UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2019 - 2147

THE BOEING COMPANY,

Appellant,

v.

SECRETARY OF THE AIR FORCE,

Appellee.

Appeal from the Armed Services Board of Contract Appeals in Nos. 61387, 61388, Administrative Judge Michael N. O'Connell, Administrative Judge Richard Shackleford, Administrative Judge J. Reid Prouty.

OPENING BRIEF OF APPELLANT THE BOEING COMPANY

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December 20, 2019

CERTIFICATE OF INTEREST FOR THE BOEING COMPANY

1. The full name of every party or amicus represented by me is:

The Boeing Company

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2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

The Boeing Company has no parent corporation. As of December 20, 2019, no corporation had filed a Schedule 13 with the U.S. Securities and Exchange Commission disclosing ownership of ten percent or more of the stock of The Boeing Company.

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4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal is:

None

Date: December 20, 2019 /s/ Scott M. McCaleb

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(*Continued*)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Regulations

Rules

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

TABLE OF ABBREVIATIONS

Abbreviation	Full Citation
800 Panel Rep.	Report of Dep't of Defense Acquisition Law Advisory Panel (Mar. 1993)
813 Panel Rep.	2018 Report of the Government-Industry Advisory Panel on Technical Data Rights (Nov. 13, 2018)
Army Dir. 18-26	Mem. from the Sec. of the Army, Army Directive 2018-26 (Enabling Modernization Through the Management of Intellectual Property) (Dec. 7, 2018)
Army IP Guidance	Mem. from the Office of the Assistant Sec. of the Army, Implementation Guidance for Army Directive 2018-26 (Enabling Modernization through Management of Intellectual Property) (Feb. 5, 2019)
DoD Instruction 5010.44	Under Secretary of Defense for Acquisition and Sustainment, DoD Instruction 5010.44 (Intellectual Property (IP) Acquisition and Licensing) (Oct. 16, 2019)
DoD IP Strat.	Dep't of Defense Open Systems Architecture—Data Rights Team, Guidance: Intellectual Property Strategy (Aug. 2014)

Air Force Space & Missile Sys. Center Tech. Data Handbook	Office of the Staff Judge Advocate, Space and Missile Systems Center, *Acquiring and Enforcing the Government's Rights in Technical Data and Computer Software Under Department of Defense Contracts: A Practical Handbook for Acquisition Professionals* (7th ed. Aug. 2015)
DoD – Navigating Through Commercial Waters	Office of the Under Secretary of Defense of Acquisition, Technology, and Logistics, *Intellectual Property: Navigating Through Commercial Waters* (Oct. 15, 2001)
Packard Rep.	President's Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President* (1986)

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Appellant states that no other appeals in this case were previously before this or any other appellate court, and there are no other pending cases in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

INTRODUCTION

In a decision with far-reaching consequences, the Armed Services Board of Contract Appeals ("Board" or "ASBCA") held that government contractors can no longer protect their ownership rights in technical data delivered to the Government—such as technical drawings and models—by placing a notice on those data to restrict their use by third parties. In so holding, the Board concluded that the regulation at issue prohibits such third party notices, even where the notice is indisputably consistent with the contractor's rights ***and*** does nothing to impair the Government's rights in the technical data. If left to stand, this holding will effectively impair contractors' rights in their data and threaten the willingness of technology innovators to do business with the Government for fear of compromising their ownership rights in technical data.

The Board's decision is incorrect because it failed to credit the plain terms of the operative clause at issue, Defense Federal Acquisition Regulation Supplement ("DFARS") 252.227-7013(f) ("Section 7013(f)"). Section 7013(f) establishes "marking requirements" for when a contractor asserts "restrictions on ***the Government's*** rights," but not

for when a contractor asserts ***third party*** restrictions that do not in any way impair the Government's rights. The provision states as follows:

> (f) *Marking requirements*. The Contractor, and its subcontractors or suppliers, 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. 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 U.S.C. 401 or 402. [1]

The first sentence of Section 7013(f) authorizes the contractor to assert restrictions on the Government's rights by marking its deliverable technical data, while the second sentence dictates the four permissible markings for restricting the Government's rights: the government purpose rights legend, the limited rights legend, the special license rights legend, and/or a notice of copyright. Neither sentence says anything about markings that address third-party rights in the data.

[1] All emphases are added unless otherwise noted.

Accordingly, Section 7013(f) does not apply here. Boeing's legend ***does not impair*** the Government's unlimited rights in the technical data delivered by Boeing under its contracts, nor does it seek to do so. Boeing delivered technical data to the Air Force marked with a notice, directed exclusively to ***third parties***, advising that the data was "Boeing Proprietary" and that "***non-U.S. Government entities*** may use and disclose [the data] only as permitted in writing by Boeing ***or by the U.S. Government***." This notice is entirely consistent with the Government's unlimited rights in these data, a fact the Government concedes. Nevertheless, the Air Force rejected Boeing's data markings because they did not conform to one of the four legends specified in Section 7013(f). On appeal, the Board upheld the Air Force's interpretation of the clause, even though it agreed that Boeing's marking applied only to third parties and that Boeing's marking did not impair the Government's rights in the technical data at issue.

This was error. The two sentences of Section 7013(f) must be read together, as a whole, not cleaved apart and interpreted as if they are unrelated to one another. The Board focused solely on nine words in the second sentence of Section 7013(f), which state that "only the

following legends are authorized under this contract," without understanding that this sentence necessarily must be read to modify the first. Taken together, the two sentences in Section 7013(f) plainly regulate the data markings that may be applied to restrict ***the Government's*** rights in technical data; they simply do not address data markings—like Boeing's—directed exclusively to third parties.

The purpose and history of the clause strongly support Boeing's interpretation. Since the 1980s, the Government has struggled to implement a balanced approach to data rights. The present compromise, reflected in the current DFARS, facilitates the working relationship between the Government and technology innovators by allowing the Government to negotiate for and receive license rights in contractor-owned technical data, while ensuring that government contractors retain ownership and the right to commercialize the technical data (even if the Government paid for its development). The Board's ruling undermines this important compromise because it prevents contractors from applying proprietary markings that are critical to enforcing the contractors' rights against third parties in future commercial opportunities.

By contrast, Boeing's interpretation is consistent with the regulatory history, which recognizes that proprietary notices to third parties are "commonly used in commercial practice to [protect] proprietary data or trade secrets." 60 Fed. Reg. 33464, 33465 (June 28, 1995). Nowhere in that history is there any suggestion that third party markings are prohibited by Section 7013(f). To the contrary, the DFARS data rights clauses focus solely on markings that restrict ***the Government's*** rights. The regulatory history explains that a marking generally "is not mandatory but contractors must mark when they desire to restrict ***the Government's*** rights." *Id.*

Finally, the Board's interpretation of Section 7013(f) should be rejected because it improperly impairs contractors' ownership rights in technical data. Specifically, the Board's ruling impermissibly prevents Boeing from marking the technical data that ***it unquestionably owns*** with a notice protecting its ownership rights and advising third parties that they need to obtain a license to use the data. This ruling is contrary to the mandate of the Rights in Technical Data statute—10 U.S.C. § 2320, which directs the Department of Defense ("DoD") to "prescribe regulations to define the legitimate interest of the United

States and of a contractor . . . in technical data pertaining to an item or process," and dictates that "[s]uch regulations ***may not impair any right*** of the United States or ***of any contractor*** . . . with respect to patents or copyrights or any other right in technical data otherwise established by law." Section 7013(f) was promulgated to implement this statute's direction, yet the Board's interpretation does precisely what the statute forbids: impairs a contractor's right to use its technical data commercially.

In sum, the Board's interpretation of Section 7013(f) is contrary to the plain meaning of the provision as a whole, and it is in tension with the purpose of the provision and its regulatory history. Moreover, the Board's interpretation will have the consequence of disrupting the calibrated balance of Government and contractor rights in technical data, which Section 7013 is intended to preserve. If the decision below is permitted to stand, technology innovators will be disinclined to license their valuable intellectual property to DoD, or to invest in further innovation of the technologies already licensed to DoD, based on the real risk that they can no longer preserve their opportunities to commercialize that data. Accordingly, for all of these and the following

reasons, this Court should reverse and remand for entry of a decision in Boeing's favor.

