

CLIENT ALERT

Contractors May Include Third-Party Restrictive Markings on Unlimited Rights Data

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On December 21, 2020, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that contractors may include restrictive markings on unlimited rights technical data as long as those markings do not restrict the Government's rights to that technical data.

The Boeing Company (Boeing) entered into two contracts with the United States Air Force (USAF), both of which included DFARS Clause 252.227-7013, Rights in technical data - Noncommercial items and required Boeing to deliver certain technical data to the USAF with unlimited rights. Boeing marked each technical data deliverable with a legend that restricted third parties' use of that data. The USAF rejected Boeing's legend and the Contracting Officer ultimately issued a Final Decision asserting that Boeing's legend was a nonconforming legend because it was not in the format authorized by Subsection 252.227-7013(f) of the clause. Boeing appealed the Final Decision to the Armed Services Board of Contract Appeals (ASBCA) arguing that Subsection 7013(f) is not applicable to legends like Boeing's that only restrict the rights of third parties, not the Government. The Board disagreed, holding that only the four legends prescribed in Subsection 7013(f) are authorized and any other legends are nonconforming. Boeing then appealed to the Federal Circuit.

The Federal Circuit reversed, finding that the portion of Subsection 7013(f) that specifies the permitted markings must be read in context with the first sentence of that subsection which provides that a contractor "may only assert restrictions on the **Government's** rights" by marking the data. Thus, "Subsection 7013(f) 'authorizes the use of certain restrictive markings' for the purpose of restricting the government's rights." Markings that do not restrict the Government's rights are not prohibited. The Federal Circuit remanded the case back to the Board to "resolve factual disputes between the parties over whether Boeing's legend does or does not restrict the government's rights."

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