (5 U.S.C. § 552)
- Records can only be protected from disclosure if they qualify under one of
 - 9 exemptions contained in the law; or
 - 3 special law enforcement record exclusions
- Most State and local governments have their own versions – do not assume they are identical!

FOIA Exemptions

- 1) Classified information
- 2) Internal agency personnel rules and practices;
- 3) Specifically exempted from disclosure by statute;
- 4) ***Trade secrets and confidential business information;***
- 5) Inter- or intra- agency memoranda or letters that are protected by legal privileges;

FOIA Exemptions

- 6) Personnel, medical, and similar files where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- 7) Law enforcement records or information
- 8) Information regarding bank supervision
- 9) Geological and geophysical information and data, including maps, concerning wells.

Protecting the Contractor

Proprietary Information (aka Trade Secrets)

- Disclosure to commercial entities typically protected by contract terms
 - NDAs/CDAs, Teaming Agreements, Subcontracts
- Disclosure to the USG protected by various federal statutes
 - Procurement Integrity Act (41 USC § 423)
 - Disclosure of Confidential Information (18 USC § 1905)
 - Also see FAR 3.104-4 – Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information

Proprietary Marking Requirements

- Consider the specific contractual obligations you have signed up to
 - Legends
 - Verbal disclosures (?!)
 - “Of their nature” are proprietary
- No magic language, but typical keywords include
 - Proprietary
 - Confidential
 - Competition Sensitive
 - Protected – Not for Public Release



Source Selection Information

- “Source Selection Information” defined in FAR 2.101
- Any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly

Source Selection Information

- Proposed costs/prices and bid prices
- Source selection and technical evaluation plans
- Technical evaluations or proposals
- Cost or price evaluations of proposals.
- Competitive range determinations
- Rankings of bids, proposals, or competitors
- Reports and evaluations of source selection teams
- Other information where disclosure would jeopardize the integrity or successful completion of the procurement

Proposal Protections

- 15.215-1 – Instructions to Offerors – Competitive Acquisitions
 - Required clause in competitive acquisitions where USG intends to award without discussions
 - Most RFPs give the USG the right to do so

- Can also (and should!) use in other types of proposal submissions
 - Sole source
 - Competitive with discussions
 - Unsolicited proposals

FAR15.215-1(e) Proposal Marking Requirements

Title Page Legend

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed -- in whole or in part -- for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of -- or in connection with -- the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]

FAR15.215-1(e) Proposal Marking Requirements (Cont'd)

Each Sheet Containing Restricted Data

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal

Contractor Intellectual Property and Data Rights

- Contractors generally retain ownership of the intellectual property that they provide to the USG
- The USG typically receives license rights to use, reproduce, modify, release, and disclose the information
- The scope of the USG's license depends on a variety of factors
 - source of funding for development of the technology
 - whether the information relates to a commercial item
 - the parties' negotiations for specialized license terms or restrictions.

FAR vs. DFARS Approach

FAR → Withholding Model

- Contractor may withhold from delivery qualifying limited rights data or restricted computer software that are not subject to unlimited rights, but must
 - Identify the data being withheld; and
 - Furnish form, fit, and function data instead.

DFARS → Delivery and Marking Model



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Why Does this Matter?

- FAR provides no right to include restrictive markings
 - Exception for copyrights
- DFARS mandates restrictive markings on every document containing protected data

Failure to properly and consistently mark data will result in unlimited rights



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DFARS Restrictive Legends

- Restrictive markings are either required or permitted on technical data or computer software delivered to DoD
- Specific marking format and content depends on
 - whether the data or software is commercial or noncommercial
 - the type of license rights granted to the USG

DFARS Restrictive Legends

- Certain restrictive legends are dictated
 - Unlimited, Government Purpose, Limited/Restricted Rights, etc.