JURISDICTIONAL STATEMENT

This case comes on appeal from a final decision of the ASBCA, which had subject matter jurisdiction pursuant to 41 U.S.C. § 7104(a). This Court has appellate jurisdiction pursuant to 41 U.S.C. § 7107(a)(1)(A) and 28 U.S.C. § 1295(a)(10). The Board issued its final decision on March 18, 2019, denying Boeing's appeal. Appx2. Boeing timely filed a notice of appeal on July 12, 2019. *See* 41 U.S.C. § 7107(a)(1)(A).

STATEMENT OF THE ISSUE

Whether the ASBCA erred in holding that DFARS 252.227-7013 precludes government contractors from marking technical data delivered to the Government in a manner that (a) recognizes the Government's unlimited rights in the data, (b) does not restrict or impair the Government's rights, and (c) restricts only the rights of third parties to use the data absent permission from the contractor or the Government.

STATEMENT OF THE CASE

I. Background

A. Factual Background

This case centers on the proper interpretation of DFARS 252.227-7013, which is incorporated into two contracts held by Boeing for the Air Force's F-15 Eagle Passive Active Warning Survivability System ("EPAWSS") program. Appx4. The EPAWSS system is a new electronic warfare suite for the F-15 Strike Eagle, replacing the aging Tactical Electronic Warfare Suite. *See* Appx173. When installed and operational, EPAWSS will equip the F-15 with advanced capabilities to jam radar, detect and geolocate threats to the aircraft, and fire anti-aircraft missiles and expendable countermeasures (*e.g.*, decoy flares, chaff). *See* Appx173.

In 2015, the Air Force awarded Boeing a delivery order under Boeing's Indefinite Delivery Indefinite Quantity Eagle TALON contract for the Technology Maturation and Risk Reduction phase of the EPAWSS program. Appx4, Appx98. In 2016, it awarded Boeing a separate contract, Contract No. FA8634-17-C-2650, for the follow-on Engineering and Manufacturing Development phase of the program to modify existing F-15 aircraft to ensure compatibility with the new

EPAWSS system. Appx4, Appx116. Both contracts incorporated the DFARS 252.227-7013 clause. [2]

Under the two EPAWSS contracts, Boeing submitted numerous technical data deliverables to the Air Force. Appx5. These deliverables included computer-aided design drawings and 3D models for the modified F-15 parts. While both contracts gave the Government unlimited rights in these data, Appx5, the Government concedes that Boeing retained ownership of the data, Appx5, Appx212. Thus, Boeing could still exercise the right to commercialize its EPAWSS technology, including through direct commercial sales to foreign allies.[3]

As is customary in the industry, Boeing marked its deliverables with a proprietary marking, putting third parties on notice that Boeing

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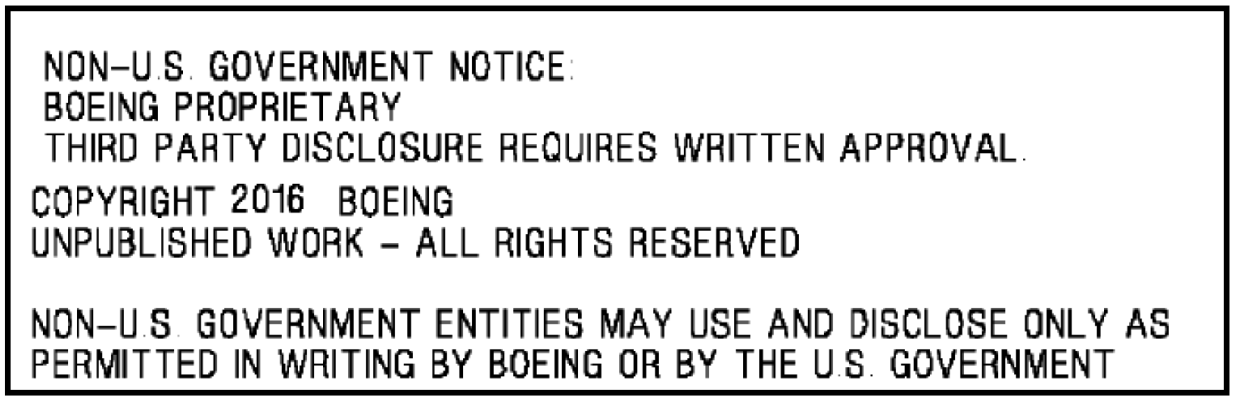
[2] One contract incorporated the 1995 version of the DFARS 252.227- clause and the other incorporated the 2014 version. Appx4, Appx85, Appx152. As the Board noted, "[n]either party has identified any relevant differences between the 1995 and 2014 versions." Appx7. Consistent with the briefing before the Board, Boeing cites the 2014 version of the clause in this brief.

[3] A U.S. contractor can sell defense articles to foreign governments under the Foreign Military Sales program (where the company contracts with the U.S. Government, which in turn contracts with the foreign government) or as a direct commercial sale (pursuant to which the U.S. company contracts directly with the foreign government).

retained rights in the technical data contained in the deliverables.[4] *See* Appx5, Appx170, Appx177. This "Non-U.S. Government Notice" in no way restricted or impaired the Government's rights:



Current Boeing Marking Example

Appx5, Appx170, Appx177.

It is important for contractors like Boeing to mark technical drawings with proprietary legends—not just for current contracts, but to protect future use of the data. For instance, Boeing's sales to U.S. allies would be undermined if Boeing could not mark its data proprietary, as would Boeing's position in the commercial marketplace for Original Equipment Manufacturer sales and spare parts. These concerns are magnified here because technical drawings related to DoD programs have a long life—often decades—and are repurposed many

[4] The Contracting Officer also rejected a marking by a Boeing subcontractor, *see* Appx5-6, which is not at issue in this appeal.

times during that span. Indeed, the original F-15 Eagle was designed in 1967 by Boeing's predecessor, McDonnell Douglas, and F-15 variants are still in service today; Boeing regularly uses technical drawings from the 1980s when it works on F-15 contracts. Boeing's marking thus ensures that third parties are on notice of Boeing's ownership throughout a drawing's long life. Furthermore, Boeing considers the notice at issue in this appeal to be especially critical in cases where Boeing's drawings can be repurposed on contracts where Boeing is not a prime contractor. Without Boeing's proprietary marking, there would be nothing on the face of the technical drawings to alert contractors throughout the contractual chain to Boeing's ownership rights and to potential limitations on distribution.

The Air Force, however, rejected the EPAWSS deliverables as nonconforming under the -7013 clause because they were marked with Boeing's proprietary legend. Appx6, Appx168, Appx175-176. To address the Air Force's concerns, Boeing proposed a compromise marking, which explicitly acknowledged the Government's unlimited rights in the data:

UNLIMITED RIGHTS MARKING FOR THE HEADER AND MEDIA OF THE COPY OF NON-COMMERCIAL COMPUTER SOFTWARE AND FIRST PAGE OF NON-COMMERCIAL TECHNICAL DATA BEING DELIVERED WITH UNLIMITED RIGHTS UNDER DOD PROCUREMENT CONTRACTS

CONTAINS TECHNICAL DATA/COMPUTER SOFTWARE DELIVERED TO THE U.S. GOVERNMENT WITH UNLIMITED RIGHTS

Contract No._____
Contractor Name_____
Contractor Address_____

[Such portions identified by SPECIFY HOW or **[ALL PORTIONS].**
Copyright **[Year of Creation]** Boeing and/or its Supplier, as applicable. Non-U.S. Government recipients may use and disclose only as authorized by Boeing or the U.S. Government.

Appx5, Appx17, Appx178. The Air Force also rejected this compromise marking as nonconforming under the -7013 clause.

On July 31, 2017, the Air Force issued a Contracting Officer's Final Decision ("COFD") for each of the contracts, confirming the rejection of the technical data marked with Boeing's proprietary legend. Appx6, Appx165, Appx172. The COFDs asserted that the challenged markings were "not in the format authorized by the subject contract" because they were not one of the four markings listed in Section (f) of DFARS 252.227-7013. Appx166, Appx173. The COFDs directed Boeing to "correct" the "non-conforming markings" at Boeing's expense. Appx168, Appx176.

