CONTRACTOR MAY USE LEGENDS TO RESTRICT DATA RIGHTS OF NON-U.S. GOVERNMENT THIRD PARTIES

The Defense Federal Acquisition Regulation Supplement ("DFARS") requires the inclusion of a clause in any contract in which noncommercial technical data will be delivered to the government. The clause is DFARS 252.227-7013 (the "7013 clause"), and it identifies "authorized markings, and states that "all other markings are nonconforming markings." Boeing added a legend to the technical data that restricted the rights of nongovernmental third parties, and after losing its right to use that legend at the Armed Services Board of Contract Appeals, Boeing appealed and the Federal Circuit reversed and remanded. *The Boeing Co. vs. Secy of the Air Force*, No. 2019-2147 (Fed. Cir. Dec. 21, 2020). After examining the plain language of the 7013 clause, the Federal Circuit held that the prohibition against nonconforming markings only applies to language that asserts restrictions on the *government's rights* (not third parties).

The 7013 clause includes a subparagraph (f) that contains two sentences as follows:

First sentence: The Contractor, and its subcontractors or supplies may only **assert restrictions on the Government's rights** to use, modify, reproduce, release, perform, display or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction.

Second sentence: Except as provided in paragraph (f)(5) of this clause, **only the following legends are authorized under this contract:** the government purpose rights legend at paragraph (f)(2) of this clause; the limited rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and /or a notice of copyright as prescribed under 17 USC § 401 or 402. [emphasis added to both paragraphs).

On its technical data in the affected contract, Boeing proposed to *add* the following legend to the requirement stating technical data rights:

"Non-US Government Entities may use and disclose only as permitted in writing by Boeing or by the U.S. Government."

The Court noted that there are two sentences in the 7013 clause, and a proper interpretation must give meaning to both of them. The Court held that the two sentences together described the way a contractor may assert restrictions on the *Government's* rights. Under the ASBCA reading, the first sentence would be unnecessary to the regulation and the scope of the 7013 clause would be exactly the same without that sentence (prohibiting use of non-conforming legends). The Court, however, insisted on giving **all** the words meaning, and therefore, the 7013 clause is only applicable in the context of restrictions on the *Government's rights.* The court remanded to the ASBCA to address certain factual issues in light of its decision.

Takeaway: The 7013 clause used for noncommercial data does not eliminate the contractor's right to restrict non-government third party's use of that data. It was a victory for contractors

who could retain greater data rights control over third parties, although it did not affect the government's rights.

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