

Department of Energy

970.2704-2

data, DOE contracting officers shall assure that management and operating contracts contain either the Rights in Data clause at 48 CFR 970.5227-1, Rights in Data—Facilities, or the clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer. Selection of the appropriate clause is dependent upon whether technology transfer is a mission of the management and operating contract pursuant to the National Competitiveness Technology Transfer Act of 1989, Public Law 101-189, (15 U.S.C. 3711 *et seq.*, as amended). If technology transfer is not a mission of the management and operating contract, the clause at 48 CFR 970.5227-1, Rights in Data—Facilities, shall be used. In those instances in which technology transfer is a mission of the contract, the clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer, shall be used.

(b) Employees of the management and operating contractor may not be used to assist in the preparation of a proposal or bid for services which are similar or related to those being performed under the contract, which are to be performed by the contractor or its parent or affiliate organization for commercial customers unless the employee has been separated from work under the DOE contract for such period as the Head of the Contracting Activity or designee shall have directed.

970.2704-2 Procedures.

(a) The clauses at 48 CFR 970.5227-1, Rights in Data—Facilities, and 48 CFR 970.5227-2, Rights in Data—Technology Transfer, both provide generally for Government ownership and for unlimited rights in the Government for all data first produced in the performance of the contract and unlimited rights in data specifically used in the performance of the contract. Both clauses provide that, subject to patent, security, and other provisions of the contract, the contractor may use contract data for its private purposes. The contractor, under either clause, must treat any data furnished by DOE or acquired from other Government agencies or private entities in the performance of their contracts in accordance with any restrictive legends contained therein.

(b) Since both clauses secure access to and, if requested, delivery of technical data used in the performance of the contract, there is generally no need to use the Additional Technical Data Requirements clause at 48 CFR 52.227-16 in the management and operating contract.

(c)(1) Paragraph (d) of the clause at 48 CFR 970.5227-1, Rights in Data—Facilities, and paragraph (f) of the clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer, provide for the inclusion in subcontracts of the Rights in Technical Data—General clause at 48 CFR 52.227-14, with Alternate V, and modified in accordance with DEAR 927.409. Those clauses also provide for the inclusion in appropriate subcontracts Alternates II, III, and IV to the clause at 48 CFR 52.227-14 with DOE's prior approval and the inclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227-16 in all subcontracts for research, development, or demonstration and all other subcontracts having special requirements for the production or delivery of data. In subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated by the contractor under its contract with DOE, the management and operating contractor shall use the Rights in Data—Facilities clause at 48 CFR 970.5227-1.

(2) Where, however, a subcontract is to be awarded by the management and operating contractor in connection with a program, as discussed at 927.404-70, which provides statutory authority to protect from public disclosure, data first produced under contracts awarded pursuant to the program, contracting officers shall ensure that the management and operating contractor includes in that subcontract the rights in data clause provided by DOE Patent Counsel, consistent with any accompanying guidance.

(3) Management and operating contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer

software for their private use, nor may they acquire rights in a subcontractor's limited rights data or restricted computer software except through the use of Alternate II or III to the clause at 48 CFR 970.5227-14, respectively, without the prior approval of DOE Patent Counsel.

(d)(1) Paragraphs (e) and (f) of the clause at 48 CFR 970.5227-1, Rights in Data—Facilities, and paragraphs (g) and (h) of the clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer, provide for the contractor's granting a nonexclusive license in any limited rights data and restricted computer software specifically used in performance of the contract.

(2) In certain instances the objectives of DOE would be frustrated if the Government did not obtain, at the time of contracting, limited license rights on behalf of responsible third parties and the Government, and to limited rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. This situation may arise in the performance of management and operating contracts and contracts for the management or operation of a DOE facility or site. Contracting officers should consult with program officials and Patent Counsel. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f). Where such a background license is in DOE's interest, a provision that provides substantially as Alternate VI at 48 CFR 952.227-14 should be added to the appropriate clause, 48 CFR 970.5227-1, Rights in Data—Facilities, or 48 CFR 970.5227-2, Rights in Data—Technology Transfer.

(e) The Rights in Data—Technology Transfer clause at 48 CFR 970.5227-2 differs from the clause at 48 CFR 970.5227-1, Rights in Data—Facilities, in the context of its more detailed treatment of copyright. In management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable

right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract. The clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer, provides for DOE approval of DOE's taking a limited copyright license for a period of five years, and, in certain rare cases, specified longer periods in order to contribute to commercialization of the data.

(f) Contracting officers should consult with Patent Counsel to assure that requirements regarding royalties and conflicts of interest associated with asserting copyright in data first produced under the contract are appropriately addressed in the Technology Transfer Mission clause (48 CFR 970.5227-3) of the management and operating contract. Where it is not otherwise clear which DOE program funded the development of a computer software package, such as where the development was funded out of a contractor's overhead account, the DOE program which was the primary source of funding for the entire contract is deemed to have administrative responsibility. This issue may arise, among others, in the decision whether to grant the contractor permission to assert copyright. See paragraph (e) of the Rights in Data—Technology Transfer clause at 970.5227-2.

(g) In management and operating contracts involving access to DOE-owned Category C-24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related restricted data and technology. Alternate I to each clause shall be used where access to Category C-24 restricted data is contemplated in the performance of a contract.

970.2704-3 Contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5227-1, Rights in Data—Facilities, in management and operating contracts which do not contain the clause at 48 CFR 970.5227-2, Rights in Data—Technology Transfer. The contracting officer shall include the clause with its Alternate I