B. Legislative and Regulatory Framework

Historically, DoD and its contractors have had competing intellectual property interests in the technical data delivered by contractors under their government contracts. DoD has regularly seized maximum rights to use, reproduce, and distribute the data, but this practice can harm—indeed, extinguish—the commercial value of the data for the contractor. Recognizing that this practice made industry increasingly reluctant to do business with the Government, over the years DoD has sought to strike a balance between Government and contractor interests. In 1995, DoD reformed its data rights regulations in a manner that recognizes DoD's interest in technical data ***and*** preserves contractors' ownership rights in those same data.[5]

This case arises from competing interpretations of one of the data rights regulations promulgated by DoD in 1995: DFARS 252.227-7013. As discussed below, although Boeing submits that the plain language of

[5] The terms "data rights" and "rights in data," as used in the regulations, encompass both rights in technical data and rights in computer software. The particular data at issue in this appeal is technical data, mostly comprised of technical drawings and models.

that regulation is clear, the historical context that culminated in the regulation bears on the interpretative question before this Court.

1. DoD's Historical Approach to Technical Data Rights Failed To Adequately Protect Contractors' Rights in Intellectual Property.

Before the 1980s, DoD obtained the technology it needed through direct funding of projects and Government research and development, as well as support for independent research and development by contractors. *See* Rep. of the DoD Acquisition Law Advisory Panel (800 Panel Rep.),[6] Ex. Summ. at 53; *see also id.*, App. at 5-1.[7] At that time, DoD's policies relating to intellectual property "focused on ensuring that DoD obtained the software, databases, patents, copyrights, information

[6] The Report of the DoD Acquisition Law Advisory Panel was transmitted to the congressional defense committees on January 14, 1993, as directed by § 800 of the 1991 National Defense Authorization Act, Public Law No. 101-510, and is commonly known as the Section 800 Panel Report. 800 Panel Rep., Ex. Summ. at vii. The Section 800 Panel Report consists of over 1,800 pages and presents the Panel's recommendations on over 600 defense acquisition statutes. *Id.* The sections of the Section 800 Panel Report cited herein document the history of DoD's approach to data rights, the problems inherent in that approach, and proposed solutions to those problems.

[7] For the Court's convenience, Boeing is providing relevant portions the cited legislative and regulatory history materials in the addendum to this brief. *See* Fed. R. App. P. 28(f).

systems, and technical data needed to develop and use weapon systems," in part to address concerns relating to alleged abuses in spare parts procurement. *Id.* at Ex. Summ. at 53, App. at 5-1, 5-1 5-4. As technology innovation began its rapid expansion in the 1980s, this approach became "obsolete" because "commercial technology ha[d] outpaced DoD technology in a number of areas of vital importance to the development of weapon systems."[8] *Id.* at 5-1.

Accordingly, President Reagan appointed the President's Blue Ribbon Commission on Defense Management, informally known as the Packard Commission, to "study the issues surrounding defense management and organization, and report its findings and recommendations." *See* Packard Rep. at xi. In its 1986 Report, the Commission observed with respect to these defense acquisition concerns that private industry was reluctant to participate in DoD procurement for fear that contractors' intellectual property rights would be seized by DoD. *Id.* at xi, 64-65; *see also id.* at App. I at 115, 120.

[8] For consistency, "DOD" has been changed to "DoD" in quotations using the former abbreviation. Except for this footnote, these alterations are not specifically noted.

As to data rights, the Report concluded that "DoD's new push for competition has caused an imbalance in weighing the contractor's legitimate interest in protecting data, its competitive position and economic interests, against the Government's need for data, especially for competitive procurement" and that "[k]eeping the various elements in balance is in the public interest[,] . . . encourages innovation, keeps suppliers in the industrial base, and increases contractors' willingness to permit government access to and use of data." *Id.* at 64-65, App. I at 115. In an effort to help DoD achieve this balance, the Report recommended that contractors ***retain proprietary rights in data*** pertaining to items developed exclusively with Government funding. *Id.* at 64-65; *see also id.* at App. I at 120.

In response to the Packard Commission Report, Congress in 1987 amended the Rights in Technical Data statute, 10 U.S.C. § 2320, to require DoD to "prescribe regulations to define the legitimate interest of the United States ***and of a contractor*** or subcontractor in technical data pertaining to an item or process[,]" and to admonish DoD that "[s]uch regulations ***may not impair any right*** of the United States or ***of any contractor*** or subcontractor with respect to patents or

copyrights or any other right in technical data otherwise established by law." National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661 § 953, 100 Stat. 3816, 3949 (1986).

Despite many efforts over several years to implement this mandate, however, the 1993 Section 800 Panel Report to Congress found that DoD "failed to achieve the agreed-upon balance between the Government's needs for competitive procurement and the contractors' proprietary rights." 800 Panel Rep., App. at 5-4.

2. DoD and Industry Jointly Drafted the Compromise Data Rights Regulations that DoD Adopted in 1995.

Against this backdrop, in 1993, DoD's Acquisition Law Advisory Panel recognized the necessity for a "new focus" on striking the right balance on data rights, which would fulfill DoD's needs "in the least intrusive manner with regard to intellectual property and . . . maximize[e] the flow of technology from the commercial sector to DoD and from DoD to the commercial sector." 800 Panel Rep., Ex. Summ. at 54, App. at 5-1. These efforts were driven in part by "opportunities to utilize DoD sponsored technology in the commercial sector of the economy." *Id.*

In parallel, Congress established a DoD-Industry Committee to develop and recommend new data rights regulations. *See* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290 (1991). The Committee drafted comprehensive regulations revising the data rights regime, which DoD adopted. 59 Fed. Reg. 31584, 31584-85 (June 20, 1994); 60 Fed. Reg. 33464. These regulations sought to establish a "balance between data developers' and data users' interests" and to "encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development." 59 Fed. Reg. at 31585.

3. DoD's Data Rights Regulations Continue To Reflect the 1995 Compromise Between the Government and Its Contracting Partners.

The 1995 regulations are the foundation for DoD's current approach to data rights. Indeed, the same concerns that animated DoD's 1995 regulations remain critical today. DoD still needs innovative contributions from industry. DoD still seeks to maintain a robust industrial base, as well. Meanwhile, private industry still has an interest in retaining the ability to commercialize its intellectual property rights in federally funded technologies.

Accordingly, DoD recently reaffirmed that it "requires fair treatment of IP owners, and seeks to create conditions that encourage technologically advanced solutions to meet DoD needs," and that "[r]espect[ing] and protect[ing] IP resulting from technology development investments by both the private sector and the U.S. Government" is a core principle governing DoD's acquisition, licensing, and management of intellectual property. DoD Instruction 5010.44 at 3, 4. In a 2018 Army Directive, then-Secretary of the Army Esper reiterated the importance of being "careful to ensure that the policies and practices governing [intellectual property] provide us with the necessary access to effectively support our weapons systems, but do not constrain delivery of solutions to the warfighter and do not dissuade commercial innovators from partnering with us. This partnership with the industrial base is critical to developing the capabilities we need to be successful during future conflicts." Army Dir. 18-26 ¶ 2.

These concerns are rooted in the risk that, if contractor intellectual property is left unprotected, contractors will be less willing to participate in DoD procurements, causing "leading technology firms to avoid the defense business for fear that, in providing the DoD such

access, their competitive edge might be compromised." 813 Panel Rep., Paper 8 at 1. The result would be a reduction in "the size of the defense industrial base and [would] put[ ] one DoD interest in conflict with another." *Id.*

To maintain balance, it is DoD's stated policy to "acquire only the technical data, and the rights in that data, necessary to satisfy agency needs." DFARS 227.7103-1(a);[9] *see also* DoD Instruction 5010.44 at 4 ("Seek to acquire only those IP deliverables and license rights necessary to accomplish [acquisition and product support] strategies, bearing in mind the long-term effect on cost, competition, and affordability."); DoD IP Strat. at 3 ("Don't make an unnecessary 'grab' for deliverables or additional license rights for 'Proprietary' IP"). DoD policy is clear that the "contractor . . . ***retains all rights*** in the data not granted to the Government." DFARS 227.7103-4(a).

C. Scope and Purpose of DFARS 252.227-7013.

Section 7013 provides that the Government can negotiate for and receive certain defined license rights in technical data delivered under a

[9] To avoid confusion, DoD's *policy statement* is codified at DFARS 227.7103. The *contract clause* at issue is codified at DFARS 252.227-7013. Though similar, the citations refer to two different provisions.

contract. DFARS 252.227-7013(b); *see also* Army IP Guidance at 9 (stating that, because the "[G]overnment generally does not 'own' IP that it does not itself create . . . it must obtain license rights to use that IP."). At the same time, the contractor ***still owns*** the technical data it has licensed to the Government, even if the technical data pertains to items, components, or processes that were developed exclusively with Government funds.[10] *See* DFARS 227.7103-4; *see also* Air Force Space & Missle Sys. Center Tech. Data Handbook at 5-6 ("This fact remains true even if the Government funded 100% of the development of that technical data or computer software.").

