

PROPRIETARY DATA, WAIVER, AND THE GOVERNMENT'S "UNLIMITED RIGHTS"

INTRODUCTION

Is your proprietary data **safe from disclosure** by the Government? According to a recent Court of Federal Claims (Court) decision, if your proprietary data is not marked as such, it may be disclosed at the Government's discretion - even to the contractor's detriment.

The case of *DynCorp International, LLC v. U.S.*, 125 Fed.Cl. 46 (2016) is a highlight of fundamental best practices that contractors should follow in handling and identifying proprietary data. The case is an interesting example of "what not to do," and is discussed below.

FLAGGING PROPRIETARY DATA

Most federal contracts contain clauses explaining how a contractor is to flag proprietary data, documents, and deliverables. The contract may explain in detail what type of data may be flagged as proprietary, or may be silent on the subject. Where a contract is silent on the subject, contractors may still flag data as proprietary by so indicating on the face of each document, file, or deliverable.

Accordingly, contractors must **strike a balance** in what they mark as "proprietary." On one hand, if contractors over-utilize a restrictive or limiting marking that is not authorized by the contract, the Government may be able to disregard certain designations and disseminate the data. See FAR 52.227-14(e). On the other hand, data "delivered to the Government without any restrictive markings shall be deemed to have been furnished with **unlimited rights**," and the contractor's right to keep the data confidential may be deemed waived. See FAR 52.227-14(f)(1).

In fact, the Court of Federal Claims has held that failure to properly mark deliverable data with appropriate restrictive indicators will result in the **Government gaining full use of that data**.¹ This includes marking data as "proprietary," "limited rights," or otherwise in accordance with the contract provisions. The restrictive marking should be clear enough to alert Government officials, including those not familiar with the contract, that the data is considered proprietary and not appropriate for dissemination.

WAIVER AND THE GOVERNMENT'S "UNLIMITED RIGHTS"

In the case of *DynCorp International LLC v. U.S.*, the Court denied DynCorp's protest over an Air Force solicitation that included the incumbent contractor's proprietary cost and pricing data, finding that DynCorp **waived protection** of its information by failing to clearly mark the information as sensitive or proprietary.

DynCorp filed a pre-award bid protest over the Air Force's War Reserve Material III (WRM III) solicitation, arguing that the Air Force publicly disclosed DynCorp's proprietary cost and pricing data submitted under predecessor contracts, WRM I and WRM II.

¹ *Night Vision Corp. v. U.S.*, 68 Fed.Cl. 368 (2005).

As part of its work on the WRM II contract, DynCorp submitted life cycle report spreadsheets to the Government that identified the date on which the Government purchased certain tools, the cost of those tools, and the date and cost of purchasing replacements. Those same spreadsheets also included DynCorp's [indirect rate and profit data](#).

In March 2015, the Air Force posted the solicitation for WRM III, which **included DynCorp's Life Cycle report spreadsheets as part of the solicitation documents**. As a result, the spreadsheets were posted to FedBizOpps.gov, thus becoming open and available to competing bidders. In fact, one competing contractor advised the Government that these proprietary documents might have been posted by mistake.

DynCorp argued that the Air Force had publicly disclosed its proprietary information, and that the disclosure put the company at a **severe competitive disadvantage** in relation to the other bidders. Accordingly, DynCorp argued that the only remedy was for the Air Force to extend DynCorp's WRM II contract for five years on a sole source basis.

The Court disagreed, finding that DynCorp's data was not proprietary at all, as the contractor did not mark its indirect cost and profit data as "proprietary." Furthermore, DynCorp failed to object when the Air Force inquired as to whether the life cycle management reports could be posted as part of the new solicitation.

Accordingly, the Court denied DynCorp's bid protest, finding that **the contractor had waived any rights it may have had in its indirect rate and profit data by failing to properly mark such data as proprietary**. The Court stated:

This Court has held that a contractor's **failure to properly mark** deliverable data with the appropriate restrictive indicators will result in the Government **gaining full use of that data**. A restrictive marking or legend "alerts all Government officials – even those unfamiliar with the data rights of the contractor – that data is considered proprietary and is inappropriate for dissemination.... The least cost burden in such instances rests with the contractor, who can easily apply an appropriate legend to the proprietary data." Accordingly, by failing to appropriately identify data a contractor considers proprietary, **a contractor who has both knowledge and ability to do so can forfeit its right to claim that data should be subject to protection**. (Slip Op. at 8; citations omitted)(emphasis added)

Based on this reasoning, the Court found that the Air Force **"did nothing wrong"** by disclosing the data as part of the new solicitation, and denied DynCorp's protest.

CONCLUSION

The first takeaway from the DynCorp case is a reminder of the fundamental mandate that contractors should **read their contract**, in detail, regarding the requirements for working with, and preserving proprietary data.

The second takeaway is that contractors should consistently and continually analyze the data they provide to the Government. If consistent reviews of data uncover certain data that should be deemed proprietary, contractors should mark the data as being proprietary, trade secret, or business confidential, with the appropriate restrictive legends. This practice will avoid giving the Government **unrestricted rights** to the data.

As seen in the *DynCorp* case, once the Government acquires “unlimited rights” to contractor data, the Government may legally use that data to the detriment of the Contractor. And, if the contractor has failed to flag its proprietary data adequately, a bid protest will likely be unsuccessful.

If you are encountering a problem similar to this, or would like to make sure you are covering all of your bases, we can help! Just give us a call.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

Author’s note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Assistant General Counsel