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FEATURE COMMENT: Data Rights Assault: What In The H (clause) Is Going On Here? Air Force Overreaching On OMIT Data

There have been occasional disputes over the years about what comprises "operation, maintenance, installation, and training" (OMIT) technical data in which the Government obtains unlimited rights regardless of contractor development at private expense. This is due largely to the absence of any definition of those words in the data rights regulations, which leaves room for debate about their breadth. But two things have not been open to debate: One is that "detailed manufacturing and process data" are, by law and regulation, not OMIT data. 10 USCA § 2320(a)(2)(C)(iii). The other is that computer software is not OMIT data, because software, also by statutory and regulatory definition, is not technical data, and, under 10 USCA § 2320, OMIT unlimited rights apply only to technical data.

The Air Force appears to have disregarded these inconvenient laws and facts by pursuing a special "H" clause that violates both of these principles, transgresses the prohibitions of 10 USCA § 2320(a)(2)(H) against compelling a contractor to relinquish its data rights as a condition of responsiveness or award, and appears to have been promulgated improperly. This clause is "LCMC/WLZ - H001 DELIVERY AND LICENSE RIGHTS FOR TECHNICAL DATA AND SOFTWARE NECESSARY FOR OPERATION, MAINTENANCE, INSTALLATION AND TRAINING (OMIT)." Contractors should consider challenging this provision through pre-award protests.

OMIT Technical Data Is a Statutory Creation—The unlimited rights grant for OMIT data is codified at 10 USCA § 2320, "Rights in technical data." Everything about this statute pertains to technical data, nothing else. And OMIT is entirely a creature of this statute, existing nowhere else in the Department of Defense data rights laws. Thus, by statute, OMIT data are **only** technical data and nothing else, such as software. This conclusion is given force by the statutory definition of technical data found in 10 USCA § 2302(4):

> The term "technical data" means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software.

It similarly is given force by the Department of Defense Federal Acquisition Regulation Supplement (DFARS) contract clause for noncommercial computer software, 252.227-7014, which, consistent with the statutes and their definitions, does not contain any exception for unlimited OMIT rights in computer software. 252.227-7014(b)(1).

The DFARS similarly does not contemplate OMIT for commercial computer software, because in 1995 the DFARS eliminated any clause or specific requirements—OMIT or otherwise—for commercial computer software. DFARS 227.7202-4. Instead, commercial software is acquired via a software license agreement. This historically has meant "standard" commercial licenses modified (if at all) to avoid inconsistencies with federal procurement laws and, occasionally, otherwise to meet the Government's needs. DFARS 227.7202-1(a); 227.7202-4. OMIT rights are alien to commercial software licenses. Any unique rights of use, such as H001's OMIT, require a "transfer of rights mutually agreed upon." DFARS 227.7202-1(c)(2). A mandatory solicitation requirement cannot fairly be characterized as a mutual agreement. More on commercial computer software a few pages from now.

The technical data rights syllogism of § 2320 is straightforward. Subsection 2320(a)(2)(B) recognizes contractor rights in private development and provides exceptions to those rights:

> Except as provided in subparagraphs (C), (D), and (G), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

Of the three exceptions, only "(C)" is relevant here. Specifically for OMIT, the statute at 2320(a)(2)(C)(iii) provides that the ability to restrict the Government's rights does not apply to technical data that:

> is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component).

Accord DFARS 252.227-7013(b)(1)(v); 227.7103-5(a)(5). In turn, the DFARS clause addressing "Rights in technical data—noncommercial items," 252.227-7013(a)(6), defines detailed manufacturing or process data as:

> technical data that describe the steps sequences and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

If we stop right there, we know at least two points with certainty: First, by law, OMIT data are technical data and not software. Second, by law, technical data that would allow an item to be manufactured cannot be OMIT data. With those two points squarely in mind, let's look at the Air Force's H001.

The Air Force Clause—H001 is an ambitious clause. Although it is tailored for specific procurements, the core provisions of the clause remain unchanged from acquisition to acquisition and are designed not only to give the Air Force unlimited rights in just about any and everything that one might imagine to be OMIT data, but also to secure delivery of all those things and to assure acquisition of and rights to them from all tiers of suppliers. The breadth of the clause, and its problematic aspects, are reflected at the outset in its definitions.