Government licenses typically attach to contractor technical data based on the source of development funding for the item, component, or process to which the data pertain:

- Limited Rights. Contractors may restrict, with some exceptions, the Government's rights to use, modify, release, reproduce, perform, display or disclose technical data pertaining to items,

[10] The license rights obtained by the Government do not confer ownership. This Court has "frequently recognized that a (non-exclusive) license," is "in substance nothing but a covenant not to sue: what such a license is, at its core, is an elimination of the potential for litigation." *Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1370 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 429 (2017).

components, or processes developed exclusively at private expense.

- Unlimited Rights. Contractors may not restrict the Government's use and disclosure of technical data pertaining to items, components, or processes developed exclusively at Government expense without the Government's approval.

- Government Purpose Rights. When an item, component, or process is developed with mixed funding, the Government may use, modify, release, reproduce, perform, display or disclose the data pertaining to such items, components, or processes within the Government without restriction and may release or disclose the data outside the Government only for government purposes.

DFARS 252.227-7013(b). Section 7013 also allows for specifically negotiated license rights. *Id.* § (b)(4).

To effect the Government's license to contractor data, contractors are required, even before the delivery of their technical data, to identify for the Government what (if any) restrictions will be asserted on the Government's rights. DFARS 227.7103-1(b)(4); *see also* DFARS 227.7103-10(a)(1) (requiring pre-award identification of technical data to be provided with restrictions); DFARS 252.227-7017 (implementing DFARS 227.7103-10(a)(1)). In addition, contractors are required to mark their delivered technical data with a legend identifying these restrictions. DFARS 252.227-7013(f) (specifying the legends to be

applied to technical data where "the Government's rights to use, modify, reproduce, release, perform, display, or disclose" are restricted).[11]

The common thread running through the assertion and markings requirements is a singular focus on restrictions on ***the Government's*** rights in technical data. For example, numerous commenters to the proposed regulatory reform of data rights regulations in the mid-90s argued that the proposed process for marking data would be burdensome. In response, DoD emphasized that "marking is not mandatory but contractors must mark when they desire to restrict ***the Government's*** rights," noting "[s]uch markings are commonly used in commercial practice to [protect] proprietary data or trade secrets." 60 Fed. Reg. at 33465. Neither DoD nor any commenters suggested that the proposed marking scheme would have any impact on a contractor's

[11] These marking requirements are consistent with the underlying policy regulations. For example, DFARS 227.7103-10(a)(5) allows the Government to "evaluate the impact on evaluation factors that may be created by restrictions on ***the Government's*** ability to use or disclose technical data." *Id.* 227.7103-10(b)(1) explains that Section 7013 "[r]equires a contractor that desires to restrict ***the Government's*** rights in technical data to place restrictive markings on the data, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings."

continued application of these "commonly used" markings directed to third parties.

II. The Decision Below

Boeing appealed both COFDs to the ASBCA. Appx6. With the Air Force's agreement, Boeing moved for summary judgment on a single question of law: Whether Boeing (and every other DoD contractor) may mark technical data in which it has given the Government unlimited rights with a marking that restricts the rights of third parties but expressly recognizes—and in no way impairs—the Government's unlimited rights in those data. Appx4. The facts supporting Boeing's motion were undisputed by the Air Force. Appx191-193, Appx198.

On November 29, 2018, the Board denied Boeing's motion, holding that the markings in Section 7013(f) "are the only permissible legends for limiting data rights and no other data rights legends are allowed." Appx12. The Board recognized that Boeing's proprietary marking "clearly states that the government has unlimited rights" and that "one might think that a legend stating that the government has unlimited rights might be preferable to one that is silent on this issue." Appx10-11.

Nonetheless, the Board held that the Air Force could order the removal of Boeing's marking under Section 7013(f). The Board reasoned that because the specified legends in Section 7013(f) included "not only . . . legends that limit the government's rights but also a notice of copyright that would, in fact, provide notice to or limit the actions of third parties," the specified legends "are the only permissible legends for limiting data rights and no other data rights legends are allowed." Appx12.

The Board left open whether its interpretation of Section 7013(f) is inconsistent with 10 U.S.C. § 2320, which states that the Government's regulations may not "impair any right . . . of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." Appx10. Instead of considering that issue as part of its interpretation of Section 7013(f), the Board decided that "compliance with the statute will have to be resolved at a later time." Appx10. On March 18, 2019, the Board entered its final decision denying Boeing's appeals. Appx2.

SUMMARY OF THE ARGUMENT

The Board's decision should be reversed for three reasons.

First, the Board misinterpreted the plain language of Section 7013(f) as applying to ***all*** legends delineating restrictions on the use of a contractor's technical data, not just legends restricting ***the Government's*** rights. Section 7013(f) provides as follows:

> (f) *Marking requirements*. The Contractor, and its subcontractors or suppliers, 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. 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 U.S.C. 401 or 402.

The first sentence provides that data markings are the only means for restricting ***the Government's*** rights in data delivered under a contract; the second sentence dictates which such data markings are permissible. Read together, as the law requires, these two sentences provide for the only data markings available to restrict ***the Government's*** rights in technical data delivered under a government contract. Indeed, the Defense Federal Acquisition Regulation Supplement's entire purpose is

to establish the rights and obligations of the parties to ***government contracts***. *See* DFARS 201.101. Nothing in Section 7013(f) pertains to markings relating to ***third party rights***.

The two sentences of Section 7013(f) must be read in harmony. *See Mont v. United States*, 139 S. Ct. 1826, 1833–34 (2019) (citations omitted) (construing adjacent sentences together and holding that "[t]he juxtaposition of these two sentences" dictates the proper interpretation of the statute); *see also Beecham v. United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences"); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577-78 (Fed. Cir. 1995) (*en banc*) (same). Proving this point, each of the four alternative data markings recognized by the second sentence—government purpose rights legend, limited rights legend, special purpose rights legend, and notice of copyright—is a method for restricting ***the Government's*** rights to use, modify, reproduce, release, perform, display, or disclose the technical data.

The Board's interpretation of Section 7013(f) incorrectly focuses on the second of these two sentences, without regard for the first. Even

though the opening sentence of the provision indisputably addresses a contractor's use of markings to assert "restrictions on ***the Government's*** rights," the Board concluded that Boeing's ***third party notice*** is prohibited because it is not among the enumerated legends in the second sentence of Section 7013(f). To reach this result, the Board relied entirely on just nine words in the second sentence—"only the following legends are authorized under this contract"—without regard for the rest of the clause, which is clearly delimited to the practice of marking data deliverable under a government contract for the purpose of restricting ***the Government's*** rights. Appx12. Here, it is undisputed that Boeing's proposed legend does not impair the Government's unlimited rights in the technical data at issue; the Board properly concluded that the legend is directed to third parties, not to the Government. Nevertheless, the Board found that Boeing's legend was nonconforming under Section 7013(f).

The Board attempted to bolster its interpretation by contending that Section 7013(f) cannot be limited only to restrictions on the Government's rights in data because it includes copyright notices, which also restrict third parties' rights in data. That construction

misses the point, however; the fact that a copyright notice restricts ***the Government's*** rights is all that is necessary for such a legend to fulfill the purpose stated in the first sentence of Section 7013(f)—to assert restrictions on the Government's rights. There is nothing in that provision that purports to address any of the many ways a contractor might use legends to restrict potential third party rights to use the contractor's data.

Second, to the extent this Court identifies any ambiguity in the meaning of Section (f), the intent, purpose, and history of the -7013 clause confirm Boeing's interpretation. The language on which the Board relies—that "only the following legends are authorized"—was first added during the 1995 overhaul of DoD's data rights regulations. As discussed more fully above, *see supra* at 13-20, those revised regulations were intended to establish a balance between Government and contractor rights, and to "encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development." 59 Fed. Reg. at 31584-85. They did not purport to address markings to restrict the rights of potential third party users of the data licensed to the Government.