BUT

- In many cases the contractor may use any restrictive legend that appropriately provides notice of the contractor's proprietary interests and accurately characterizes the Government's license rights

General Marking Requirements

- Data must be “conspicuously and legibly” marked with a protective legend
- Authorized legends shall be placed on
 - The transmittal/cover document or storage container
 - Each page of printed material containing technical data for which restrictions are asserted
- When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier

General Marking Requirements

- Technical data transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions
- Reproductions of technical data or any portions thereof subject to asserted restrictions must also reproduce the asserted restrictions

Unlimited Rights Data

- No markings are required, but good practice
 - Default assumption is unlimited rights
- When the USG receives *less* than unlimited license rights in technical data, the contractor is required to mark the information with an appropriate restrictive legend

Government Purpose Rights Data (GPR)

- Grants the USG the rights to use, modify, reproduce, release, perform, display, or disclose technical data/computer software
 - within the Government without restriction; and
 - outside the Government (with same rights to recipients) for United States government purposes
- “Government purpose” is *very* broad
 - Excludes commercial rights
- Expires after a defined period and converts to Unlimited Rights

DFARS Legend – 252.227-7013,& -7014

GOVERNMENT PURPOSE RIGHTS

Contract No.
Contractor Name:
Contractor Address:
Expiration Date:

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the Rights in [Technical Data –Noncommercial Items / Noncommercial Computer Software and Noncommercial Computer Software Documentation] clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the [technical data/software] or portions thereof marked with this legend must also reproduce the markings



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Limited/Restricted Rights Data

- Analogous rights for technical data and computer software
- Grants the USG the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government.
- The Government generally may not use or disclose the information outside the Government except in certain defined circumstances



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DFARS Legend – 252.227-7013 & -7014

[LIMITED / RESTRICTED] RIGHTS

Contract No.
Contractor Name:
Contractor Address:

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in [Technical Data--Noncommercial Items / Noncommercial Computer Software and Noncommercial Computer Software Documentation] clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.



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Special License Rights Data

- The USG's 'default' license rights may be negotiated and modified by mutual agreement of the parties
- May not restrict the USG's rights to lesser rights limited/restricted rights
- Any such unique rights must be identified in a license agreement and incorporated into the contract



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DFARS Legend – 252.227-7013 & -7014

SPECIAL RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. _____(Insert contract number)_____, License No. _____(Insert license identifier)_____. Any reproduction of [technical data / computer software, computer software documentation,] or portions thereof marked with this legend must also reproduce the markings.

SBIR Data Rights

- Hybrid GPR and Limited/Restricted Rights applicable to Small Business Innovation Research projects
- Grants the USG the rights to use, modify, reproduce, release, perform, display, or disclose data generated under a SBIR award with:
 - Limited rights in SBIR technical data; and
 - Restricted rights in SBIR computer software.
- Expires after 5 years and converts to Unlimited Rights

DFARS Legend – 252.227-7018

[LIMITED / RESTRICTED] RIGHTS

Contract No.
Contractor Name:
Contractor Address:
Expiration of SBIR Data Rights Date:

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the Rights in Noncommercial Technical Data and Computer Software–Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.



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Pre-Existing Data Markings

- Applies if the terms of a prior contract or license permitted the Contractor to restrict the USG's rights and those restrictions are still applicable
- Contractor may mark such data with the appropriate restrictive legend for which the data qualified under the prior contract or license



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Commercial Technology

- The Government's license rights are as specified in the contract
- Contractor must use a restrictive legend for data being provided with less than unlimited rights, but no specific verbiage required

Copyright Markings

- Statutory right – 17 U.S.C. § 401-402
 - Allowed under DFARS data right clauses (See e.g., 252.227-7013(f))
- Notice: “Copyright or © [Date] [Copyright Owner]”
- But don't forget about third party data obligations:
 - Contractor may not incorporate any copyrighted data in deliverables it is the copyright owner or has obtained for the USG the necessary license rights and has affixed a statement of such license or licenses to the data transmittal document.