Here are the first two (of five) definitions, excerpted from an aircraft program:

> 1. "OMIT Data" is defined for the purposes of this contract as all technical data, **computer software,** computer software documentation, computer data bases and graphics pertaining to [the subject of the acquisition] required to successfully conduct all operation, maintenance, installation, and training activities, regardless of whether such activities are performed by Air Force military, civilian, or contract personnel.
>
> A. OPERATION
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> "Operation" includes all procedures, guidance, and instructions for ground and inflight operating, handling, testing, emergency, utilization, familiarization, and functional use of the Aircraft, Engine(s), Support Equipment (SE), Aircrew Training Devices (ATDs), and Ground Training Devices (GTDs) to perform their intended functions. Operation also includes **all data to** identify, catalog, **stock, source, acquire, procure,** replenish, package, handle, store, and transport of the … aircraft system and [its] subsystems, assemblies, subassemblies, **components, parts, and pieces.** [Emphases added.]

The clause's grant of unlimited rights in these OMIT "data" is as stark as it unambiguous:

> License Rights. Contractor hereby grants or shall obtain for the Government unlimited rights in all technical data, computer software, computer databases, graphics, and computer software documentation necessary for OMIT. [H001(c).]

It is apparent immediately that the OMIT definition and license rights are inconsistent with the statute and DFARS. There are no statutory or regulatory OMIT unlimited rights in computer software, yet "computer software" is squarely in H001's opening paragraph. This alone is grounds for challenging the clause.

The next paragraph defining "Operation" compounds the Government's problem. There is no meaningful, even discernible, difference between this definition's requirement for "all data" that will allow the Air Force to "stock, source, acquire, [and] procure" the end item (as well as any and all of its components) and the prohibitions on OMIT data's including detailed manufacturing or process data, which is defined as the data necessary for the manufacturer "to produce an item or component." DFARS 252.227-7013(a)(6). One cannot "stock, source, acquire, or procure" an item unless it can be produced, and it cannot be produced without "detailed manufacturing or process data"—at least not for any amount of money the Government tends to have available. This is contrary to law.

Furthermore, both aspects of the clause also run afoul of the longstanding prohibition in 2320(a)(2)(H)

against compelling a contractor to relinquish its data rights as a condition of responsiveness or award:

> A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract—(i) to sell or otherwise relinquish to the United States any rights in technical data.

This statutory admonition is replicated in the DFARS at 227.7103-1(c) for noncommercial technical data and at 227.7203-1(c) for noncommercial computer software.

There are very few exceptions to 2320(a)(2)(H), one of which is for OMIT technical data as defined in 2320(a)(2)(C)—i.e., not software and not detailed manufacturing data. The "technical data" in H001 obviously do not meet that definition or, therefore, the exception. Nor does H001 set up the questionable but (as yet) unchallenged practice of agencies attempting to end run 2320(a)(2)(H) by asking offerors for priced options to give up their data rights in exchange for a more favorable rating. H001 simply demands giving them up.

When a procurement solicitation includes provisions that are contrary to law or regulation, the Government Accountability Office and the Court of Federal Claims will sustain timely pre-award protests challenging the provisions. E.g., *Delex Sys., Inc*., Comp. Gen. Dec. B-400403, 2008 CPD ¶ 181 at 8–9 (sustaining protest where solicitation was not set aside for small businesses, in violation of statute); 50 GC ¶ 404; *Crane & Co., Inc.*, Comp. Gen. Dec. B-297398, 2006 CPD ¶ 22 (sustaining protest where solicitation provided for the award of contracts for a period of performance exceeding the statutory time limit); 48 GC ¶ 117; *Palantir USG, Inc. v. U.S.*, 129 Fed. Cl. 218 (2016) (sustaining protest where agency issued a solicitation for a developmental contract, without first conducting a commercial availability determination, as required by statute); 58 GC ¶ 430.

An Improper Deviation—There may well be another fundamental infirmity in H001, depending on how it was promulgated. DOD agencies, departments, and contracting activities are permitted to issue contract clauses, such as Air Force H001, that deviate from the FAR or DFARS. DFARS Subpt. 201.4 describes the circumstances in which this can be done properly. Although the provenance of H001 is unclear, there is no indication it meets any of the requirements for DFARS deviations.

Individual or class deviations can be authorized at various levels within DOD. No deviation is permissible, however, with respect to the FAR or DFARS data rights provisions without the approval of the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) (OUSD(AT&L)DPAP). DFARS 201.402(1)(ii). There is no evidence this has occurred for H001. If not, it is an unauthorized clause.

Moreover, even if this absolute secretarial approval requirement did not exist—which it does—there is no indication the clause was an authorized class deviation approved by an Air Force "senior procurement executive," as required by DFARS 201.404(b)(ii). Nor would it qualify as a properly promulgated individual deviation (also known as a "local clause"). In accordance with DFARS 201.304(4), these clauses must be consistent with a department plan approved at the OUSD(AT&L)DPAP level, and if used repetitively—as is H001—must be published as a final rule in the Federal Register. PGI 201.304(4)(E). If such publication occurred, it must have been in invisible ink.