The DoD contemporaneously acknowledged that markings to convey notice of restrictions on use to third parties were "commonly used in commercial practice to [protect] proprietary data or trade secrets." *See* 60 Fed. Reg. at 33465. Nothing in the regulatory history suggests that DoD intended to prohibit contractors from using these "commonly used" markings to protect their data for purposes of dual use.

Third, the Board's interpretation of Section 7013(f) is in tension with the Rights in Technical Data statute, 10 U.S.C. § 2320. This statute cautions that DoD's data rights regulations "may not impair any right . . . of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." The Board's holding, however, threatens to do just that: Under the Board's interpretation, Section 7013(f) would bar contractors from applying markings that are intended to preserve such rights vis-à-vis third parties, an outcome that puts Section 7013(f) on a collision course with 10 U.S.C. § 2320.

The Board improperly declined to address this conflict, ruling that it "will have to be resolved at a later time." Appx10, Appx13. That decision violates the longstanding principle that regulations must be

construed to avoid conflict with a statute if fairly possible. Had the Board considered the impact of 10 U.S.C. § 2320, it would have been compelled to adopt Boeing's construction of Section 7013(f), as its own reading impairs the ownership rights contractors retain in their data. For this reason, as well, the Board's decision should be reversed.

ARGUMENT

I. Standard of Review

The "decision of the agency board on a question of law is not final or conclusive." 41 U.S.C. § 7107(b)(1). Thus, the "interpretation of a contract by the ASBCA is a question of law that is reviewed without deference on appeal," *England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372, 1377 (Fed. Cir. 2004), as is the interpretation of agency regulations, *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) ("The construction of a regulation is a question of law."). *Accord States Roofing Corp. v. Winter*, 587 F.3d 1364, 1368 (Fed. Cir. 2009) (no deference owed "to the interpretation adopted by either the agency or the Board.") (internal quotation marks and citation omitted). Accordingly, this Court reviews the question presented *de novo*.

II. The Plain Language of DFARS 252.227-7013(f) Applies Only to Data Markings That Restrict the Government's Rights—Not Markings Directed at Third Parties.

To interpret a regulation, the court must look at its plain language and consider the terms in accordance with their common meaning. *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017). Courts "use the same interpretive rules to construe regulations as [they] do statutes; [they] consider the plain language of the regulation, the common meaning of the terms, and the text of the regulation both as a whole and in the context of its surrounding sections." *Id.*

The Board erred because it focused only on nine words in the second sentence of the provision at issue and thus concluded that Section 7013(f) allows for only four listed legends that may be applied to technical data, regardless of whether the data markings are intended to restrict Government or third party rights. Appx12 (quoting "the second sentence, which provides 'only the following legends are authorized under this contract . . . .'"). In so doing, it overlooked the plain language in the first sentence of Section 7013(f), which states expressly that the provision outlines the only way that a contractor may assert restrictions on ***the Government's*** rights in technical data delivered under a

government contract. Section 7013(f) simply does not regulate ***third party*** proprietary markings like the ones at issue here. The Board's contrary interpretation, relying only on the second sentence of Section 7013(f), fails to read the entire regulation as a whole. Accordingly, the Board's decision should be reversed.

A. The Text of Section 7013(f) Applies Only to Markings that Restrict Government Rights.

The clause at issue here—Section 7013(f)—is labeled "Marking requirements" and is composed of only two sentences:

> (f) *Marking requirements*. The Contractor, and its subcontractors or suppliers, 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. 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 U.S.C. 401 or 402.

DFARS 252.227-7013(f). The first sentence, by its terms, provides for the only way that contractors may assert "restrictions on ***the Government's*** rights" in technical data to be delivered under contract with the Government: namely, "by ***marking the deliverable data***

subject to restriction." The provision does not address—and does not purport to address—how the contractor might assert restrictions on third parties' rights in those data.

The second sentence follows logically from the first, by identifying the only markings that are permitted to accomplish the first sentence's purpose of providing the mechanism by which a contractor may assert ***"restrictions on the Government's rights***." The second sentence states that "only the following legends are authorized under this contract";[12] it then lists four separate legends: (i) "the government purpose rights legend at paragraph (f)(2) of this clause";[13] (ii) "the

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[12] The sentence's opening phrase, "[e]xcept as provided in paragraph (f)(5) of this clause," carves out pre-existing data markings, relating to data provided under a previous contract, which are not at issue in this case. It is worth noting, however, that even that carve-out bolsters Boeing's reading of Section 7013(f), because it relates only to restrictions on ***the Government's*** rights in technical data, and does not purport to govern the contractor's means of restricting third party rights.

[13] This legend means that the Government cannot use such data for commercial purposes or authorize third parties to do so. DFARS 252.227-7013(b)(2)(iv). The Government also must impose non-disclosure obligations upon any authorized third party recipients of the technical data. *Id.* at (iii).

limited rights legend at paragraph (f)(3) of this clause";[14] (iii) "the special license rights legend at paragraph (f)(4) of this clause";[15] and/or (iv) "a notice of copyright as prescribed under 17 U.S.C. 401 or 402."[16] Each of these legends provides a means of restricting ***the Government's*** rights in technical data.

Reading the plain text of Section 7013(f), four salient points emerge. First, it focuses exclusively on restrictions that a contractor asserts on ***the Government's*** rights in technical data delivered under the contract. It imposes no limitations whatsoever on a contractor's right to restrict a third party's rights in the data. Second, the singular method by which a contractor can assert any restrictions on the Government's rights in technical data is to ***mark the deliverable data*** as subject to

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[14] This legend means that the Government is generally prohibited from using these data to manufacture additional end items and from disclosing such data outside the Government, except in narrowly defined emergencies. *See id.* 252.227-7013(a)(14).

[15] This legend means that contractors and the Government may agree on tailored restrictions on the Government's use and disclosure of the contractor's technical data, provided that the Government receives at least limited rights. *See id.* 252.227-7013(b)(4).

[16] Pursuant to DFARS 252.227-7013(e)(1), a copyright notice under 17 U.S.C. §§ 401 or 402 alerts the Government that the contractor is restricting the use and disclosure of data based solely on the exclusive rights granted to a copyright owner under 17 U.S.C. § 106.

restriction. Third, there are only four permissible markings a contractor may apply to technical data delivered under contract to restrict the Government's rights in those data. Fourth, under the carve-out, as discussed in note 12, *supra,* if the contractor restricted the Government's rights in technical data under a prior government contract, it may mark those data with the restrictive legend used under the prior contract. All of these points relate to restrictions on the Government's rights in data delivered under the contract. Nowhere in Section 7013 is there any prohibition on a contractor's right to mark technical data that it owns to notify ***third parties*** of its ownership rights in those data.

The Board rejected this plain language interpretation, reasoning that Section 7013(f) is not limited to restrictions on the Government's rights because one of the enumerated legends, "Copyright Notice," can also limit third parties' rights. This, however, misses the point. Under Boeing's interpretation, Section 7013 is intended to identify legends that restrict the Government's rights, and a copyright legend indisputably does just that—it is, in fact, a restriction "on the Government's rights to use, modify, reproduce, release, perform,

display, or disclose technical data" within the terms of Section 7013. Indeed, the terms "reproduce," "perform," and "display" refer to the core rights protected by copyright law. 17 U.S.C. § 106.[17]

Even though the Government obtains a copyright license coextensive with its data rights license, *see* DFARS 227.7103-9(a), a copyright notice still operates to restrict the Government's rights to do anything outside the scope of that license. If the Government exceeds that scope, the contractor may bring suit for damages under 28 U.S.C. § 1498(b). The Copyright Notice, therefore, ***is*** a restriction on ***the Government's*** rights, just like the other three legends listed in the clause. The fact that it also restricts third-party rights does not conflict with Boeing's interpretation of the clause.

By focusing exclusively on the words "only the following legends are authorized under this contract," the Board impermissibly overlooked the natural relationship between the first and second sentences of Section 7013(f). *See Mont*, 139 S. Ct. at 1833–34 (construing adjacent

[17] Moreover, Section 7013(e) acknowledges that copyrights operate as restrictions on Government "use, release, or disclosure" by exempting "restrictions based solely on copyright" from the requirement to identify restrictions on an assertions table.

sentences together and holding that "[t]he juxtaposition of these two sentences" dictates the proper interpretation of the statute) (citations omitted); *see also Beecham*, 511 U.S. at 372 ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences"); *Reflectone,* 60 F.3d at 1577 (*en banc*) (same). Had the Board construed "the text of the regulation both as a whole and in the context of its surrounding sections," as it was compelled to do, *Aqua Prods.*, 872 F.3d at 1316, it would not have made that error.