Protecting the Government

Export Controls

- 2 Major Export Control Regimes
 - International Traffic in Arms Regulation (ITAR) → items identified on the United States Munitions List (USML)

and

 - Export Administration Regulation (EAR) → everything else

Export Control Markings

- No 'universal' marking
 - Will depend on the individual item, contract, agency, etc.
- Sample generic DoD marking

WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751, et seq.) or the Export Administration Act of 1979 (Title 50, U.S.C., App. 2401 et seq.), as amended. Violations of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DoD Directive 5230.25.

Sample ITAR Marking

- Similar to proposal and data rights marking approaches – detailed cover page statement + footer on relevant pages
- Cover page: “***This document contains Technical Data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751, et seq.). Violations of these export laws are subject to severe criminal penalties.***”
- Footer: “***This page contains ITAR Restricted Data.***”

For Official Use Only (FOUO)



For Official Use Only (FOUO) Information

- No “official” definition – varies by agency
- DoD Definition (32 C.F.R. Appendix A to Part 295)
 - Unclassified information that may be withheld from the public for one or more of the reasons cited in FOIA exemptions (b)(2) through (b)(9)
- DHS Definition is DoD plus...
 - Privacy Act information
 - Information that could result in physical risk to personnel
 - Facility infrastructure or security vulnerabilities
 - ...and more

For Official Use Only (FOUO) Information

- **Distribution Rights/Restrictions**
 - May be disseminated within DoD components and to contractors as necessary in the conduct of official business
 - May be released to other executive and judicial departments and agencies in performance of a valid USG function

Marking DoD FOUO Documents

- **FOR OFFICIAL USE ONLY** at the bottom on the:
 - outside front cover or title page,
 - each page containing FOUO information, and
 - outside of the back cover (if any)
- **Classified Documents containing FOUO**
 - If page contains both classified & FOUO, mark at the top and bottom with the highest security classification of information appearing on the page
 - If page contains no classified data, mark “For Official Use Only” at the bottom of the page

Other Records and Media

- “Common Sense” standard for other records and media
 - E.g., photographs, tapes, slides, computer media
- Mark the records “For Official Use Only” or “FOUO” in a manner that ensures that a recipient or viewer is aware of the status of the information

Transmitting FOUO Data

- Unclassified electronically transmitted messages must contain “FOUO” before the beginning of the text
- FOUO information transmitted outside the DoD must bear an expanded marking on the face of the document to explain the significance of the FOUO marking
 - *This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemptions [...] apply*

DoD Distribution Statements

- Distribution statements shall be shown on the title page, front cover, and SF 298
- Portions or pages of a document or compilation may have different distribution statements that would govern their distribution if separated from the main document
- *The most restrictive distribution applies to the document as a whole*

5 Distribution Statement Categories:

- A: Approved for Public Release
- B: U.S. Government agencies only (w/ reason)
 - Administrative or Operational Use
 - Contractor Performance Evaluation
 - Critical Technology
 - Export Controlled
 - Foreign Government Information
 - Operations Security
 - Premature Dissemination
 - Proprietary Information
 - Test and Evaluation
 - Software Documentation
 - Specific Authority
 - Vulnerability Information

5 Distribution Statement Categories:

- C: U.S. Government agencies and their contractors (w/ reason)
- D: Department of Defense and U.S. DoD contractors only (w/ reason)
- E: DoD Components only (w/ reason)
- F: Further dissemination only as directed by controlling DoD office or higher DoD authority.

