

CLIENT ALERT

Software Development Under Government-Funded Technology Investment Agreements Is Development "Exclusively at Private Expense" Under Data Rights Clauses

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On July 17, 2018, in *Appeal of The Boeing Company* (Boeing), the Armed Services Board of Contract Appeals (ASBCA) granted Boeing's motion for partial summary judgment, holding that, as a matter of law, software Boeing developed with U.S. government funding under two Technology Investment Agreements (TIA) is subject to restricted rights because it was developed "exclusively at private expense" as defined in DFARS 252.227-7014(a)(8), because TIAs are not procurement contracts. The dispute involves two TIAs issued to Boeing pursuant to 10 U.S.C. § 2358 as Research and Development Projects, one fully funded by the government and the other partially funded by the government, and an Army Low Rate Initial Product (LRIP) contract for the manufacturing of AH-64D model aircraft, which incorporated DFARS 252.227-7014. Boeing asserted that the government had restricted rights in certain software delivered under the LRIP Contract because the software was developed under the TIAs and, therefore, exclusively at private expense for data rights purposes. The government challenged Boeing's assertion because the TIAs, and therefore the software development, were government funded, and ultimately issued a final decision which Boeing appealed. The ASBCA held that the TIAs are not government "contracts" as defined in FAR 2.101 and, therefore, the associated funding are not "costs charged directly to a government contract" for the purposes of the source of funding test under DFARS 252.227-7014(a). Thus, the associated software was "developed exclusively at private expense" as that term is defined in DFARS 252.227-7014(a)(8).

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