"The terms and policy of applicable procurement regulations are to be followed, not thwarted." *McDonnell Douglas Corp. v. U.S.*, 229 Ct.Cl. 323, 327 (1982). Contracting officers have no authority to insert into solicitations or contracts clauses that, like H001, deviate from prescribed regulations. See id. (provision excluding specific invention from patent rights clause did not bind the Government without evidence of authorization in accordance with departmental procedures); *Beta Sys., Inc. v. U.S.*, 838 F.2d 1179, 1185–86 (Fed. Cir. 1988) (Government cannot benefit from contract provision that violates the acquisition regulations in effect at the time the contract is signed); 30 GC ¶ 52. Moreover, a provision in a Government contract that violates or conflicts with a federal statute, as does H001, is invalid or void. *Am. Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996); see *W.G. Yates & Sons Constr. Co., Inc. v. Caldera*, 192 F.3d 987, 994 (Fed. Cir. 1999) (solicitation qualification requirement invalid and unenforceable where agency did not follow statutory or regulatory procedure for establishing it); *Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997) (contract clause purporting to divest court of jurisdiction invalid for violating the Contract Disputes Act).

Commercial Computer Software as OMIT—The breadth of the clause's OMIT coverage for soft-

ware is obvious from the definitions, above, as well as from the flow-down requirement:

> (d) Subcontractors and Suppliers. The contractor's obligations in this Special contract requirement shall apply to all technical data, computer software documentation, computer databases, graphics and computer software, including all technical data developed, delivered, or otherwise provided by subcontractors and suppliers at any tier; **regardless of whether the OMIT data is, or relates to, commercial items** or non-commercial items. The contractor shall include these requirements in its subcontracts or other contractual or legal instruments with its subcontractors and suppliers at any tier. The contractor shall ensure all subcontractors and suppliers at any tier replicate this clause. [Emphasis added.]

The Air Force, nonetheless, is aware of the DFARS position on commercial computer software license agreements reflected in 227.7202, and plainly recognizes that in practice some suppliers of commercial software will not agree to unlimited OMIT rights. Indeed, experience shows that some commercial software suppliers will not agree to any deviations from their purely commercial license agreements, even when those agreements contain provisions unenforceable against the Federal Government, such as commercial disputes clauses. In the suppliers' view, this is a problem for primes to solve with agencies. Accordingly, H001 affords the Air Force the opportunity to gauge how many commercial software suppliers will not agree to the clause but rather may pursue a license agreement. That said, H001 constrains software suppliers to only two options. Specifically, the unlimited OMIT rights license grant in H001(c) contains this proviso:

> Any exceptions to this grant for computer software shall be identified and asserted as a restriction on computer software pursuant to LCMC/WLZ – H002 and shall include any assertions for commercial computer software required for OMIT, which shall be subject to a commercial license consistent with DFARS 227.7202-1(a) and AFMC STD8 clause, **Alternate I and Alternate III only.** [Emphasis added.]

The reference to H002 is to a clause entitled "IDENTIFICATION AND ASSERTION OF RESTRICTIONS ON TECHNICAL DATA AND COMPUTER SOFTWARE (DEC 2016)," which requires identifying restricted or limited rights more comprehensively than prescribed by the DFARS basic identification clause—252.227-7017. "Identification and assertion of use, release, or disclosure restrictions"—and requires "copies of negotiated, commercial, and other non-standard licenses."

The more troublesome reference in H001 is to the AFMC STD-8 clause (also referred to as AFMC STD-H006), Commercial Computer Software License (Dec 2016). This clause is a multi-page doozy, worthy of an article unto itself. Here is a portion of its introduction:

> In accordance with the present clause, the Contractor shall provide license agreement information for all COMMERCIAL computer software licenses to be obtained on behalf of or transferred to the US Government under this contract. In this arrangement, the Government may ultimately become the Licensee in certain COMMERCIAL computer software licenses, which software is specifically defined at DFARS 252.227-7014(a)(1). In order to permit the Government to become a Licensee in the COMMERCIAL computer software licenses, the Contractor shall first prereview the COMMERCIAL computer software licenses intended for transfer to the Government to verify compliance with any one of Alternatives I, II or III, as shown below.

The three referenced Alternatives provide descending levels of specificity, and, ostensibly, increasing levels of acceptability to recalcitrant software suppliers. But under H001, only Alternatives I and III are available.