Distribution Statement Category Reasons

REASON	A	B	C	D	E
PUBLIC RELEASE.	X				
ADMINISTRATIVE OR OPERATIONAL USE: To protect technical or operational data or information from automatic dissemination under the International Exchange Program or by other means. This protection covers publications required solely for official use or strictly for administrative or operational purposes. This statement may apply to manuals, pamphlets, technical orders, technical reports, and other publications containing valuable technical or operational data.		X	X	X	X
CONTRACTOR PERFORMANCE EVALUATION: To protect information in management reviews, records of contract performance evaluation, or other advisory documents evaluating programs of contractors.		X			X
CRITICAL TECHNOLOGY: To protect information and technical data that advance current technology or describe new technology in an area of significant or potentially significant military application or that relate to a specific military deficiency of a potential adversary. Information of this type may be classified or unclassified.		X	X	X	X
DIRECT MILITARY SUPPORT: The document contains export-controlled technical data of such military significance that release for purposes other than direct support of DoD-approved activities may jeopardize an important technological or operational military advantage of the United States, another country, or a joint U.S.-foreign program. Designation of such data is made by competent authority in accordance with Reference (d).					X
EXPORT CONTROLLED: To protect information subject to the provisions of Reference (d).		X	X	X	X
FOREIGN GOVERNMENT INFORMATION: To protect and limit distribution in accordance with the desires of and agreements with the foreign government that furnished the technical information.		X	X	X	X

Distribution Statement Category Reasons

REASON	A	B	C	D	E
OPERATIONS SECURITY: To protect information and technical data that may be observed by adversary intelligence systems and determining what indicators hostile intelligence systems may obtain that could be interpreted or pieced together to derive critical information in time to be useful to adversaries.		X			X
PREMATURE DISSEMINATION: To protect patentable information on systems or processes in the development or concept stage from premature dissemination.		X			X
PROPRIETARY INFORMATION: To protect information not owned by the U.S. Government and marked with a statement of a legal property right. This information is received with the understanding that it will not be routinely transmitted outside the U.S. Government.		X			X
TEST AND EVALUATION: To protect results of test and evaluation of commercial products or military hardware when disclosure may cause unfair advantage or disadvantage to the manufacturer of the product.		X			X
SOFTWARE DOCUMENTATION: To protect technical data relating to computer software that is releasable only in accordance with the software license in subpart 227.72 of Reference (s). It includes documentation such as user or owner manuals, installation instructions, operating instructions, and other information that explains the capabilities of or provides instructions for using or maintaining computer software.		X	X	X	X
SPECIFIC AUTHORITY: To protect information not specifically included in the above reasons, but which requires protection in accordance with valid documented authority (e.g., Executive orders, statutes such as Atomic Energy Federal regulation). When filling in the reason, cite "Specific Authority (identification of valid documented authority)."		X	X	X	X
VULNERABILITY INFORMATION: To protect information and technical data that provides insight into vulnerabilities of U.S. critical infrastructure, including DoD warfighting infrastructure, vital to National Security that are otherwise not publicly available.		X	X	X	X

Distribution Statement Format

- Distribution Statements B, C, D, and E are expressed in a standard format comprising four components presented in the following order:
 - 1) Authorized audience
 - 2) Reason for control
 - 3) Date of determination
 - 4) Controlling office

Specific Legends

“DISTRIBUTION STATEMENT A. Approved for public release.”

“DISTRIBUTION STATEMENT B. Distribution authorized to U.S. Government agencies only (fill in reason) (date of determination). Other requests for this document shall be referred to (insert controlling DoD office).”

Specific Legends

DISTRIBUTION STATEMENT C. Distribution authorized to U.S. Government agencies and their contractors (fill in reason) (date of determination). Other requests for this document shall be referred to (insert controlling DoD office).”

“DISTRIBUTION STATEMENT D. Distribution authorized to the Department of Defense and U.S. DoD contractors only (fill in reason) (date of determination). Other requests shall be referred to (insert controlling DoD office).”

Specific Legends

“DISTRIBUTION STATEMENT E. Distribution authorized to DoD Components only (fill in reason) (date of determination). Other requests shall be referred to (insert controlling DoD office).”

“DISTRIBUTION STATEMENT F. Further dissemination only as directed by (inserting controlling DoD office) (date of determination) or higher DoD authority.”

Bringing it All Together

CDRLs and “Non-Deliverables”

- Aggregation of everything we have talked about today:
 - Data Rights / Proprietary Markings
 - Copyright Marking
 - Export Controls
 - Distribution Statement
 - FOUO
- Best practice: pre-established templates for various combinations of data types

Questions



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