

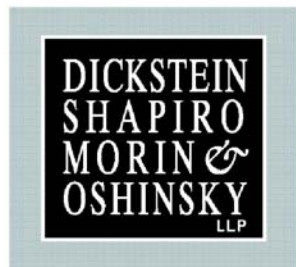


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Our attorneys guide clients through the maze of regulations to maximize a company's ability to secure government contracts. If you would like more information on this issue or any other government contracts issue, please contact us.

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PROTECTING CONFIDENTIAL INFORMATION

Recent increases in military and Homeland Security spending present government contractors with a wide array of potential new business opportunities, as virtually every executive agency is involved in federal efforts to combat terror, both domestically and abroad. The speed with which federal agencies must deploy military materiel, and the urgency with which they seek to bolster domestic security, increase the likelihood that the Government will turn to non-traditional procurement methods to meet its needs for both services and goods. Accordingly, contractors who are willing to submit unsolicited proposals may gain an important edge in obtaining new government contracts. It is critical, however, that contractors seeking to drum up new business through this approach take steps to protect the confidentiality of their proprietary data and any intellectual property contained in such unsolicited proposals.

A variety of government regulations govern how agencies will treat contractor information contained in unsolicited proposals. Generally, these regulations create an implied contract between the Government and the offeror whereby the Government promises to refrain from disclosing the proprietary data contained in the offeror's proposal.¹ Contractors' proprietary data, however, is only entitled to the confidential treatment guaranteed by this implied

contract if it is labeled in precise accordance with governing regulations. For example, FAR 15.608(b) prohibits the Government from disclosing "restrictively marked information" contained in unsolicited proposals. FAR 15.609(a), (b), however, specifies that in order to qualify as "restrictively marked information," meriting confidential treatment, unsolicited proposals must bear a specific restrictive legend on the cover page *and on each successive page* that contains proprietary data. The restrictive legend is set forth at FAR 15.609(a) and states:

USE AND DISCLOSURE OF DATA

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. However, if a contract is awarded to this offeror as a result of - or in connection with - the submission of these 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 these data if they are obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets].

¹See, e.g., *Airborne Data, Inc., v. United States*, 703 F.2d 1350 (Fed. Cir. 1983).

The consequences of failing to comply with the precise instructions contained in the confidentiality regulations can be severe. As a preliminary matter, FAR 15.609(c) prohibits the Government from accepting any unsolicited proposal marked with a legend different from that set forth above. Thus, nonconformance with labeling regulations can result in increased costs, and potentially can result in the loss of a business opportunity due to delay.

Failure to conform to the labeling instructions of confidentiality regulations can also result in disclosure of an offeror's proprietary data. In *Xerxe Group, Inc. v. United States*, 278 F.3d 1357 (Fed. Cir. 2002), the plaintiff submitted an unsolicited proposal bearing a restrictive legend only on the cover page. *Id.* at 1358. The Government rejected Xerxe's proposal but later incorporated some of Xerxe's proprietary data in a request for information that it issued to third parties. *Id.* Xerxe subsequently filed a \$72 million claim alleging that the Government had breached the confidentiality provisions of the Federal Acquisition Regulation (FAR). *Id.* The Federal Circuit denied Xerxe's claim, finding that its failure to place a restrictive legend on every page containing proprietary data, as required by FAR 15.608, precluded any recovery. *Id.* at 1359-60. Xerxe clearly shows, therefore, that a contractor's failure to comply fully with the labeling requirements of the FAR can result in Government disclosure of proprietary data directly to a contractor's competitors.

A contractor's failure to comply with proposal labeling regulations can have especially severe effects in the context of software proposals. Government software development contracts typically contain any one of several data rights clauses, which give the Government unlimited rights in the offeror's software unless the offeror places a restrictive legend in the software and/or incorporates the restrictive legend into a licensing agreement. If the Government accepts an insufficiently labeled proposal and incorporates these data rights clauses into the resulting contract, the contractor can lose all of its rights in its software.

For example, in re *General Atronics Corp.*, ASBCA No. 49,196, 2002 WL 450441 (A.S.B.C.A. Mar. 19, 2002), the plaintiff received a contract to provide the Government with 194 data terminals and associated data, support services, and software. The contract incorporated by reference DFARS 252.227-7027, *Deferred Ordering of Technical Data Or Computer Software* (Apr. 1998), and DFARS 252.227-7013, *Rights In Technical Data And Computer Software* (Oct. 1988). These clauses gave the Government unlimited rights in the plaintiff's software unless the plaintiff marked the software with a restricted rights legend and incorporated the restricted rights into a licensing agreement. When the parties subsequently became embroiled in a dispute over whether the plaintiff had to provide the Government with a software enhancement that it had developed, the plaintiff delivered the software bearing a restrictive

rights legend and later submitted a \$327,000 claim for software license fees. The Armed Services Board of Contract Appeals denied the plaintiff's claim, holding that the Government had acquired unlimited rights in the plaintiff's software since: (1) the restrictive legend employed by the plaintiff varied from that required by the regulations; and (2) the plaintiff had never executed the required licensing agreement.

General Atronics clearly demonstrates that a contractor's failure to properly label software proposals can potentially eviscerate an entire product line and may irreparably damage a company whose revenue is generated from the sale of a small number of products. To forestall the disclosure of proprietary data or the loss of intellectual property in this manner, it is imperative that contractors review the FAR and all pertinent agency supplements to the FAR before applying restrictive legends to their unsolicited proposals.



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