Alternative I is the most comprehensively worded, spelling out each type of software license clause that is unacceptable or, arguably, inconsistent with federal procurement law (e.g., no audit, injunctive relief, attorneys' fees, or warranty disclaimers). It also includes an array of obligations, such as making the license perpetual and transferable, and requiring mapping the licensed software to specific contract line item numbers, contract data requirements lists, and deliverables.

Alternative II does away with the details of Alternative I, and simply has the suppliers agree:

> In the event that any of the provisions of the present Software License are determined to be inconsistent with Federal procurement law(s); DFARS section 227.7202 and/or said contract, the parties to the present Software License hereby agree that said provision(s) shall be null and void. In the event that any of said provision(s) are

> rendered null and void, as described hereinabove, the remaining provision(s) of said License shall remain in full force and effect.

Alternative III is the most insidious, and is for use "when the Licensor will not agree to the terms and conditions cited above in Alternatives I and II; and/or as contained in DFARS 227.72." In that event:

> the Contractor shall obtain Licensor's consent to sever usage rights contained in any license(s), whereby said usage rights shall be assigned or otherwise transferred to the Government, so as to permit the Government to operate any related software or system containing the software which is associated with the license(s). All other rights and obligations contained in the license(s) shall remain with the Contractor. In this manner, the Contractor maintains their status as Licensee in said license(s) and only assigns or otherwise transfers usage rights portions thereof to the Government.

Contractors should beware of this clause, although as between Alternatives I and III it is the Alternative most likely to be acceptable to commercial software suppliers because it requires them to do the least. The concern is that one could read this provision as meaning the Government has no obligation for misuse of the software or breach of the supplier's license because the Air Force is acquiring only "usage rights" with all "obligations" remaining with the contractor. In essence, the contractor could be on the hook, at least in the first instance, for any inappropriate actions of the Air Force. Whether that is a significant risk might, as a practical matter, be difficult to gauge.

Conclusion and Recommendations—The Air Force's motivation behind these clauses, which it almost certainly knows are pushing or crossing boundaries, is less difficult to discern: Two factors coalesce—first, contractors can be squeezed, and second there is a widespread lack of understanding about the data rights clauses.

As for the first, experienced DOD acquisition professionals recognize that, in any major procurement, most, and sometimes all, major contractors are leery of protesting solicitation provisions for fear of aggravating the customer or risking subsequent adverse evaluations. We all can say righteously "this is not the way the evaluation system really works," but contractors believe, rightly or wrongly, that this is exactly the way it works. The corollary is that once aggressive clauses get past the time for pre-award protests (the closing date for receipt of initial proposals), agencies know that prime contractors will have little choice but to lean heavily on their suppliers, and internally on themselves, to agree to provisions such as these, for fear that competitors will do so better than will they. So the acquisition corps advances the likes of H001.

The second point suggests a more benign motivation, although I am not convinced of it. The Air Force simply might think there is nothing inappropriate about its expansive elaboration on the data rights clauses. Those clauses are not well understood by the Government and contractors alike; even less understood is the interplay between the clauses and the statutes they implement. Thus, one might plausibly, if incorrectly, believe that software should be OMIT because sometimes one needs software for OMIT purposes, and the DOD software clause does not affirmatively preclude this. Or one might say H001 does not expressly call for detailed manufacturing and process data, and thus does not, except by implication, violate the regulations or the statutes. Perhaps, but it is a violation nonetheless.

Whatever the motivation, these clauses have no place in our procurement system. They are contrary to law and to the balance Congress and DOD overall strive to maintain between the Government's and contractors' interests. They overreach, denigrating contractors' legitimate and important rights in intellectual property. They undercut respect for the acquisition corps. They are, however, easy to fix.

The clauses can readily be revised expressly to eliminate any requirement for detailed manufacturing or process data. The Air Force knows how to do this, as it did in the definition of depot-level maintenance in H001, which excludes "the manufacture of new items."

Software also can be expressly excluded. Instead, the agency can think through more rigorously what type of software it really needs for OMIT purposes, if any, and then seek to obtain this software with Government Purpose Rights (GPR)—which are much more palatable to commercial software suppliers than unlimited rights—either through negotiation over a price for those rights (as contemplated analogously by 10 USCA § 2320(a)(2)(G) for major systems' interfaces developed at private expense) or by seeking priced options for GPR. These changes will make it easier for the Air Force to get the software the Air Force actually needs, without the unnecessary and inappropriate burdens imposed by H001.

Until these changes occur, contractors would be better served by considering challenging the clauses in pre-award protests, rather than succumbing to this

improper assault on their substantial private investment in intellectual property rights.

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