

July 2, 1998

G. DEPARTMENT OF ENERGY ASSISTANCE REGULATIONS

Anyone dealing with a DOE grant award should not rely on OMB Circular A-110 alone. Although DOE's original implementation of OMB Circular A-110 as published in 1994, indicated no deviations in the intellectual property section at -33, DOE amended its assistance rules again in 1996. Significant changes were made at that time. In the revised intellectual property section, at 10 CFR 600.136, DOE no longer cited the Bayh-Dole Act at 37 CFR Part 401, as does the Circular, but imposed instead provisions arising out of DOE's own acquisition regulations, *ibid.* at 600.27, under authority of the Atomic Energy Act. As a result, DOE grant awards became governed by broader patent and data rights provisions than those used by other federal agencies and these DOE requirements were expressed and made enforceable in procurement terms.

In March 1998, DOE finalized its revision of rules governing data rights. Although originally described in the proposed rule as a revision for contracts only, the final regulation was made applicable, after the fact, to assistance awards as well. The following analysis describes the general compliance obligations for universities resulting from the sum of the above-cited changes.

Summary of the changes:

For grants as well as for contracts, DOE will use the FAR General Data Rights clause, at 48 CFR 52.227-14. The FAR clause has been amended in the definitions section (a) and by inserting (d)(3) of 48 CFR 927-409(a)(1). Use of Alt. V is also mandatory. In addition, solicitations must include the representation of Limited Rights Data and Restricted Computer Software provisions at 48 CFR 52.227-15.

These general instructions to DOE grantees are cited at 10 CFR 600.27(b)(2)(i)(A). However, *ibid.* (B) addresses the special provisions for university awardees regarding copyright. Except as otherwise specifically provided in the award, subparagraph (d)(3) of the DEARS clause requiring prior permission from DOE before awardees may secure copyright protection, will be deleted and the equivalent of FAR 52.227-14 Alt. IV will be authorized. This means that university grantees may "establish" copyright in all data first produced under the award, including computer software. To accomplish that purpose, DOE indicates it will use language cited at 10 CFR 600.27 (b)(2)(i)(B)(c), which expresses similar intent as FAR 52.227-14, rather than (c) in the FAR clause itself.

DOE states that, with respect to the universities' right to establish copyright and the terms of the retained government copyright license, DOE's assistance regulations are compatible with and have not exceeded OMB Circular A-110 guidance. However, with respect to other data rights, university grantees will have to accept the same expanded DOE rights as in contracts. If you wish to obtain more detail, please turn to the detailed review below.

Detailed discussion of the new DOE grant provisions

a) Definitions:

The following definitions have been changed: computer databases; computer software; limited rights data; restricted computer software; unlimited rights. These changes are described in our analysis of the 1998 DOE acquisition changes.

b) Securing copyright

The 1996 revision of DOE's financial assistance awards made all the key changes, introducing patent, data rights and copyright provisions into the management of assistance awards. By comparison, the 1998 revision largely renumbers and updates the earlier instructions to grantees. The changes clarify and underscore DOE's intent to incorporate into financial assistance awards the FAR clause without (d)(3) thus eliminating the requirement to obtain prior written approval from DOE legal counsel before being able to establish copyright. This parallels the decision by DOE to authorize use Alt. IV in contracts with institutions of higher education.

The options for institutions to establish copyright and the resulting rights of the government remain the same as in the 1996 revision. DOE merely clarifies that the instructions at 600.27(b)(2)(i)(B)(c) supersede and replace those of the FAR clause (c) although the FAR clause prevails in all other respects.

How do the new DOE provisions for copyright in assistance awards compare to government-wide provisions for intellectual property under A-110? DOE claims it took great care to make sure its language, taken from procurement, would comply with A-110. In an explanatory letter to COGR, DOE states:

"In writing the final rule, we have considered OMB Circular A-110 and found the copyright license retained by the government to be broader in assistance than in the case of contracts. Paragraph 36 'Intangible Property' of OMB Circular A-110 states that the grant recipient may copyright any work developed under an award. The agency reserves a "royalty-free, nonexclusive and irrevocable right to reproduce, publish (emphasis added), or otherwise use the work for Federal purposes and to authorize others to do so." The license retained by the government in computer software first produced and copyrighted by the contractor under Alt. IV of FAR 52.227-14 does not include the right to publish as required by OMB Circular A-110. While we were sympathetic with the case you make that assistance should confer a broader set of rights, we were constrained by the Circular. We believe the right to copyright and the retained government license provided in both OMB Circular A-110 and in our assistance regulations are equivalent."

c) Other Required Clauses

As in contracts, the general data rights provisions for grants also require the use of Alt. V, which gives the government the authority to inspect records. Solicitations shall also include the Representations of Limited Rights Data and Restricted Computer Software at 48 CFR 52.227-15.

DOE contracting officers will also incorporate Rights to Proposal Data, (Technical) (52.227-23) and Additional Data Requirements (52.227-16). For a detailed discussion of these and other provisions regarding sub-tier awards and policy regarding delivery of data, please refer to our analysis of DOE acquisition regulations.

General Assessment

Regarding copyright protection for data first produced under an award, DOE has stayed within the perimeters of OMB Circular A-110, taking advantage of the right to publish university generated software, which is a part of the OMB government license but is lacking in the FAR government license. Regarding data rights, DOE imposed all its procurement provisions on assistance, contrary to the Chiles Act, which draws a distinction between assistance and procurement, based on the separate purposes each serves. DOE has expanded its rights in the pre-grant area (Unlimited Rights in Proposal Data) and in the post-grant area (Additional Technical Data clause) compared with the rights retained by other agencies under the FAR, again citing its special mission under the Atomic Energy Act. In addition, contracting officers are instructed to treat data rights matters in accordance with 48 CFR 927.4 – the DOE technical data and copyright policy for procurements.

DOE does not justify its injection of acquisition terms into assistance awards beyond citing its special mission and its years of unchallenged practice of having done this de facto if not de jure. When questioned about the rules, DOE explained to COGR its position as follows:

“You question our amendment of the assistance regulations in a manner that is consistent with the changes to our procurement regulations. As a preface, the Department of Energy operates in the area of rights in data in a manner that reflects a statutory duty to disseminate the product of our contracts and assistance agreements. This rule follows this Department’s long history of linking the treatment of data first produced under contracts with the treatment of data first produced under assistance agreements.”

Finally, a reminder about liability. DOE imposes liabilities on grantees as well as contractors, for knowingly including any material copyrighted by others in any written

material furnished or delivered under an award, unless the appropriate licenses or approvals have been obtained.