Read harmoniously, limiting the scope of Section 7013(f) to only those markings restricting ***the Government's*** rights in data is the only faithful reading of the clause. *Reflectone*, 60 F.3d at 1577 (the proper interpretation of the plain language of the regulation "examines and reconciles the text of the entire regulation, not simply isolated sentences"). Under this reading, Boeing's data marking—directed only to third parties, and not to the Government—is unquestionably permissible.

B. The Balance of DFARS 252.227-7013 and DFARS 227.7103 Support the Plain Language Interpretation of Section 7013(f).

The broader context of the entire DFARS clause, 252.227-7013, supports the plain language reading of Section 7013(f). The sections preceding 7013(f) focus only on the contractor's ownership rights and the extent of the Government's license rights in the technical data owned by the contractor, and do not touch on contractor rights vis-à-vis third parties. *See, e.g.*, DFARS 252.227-7013(b) ("The Contractor grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in technical data."); *id.* § (c) ("All rights not granted to the Government are retained by the Contractor.").

The Board attempts to rely on language regarding nonconforming markings in DFARS 252.227-7013(h)(2) and DFARS 227.7103-12 to support its interpretation, but its reliance on these provisions is misplaced. Subsection 7013(h)(2) defines a "nonconforming marking" as a "marking placed on technical data delivered or otherwise furnished to the Government under this contract that is ***not in the format authorized*** by this contract." According to the Board, this language

means that "any legend not specified in the contract is nonconforming." Appx12. This cannot be the case, however, because Subsection 7013(h)(2) governs only the "***format***" of markings,[18] not the threshold question of whether a third party marking is even within the scope of the markings addressed by Section 7013. *See* 60 Fed. Reg. at 33466 ("The nonconforming marking procedures address ***only the proper format*** for a marking.").

Merriam-Webster defines "format" as "the shape, size, and general make-up, as of something printed." "Format," *Merriam-Webster,* https://www.merriam-webster.com/dictionary/format. Consistent with that definition, Section 7013 identifies the exact legend a contractor must use to assert any rights greater than unlimited rights. For

[18] It is worth noting that the section relating to "format" is a significant rule in its own right. If the markings are not in the authorized format, and the contractor does not correct the format within 60 days of being notified of the error, subsection 7013(h) allows the Government to "ignore or, at the Contractor's expense, remove or correct any nonconforming marking." DFARS 252.227-7013(h)(2). This results in the Government obtaining unlimited rights in the data, regardless of the source of funding. *See, e.g.*, *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 380 (2005), *aff'd*, 469 F.3d 1369 (Fed. Cir. 2006).

example, to assert limited rights in technical data, a contractor must apply the following legend in this precise format:

> *Limited rights markings*. Data delivered or otherwise furnished to the Government with limited rights shall be marked with the following legend:
>
> LIMITED RIGHTS
>
> Contract No. _____
>
> Contractor Name _____
>
> Contractor Address _____
>
> _____
>
> The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data--Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.
>
> (End of legend)

DFARS 252.227-7013(f)(3). To the extent that the contractor asserting limited rights affixes a legend that does not adhere to this precise ***format***, for example by placing the final three sentences before the contract number, the Government may require the contractor to correct that marking under Section 7013(h)(2). This Government right, however, does not bear at all on the question of whether a contractor may affix a legend notifying third parties of the contractor's ownership

rights in those data. Therefore, Subsection 7013(h)(2) does not animate the interpretive question presented in this appeal.[19]

Likewise, DFARS 227.7103-12 is irrelevant to the question before this Court. That provision is the policy predicate for DFARS 252.227-7013(h), and it identifies "authorized markings" as those in DFARS 252.227-7013. When Section 7103-12 goes on to state that "all other markings are nonconforming markings," it is not purporting to expand the scope of Section 7013, which is limited to restrictions on Government rights. Rather, it is referring only to the conforming or nonconforming ***format*** of the legends permitted to restrict Government

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[19] Indeed, Section 7013(h)(2) expressly states that, unlike Section 7013(h)(1) ("*Unjustified technical data markings*"), the correction of nonconforming markings under Section 7013(h)(2) is not subject to the Validation of Restrictive Markings on Technical Data clause of the contract (DFARS 252.227-7037). The Section 7037 clause requires a contractor to justify the ***substantive*** validity of its markings (not the ***format*** of the markings) that "impose restrictions on the Government" and others (*e.g.*, contractors with which the Government may want to share those data). For example, if the contractor marks the data with a limited rights legend but the Government thinks it has unlimited rights in those data, it will require the contractor to justify the affixed legend under Sections 7013(h)(1) and 7037. This undermines the Board's reliance on Section 7013(h)(2) because it confirms that "nonconforming markings" do not relate to the ***validity*** of any restrictions imposed by a marking, but rather only the ***form*** in which justified restrictions are expressed.

rights in the data delivered under contract. Section 7103-12(b) also reinforces the distinction between "unjustified markings," which relate to the ***substance*** of the Government's rights in a contractor's technical data, and the ***form*** in which these restrictions are expressed. *Compare* DFARS 227.7103-12(b)(1) ("An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data.") *with* DFARS 227.7103-12(a)(1) ("Authorized markings are identified in the clause at 252.227-7013, Rights in Technical Data—Noncommercial Items. All other markings are nonconforming markings."). Because Section 7013(f) pertains only to markings that restrict the Government's rights, DFARS 227.7103-12 means only that markings that purport to restrict the Government's rights, but are not in the format authorized in Section 7013(f), are nonconforming.

In sum, Boeing's construction of Section 7013(f)—*i.e.*, that Section 7013(f) only regulates markings that restrict ***the Government's*** rights in technical data—is faithful to the text of the clause and to its context, and it gives meaning to all of its parts. Under this reading of Section

7013(f), Boeing's proprietary marking is permitted. Boeing did not assert restrictions on the Government's rights in the EPAWSS technical data it delivered to the Air Force. As the Board correctly noted, "Boeing's compromise legend clearly states that the government has unlimited rights and can grant authority to others." Appx10. Indeed, Boeing's marking is expressly identified as a "non-U.S. government notice" and makes plain that "***non-U.S. government entities*** may use and disclose only as permitted in writing by Boeing ***or by the U.S. Government***." Appx5. Accordingly, the Board erred in holding that Boeing's data marking violated Section 7013(f).

III. Boeing's Interpretation Is Further Compelled by the Intent, Purpose, and History of DFARS 252.227-7013.

The plain text of Section 7013(f) compels Boeing's interpretation, and that should be the end of the inquiry. *Aqua Prods.,* 872 F.3d at 1316 ("If the regulatory language is clear and unambiguous, no further inquiry is usually required."). Yet even if the Court looks beyond the plain language of Section 7013(f), the relevant legislative and regulatory history of DFARS 252.227-7013 confirms Boeing's interpretation. *Cf. Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1380 (Fed. Cir. 2000) ("[L]ike any contract," this one

"must be read in light of its purpose and consistently with common sense.").

The Board's interpretation hinges on a single phrase in Section 7013(f), divorced from its surrounding context, which states that "only the following legends are authorized under this contract." That phrase, however, was first added to Section 7013 as part of the 1995 rewrite of the DFARS data rights provisions—an overhaul intended ***to expand*** contractor rights in intellectual property, ***not to constrict*** them.

Before 1995, Section 7013 simply listed each category of restriction on the Government's rights in a separate subsection and stated that each restriction applied "only when the portion or portions of each piece of data subject to such rights are identified (for example, by circling, underscoring, or a note), and are marked with the legend below." DFARS 252.227-7013 (1994). As part of the 1995 rewrite, all restrictive legends were placed under a single subsection, subsection (f), and language was added to clarify that those legends were the "only" restrictive legends "authorized under this contract." *Compare* DFARS 252.227-7013 (1994), *with* DFARS 252.227-7013(f) (1995).

Nothing in the regulatory history of the 1995 rewrite suggests that this change was intended to prevent contractors from using proprietary notices to third parties. To the contrary, DoD acknowledged during the promulgation of the regulation that such markings were "commonly used in commercial practice to [protect] proprietary data or trade secrets." 60 Fed. Reg. at 33465. DoD explained that "marking is not mandatory but contractors must mark when they desire to restrict ***the Government's*** rights," underscoring the regulation's singular focus on markings that "restrict the Government's rights," not on markings directed exclusively to third parties. *Id.* The Board's interpretation does not account for this history.

The Board's interpretation also runs counter to DoD's intent to restore balance between the interests of DoD and private industry in technical data and to reverse the erosion of the industrial base that was the backdrop for the 1995 data rights revisions.[20] *See supra* at 13 - 20. The 1995 regulations were an outgrowth of the recognition that

[20] These concerns are just as real today. *See, e.g.*, 813 Panel Report, Paper 19 at 1 ("Commercial vendors may be unwilling to accept DoD unique data rights clauses that introduce IP risk or require commercial vendors to grant license rights in a scope different from the licenses granted in the commercial marketplace.").

achieving these goals required "new focus" on fulfilling DoD's needs "in the least intrusive manner with regard to intellectual property and on maximizing the flow of technology from the commercial sector to DoD and from DoD to the commercial sector." 800 Panel Rep., Ex. Summ. at 54, App. at 5-1.

The 1995 regulations are the direct result of a careful compromise between Government and private industry. *See supra* at 13 - 20. The regulations were drafted by a joint DoD-Industry Committee after DoD had repeatedly failed to propose workable regulations. *See* 59 Fed. Reg. at 31584-85; *see also* 800 Panel Rep., Ex. Summ. at 54-55, App. at 5-4. As DoD acknowledged at the time, the regulations were intended to establish a "balance between data developers' and data users' interests" and "encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development." 59 Fed. Reg. at 31585.

The Board's reading of Section 7013(f) negates this history by interpreting language first added in the 1995 DFARS revision in a manner that impairs the ability of contractors to mark and protect their proprietary data—data that contractors ***still own***, regardless of the non-exclusive license they grant the Government. This, in turn,

diminishes the incentives for private industry to participate in DoD programs, exacerbating the very problem the revised data rights regulations were crafted to solve. Nothing in the plain language of the clause or the regulatory history of the clause compels such a result. To the contrary, both require the opposite.

IV. The Board's Interpretation Failed to Consider the Rights in Technical Data Statute and Impermissibly Impairs Contractors' Ownership Rights in Technical Data, In Conflict with that Statute.

Boeing's interpretation of Section 7013(f) should also be confirmed by this Court because it is consistent with the Rights in Technical Data statute, which broadly governs data rights in all DoD contracts and which Section 7013 was promulgated to implement. *See* 60 Fed. Reg. 33464. The Rights in Technical Data statute (10 U.S.C. § 2320) codifies Congress's intent, implemented in the 1995 regulations, to restore balance between the interests of DoD and private industry in technical data. *See supra* at 16. In so doing, the statute provides that DoD "shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process" and that "[s]uch regulations ***may not impair any right*** of the United States or ***of any contractor*** or subcontractor

with respect to patents or copyrights or any other right in technical data otherwise established by law." 10 U.S.C. § 2320(a). In other words, the Rights in Technical Data statute is concerned exclusively with the proper balance of rights between the contractor and the Government.

The Board erred in failing to interpret Section 7013 in a manner consistent with this statute. The Board admits that its interpretation of Section 7013 may have created a conflict with the Rights in Technical Data statute's mandate not to "impair any right . . . of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." Appx10. It declined to address that question, however, ruling that "whether the Air Force is in compliance with the statute will have to be resolved at a later time." *Id.*

This is reversible error. It is well established that "regulations must be construed to avoid conflict with a statute if fairly possible." *Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994), *superseded on other grounds by* 38 U.S.C. § 7111. A "regulation must be interpreted so as to harmonize with and . . . not to conflict with the objective of the statute it implements." *Sec'y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320

(D.C. Cir. 1990) (internal quotation marks and citation omitted). By failing to address this conflict, the Board not only reached the wrong interpretation of Section 7013(f), but also failed to fulfill its duty to harmonize the regulation with its governing statute.

There is no question that the Board's interpretation of Section 7013(f) would impair contractors' rights in technical data in contravention of the Rights in Technical Data statute. The Air Force does not dispute that, even with unlimited rights, the Government obtains only a license in—not ownership of—technical data. DFARS 252.227-7013(a)(16), (c); Appx186-187. The Government's position, however, is that despite Boeing's ownership of the technical data at issue, Boeing is prohibited from informing third parties of that ownership. By adopting the Government's position, the Board's interpretation of Section 7013(f) will impair Boeing's ownership right—and that of all contractors—to protect its data, in violation of Section 2320.[21]

[21] The Board commented that a "prudent contractor would have sought clarification prior to entering into the contract," and pointed to commentators "suggest[ing] that contractors attempt to negotiate a special contract provision allowing" the markings. Appx13. That is not

A. Contractors Retain Substantial Rights in Technical Data Delivered to the Government.

DoD recognizes that contractors not only own technical data delivered to the Government, they also retain a valuable interest in such data, including, but not limited to, trade secrets. *See* DFARS 252.204-7012 (defining "proprietary information" as "trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company"). DoD also acknowledges that contractors typically safeguard these interests through the application of restrictive markings. *See* 60 Fed. Reg. at 33465 ("[M]arkings are commonly used in commercial practice to [protect] proprietary data or trade secrets."); DoD –Navigating Through Commercial Waters at 4-4 ("DoD's way of handling a contractor's previously developed, copyrighted material, proprietary data, and trade secrets is through the application of restrictive legends on deliverable data.").

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a viable solution, however, as the 813 Panel Report expressly acknowledged. *See* 813 Panel Rep., Paper 16 at 2 ("The Panel received Government comments that [Specially Negotiated License Rights (SNLR)] are difficult to negotiate, and that there are too few Government personnel available with enough experience, who are qualified to negotiate SNLR.").

Here, however, the Board failed to acknowledge these interests. Instead, the Board focused exclusively on the issue of trade secret protection, suggesting in dicta that any such rights in trade secrets are eliminated when data is delivered with unlimited rights. This question was not before the Board. This is not, nor has it ever been, a case to determine trade secret rights. That question, which would be a matter of state law—and which was not briefed to the Board—simply is not relevant to whether Section 7013(f) permits Boeing's data markings.

In any event, the Board's suggestion that Boeing does not have trade secret rights in data delivered to the Government with unlimited rights is incorrect. As noted above, DoD recognizes that contractors such as Boeing retain general ownership and proprietary rights in such data. *See* DFARS 227.7103-4. Moreover, even with respect to trade secrets, numerous cases hold that trade secret status is not lost until such time as the Government exercises its license and publicly discloses information.[22] This is so because "[e]ven limited non-confidential

[22] *See, e.g.*, *GlobeRanger Corp. v. Software AG*, 27 F. Supp. 3d. 723, 748 (N.D. Tex. 2014) ("If a voluntary disclosure occurs in a context that would not ordinarily occasion public exposure, and in a manner that does not carelessly exceed the imperatives of a beneficial transaction,

disclosure will not necessarily terminate protection if the recipients of the disclosure maintain the secrecy of the information." Restatement (Third) of Unfair Competition, § 39 cmt. f (Definition of Trade Secret).[23] In other words, unless and until the information is ***actually ascertained by the public***, trade secret protection remains available. Nonetheless, the Board has failed to acknowledge these rights.

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then the disclosure is properly limited and the requisite secrecy retained."); *see also Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113 (5th Cir. 1991) (holding that filing architectural plans with a city does not make them public information within the context of trade secrets for same reason); *Vianet Grp. PLC v. Tap Acquisition, Inc.*, No. 3:14-cv-3601, 2016 WL 4368302 (N.D. Tex Aug. 16, 2016); *Wellogix, Inc. v. Accenture*, LLP, 823 F. Supp. 2d 555, 564 (S.D. Tex. 2011), *aff'd*, 716 F.3d 867 (5th Cir. 2013).

[23] Even where eventual disclosure by the Government is certain, such as information in a patent application, the information is eligible for trade secret protection up until it is actually disclosed. *Plastic & Metal Fabricators, Inc. v. Roy*, 303 A.2d 725, 734 (Conn. 1972) ("Since an application to patent a discovery is not of itself a general disclosure of the discoverer's secret and hence not a release of the obligation of the confidential disclosure, protection may be afforded during the period that the patent application is pending and it presents no conflict with the purposes or objectives of the federal patent law."); *see Innovatier, Inc. v. CardXX, Inc.*, No. 08-CV-00273, 2011 WL 3293789, at *4 (D. Colo. Aug. 1, 2011) (holding trade secrets disclosed in a patent application retain their trade secret status until "the USPTO approved the patent or published the application" because "[m]aterial in a patent application remains secret unless and until it is published by the USPTO").

By overlooking Boeing's ownership, proprietary, and potential trade secret rights in the data delivered, the Board's construction of Section 7013(f) falsely equates a license for unlimited rights with placing the data in the public domain—a mistake of profound consequence. If this were true, it would extinguish the value of the very data being licensed, thereby rendering the license meaningless. If, as the Board's ruling would suggest, a contractor has no remaining rights in technical data delivered with unlimited rights, why is a government unlimited rights license necessary at all?

This Court need not resolve this question, however, because it was neither presented to the Board, nor is it relevant to the sole question at issue here: Whether Section 7013 permits a contractor to give notice to third parties that it retains ***ownership*** of proprietary technical data that has been delivered to the Government.[24] The plain language of Section 7013 permits this notice, regardless of whether the underlying

[24] Significantly, the Board's interpretation of Section 7013(f) is not confined to data pertaining to items, components, and processes developed exclusively at Government expense. Because Section 7013(f) applies to ***all*** data delivered to the Government, the Board's interpretation applies to limited rights data as well. DFARS 252.227-7013(f)(3). *See infra* at 59.

data constitutes a trade secret. The cases relied on by the Board—*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984), and *Conax Fla. Corp. v. United States*, 824 F.2d 1124, 1128-30 (D.C. Cir. 1987)—are inapposite because they do not address whether a contractor may put third parties on notice of the contractor's ownership rights in technical data, nor do they address whether an unlimited rights license impacts trade secret protection.

Monsanto involved "whether Monsanto had a property interest protected by the Fifth Amendment's takings clause" in information that Monsanto submitted to the Environmental Protection Agency as part of a product application process. *Sec. People, Inc. v. Medeco Sec. Locks, Inc.,* 59 F. Supp. 2d 1040, 1044 (N.D. Cal. 1999), *aff'd*, 243 F.3d 555 (Fed. Cir. 2000). It did not consider an unlimited rights license under the DFARS. As the Ninth Circuit has held, "*Monsanto* does not stand for the principle that disclosure of trade secret information to a competitor who is not required to protect it destroys trade secret

protection, nor has any court read *Monsanto* as establishing this principle." *United States v. Liew*, 856 F.3d 585, 601 (9th Cir. 2017).[25]

Conax is similarly inapt. There, a contractor—Conax—delivered technical drawings to the Navy under a contract incorporating a pre-1995 version of the technical data rights clause. Conax asserted a limited rights restriction in the data, which the Navy rejected, instead claiming unlimited rights in the data. 824 F.2d at 1126-27. The Navy then informed Conax that it planned to disclose the data to third parties under its presumed unlimited rights license. *Id.* at 1125-28. Conax filed an Administrative Procedure Act action in district court seeking to enjoin the disclosure. *Id.* at 1127-28, 1132. The only issue in *Conax* was whether the Navy had limited or unlimited rights in Conax's data, and the decision stands only for the unremarkable proposition that, if the Navy possessed unlimited rights, it had the right to disclose Conax's data as proposed.

[25] Here, of course, Boeing did not disclose its technical data to "a competitor"; rather, it provided the data to the U.S. Government, one of its largest customers, but the Ninth Circuit's reading of the scope of *Monsanto* is still applicable here.

At bottom, the Board's suggestion that Boeing lost any trade secret status it held in its technical data by providing the Government unlimited rights in those data is merely dicta; it is of no weight here, because it is irrelevant to the question before the Board; it is wrong, as a matter of law; and it cannot independently sustain the Board's decision.

B. Impairment of Contractor Rights in Technical Data Negates the Compromise Between the Government and Its Contracting Partners.

Following the Board's dicta regarding trade secret status would also be ill-advised because it could result in the most extreme case of impairment of contractor technical data rights: the complete denial of any property rights at all. Such a result would distort the incentive for contractors to participate in government procurement, in contravention of the legislative and regulatory purpose and history discussed above. *See supra* at 13 - 20. Contractors derive significant value from their technical data, even when these data are delivered to the Government with unlimited rights. *Cf. Lockheed Martin Corp. v. United States*, 210 F.3d 1366, 1378 (Fed. Cir. 2000) ("Lockheed Martin retained the right to use the results of its research in its business without paying for that

right and therefore retained 'substantial rights' in its research," even though the research was given to the Government with unlimited rights). If, instead of retaining the intellectual property they generate under government contracts, contractors are instead required to relinquish it to the public, including their competitors, they will flee the government marketplace. This inevitable result would run afoul of the compromise struck between the Government and industry when the data rights regulations were rewritten in the mid-1990s.

These are not theoretical concerns. Boeing has given its technical data to parts suppliers under restrictions of use, and some suppliers have taken the position that they can ignore the restrictions because the same data was given to the Government with unlimited rights. These suppliers are arguing, in effect, that they also have at least unlimited rights in Boeing's technical data, even though neither Boeing nor the Government has authorized them to use the data so broadly. The Board's decision gives credence to that legally flawed position.

By contrast, by maintaining control over its proprietary technical data with the markings at issue here, Boeing is able to leverage that technical data in direct commercial sales. *See* 59 Fed. Reg. at 31585

(recognizing the desirability of "dual use development."). Without these commercial sales to help absorb costs, contractors like Boeing would have to increase prices to the Government. This would lead to the very result the Government sought to avoid: When companies are "discouraged from investing in commercial applications of new technologies that are developed for Government use . . . the Government gets less for its money, the defense industrial base shrinks, and the competitiveness of U.S. firms suffers." 800 Panel Rep., App. at 5-11 to 5-12.

Notably, the Board's interpretation of Section 7013(f) is not confined to data pertaining to items, components, and processes developed exclusively at Government expense. Because Section 7013(f) applies to ***all*** data delivered to the Government, the Board's interpretation applies to limited rights data as well. *See* DFARS 252.227-7013(f)(3). Such data typically is developed by contractors exclusively at their own expense, representing company investment in technological innovations. Impairing contractors' ability to protect and commercialize these data will chill precisely the innovations and data infusion that

DoD intended to encourage when it undertook the 1995 regulatory revisions.

This outcome should give the Court pause. Boeing indisputably has property rights in the technical data at issue here, and denying Boeing the ability to provide notice of these rights to third parties impairs those rights. Because Section 7013 "may not impair any right" belonging to Boeing, 10 U.S.C. § 2320, the Court should reject the Board's interpretation and avoid a conflict between the DFARS and the Rights in Technical Data statute.

V. The Government Is Not Prejudiced by Boeing's Third-Party Notice.

Finally, the Board's interpretation should be rejected because the Government has asserted no prejudice, nor will it suffer any, from allowing Boeing to maintain its proprietary marking. Indeed, the legend Boeing has proposed actually helps ***protect*** the Government's interest in the data: as the Board noted, "one might think that [Boeing's] legend stating that the government has unlimited rights might be preferable to one that is silent on this issue . . . ." Appx11. As explained above, it is undisputed that Boeing's proposed data markings are consistent with the Government's unlimited data rights license.

This unlimited rights license is broad, and it allows the Government both to use the data and to "authorize others to do so," DFARS 252.227-7013(b)(1); Appx11, which Boeing's proposed data markings clearly assert. In the proceedings below, the Board correctly rejected the Government's hollow claim that the act of "authorizing" a third party to use and distribute the data is somehow prejudicial or burdensome to the Government. Appx11. Authorizing third party use cannot be burdensome where that authorization is "what a government-drafted clause expressly contemplates." *Id*. Accordingly, Boeing's interpretation does not impose any burden on the Government that would weigh against permitting the markings it seeks to use.

CONCLUSION

For the reasons stated above, the decision of Armed Services Board of Contract Appeals should be reversed and this case remanded for decision in favor of Boeing.

Dated: December 20, 2019

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ADDENDUM

ADDENDUM INDEX

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, the foregoing Brief of Appellant The Boeing Company was served via ECF on all counsel of record.

/s/ Scott M. McCaleb
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Dated: December 20, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief contains 11,899 words, excluding the parts of the brief exempted by rule. This number was generated using the Microsoft Word "Word Count" feature.

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