ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
The Boeing Company	)	ASBCA Nos. 61387, 61388
	)	
Under Contract Nos. F33657-01-D-0026	)	
FA8634-17-C-2650	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Appellant, The Boeing Company (Boeing), moves for summary judgment, seeking the Board's interpretation as to whether the above-captioned contracts allow it to place certain marking legends on technical data. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Unless noted otherwise, the following facts are drawn from appellant's statement of undisputed material facts (ASUMF), with which the government has concurred (gov't opp'n at 1).

On September 30, 2015, the Air Force awarded Boeing Delivery Order 0138 on Contract No. F33657-01-D-0026 to provide certain work under the F-15 Eagle Passive/Active Warning Survivability System (EPAWSS) program (R4, tab 9). The contract incorporated the November 1995 version of the Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.227-7013, RIGHTS IN TECHNICAL DATA–NONCOMMERCIAL ITEMS (NOV 1995) (R4, tab 3 at 37; ASUMF at 1).

On November 3, 2016, the Air Force awarded Boeing Contract No. FA8634-17-C-2650 for additional work under the EPAWSS program. The contract incorporated the February 2014 version of DFARS 252.227-7013. (R4, tab 18 at 1, 37; ASUMF at 1)

Both contracts require Boeing to deliver technical data with unlimited government rights in that data (ASUMF at 1). The government concedes that Boeing retained ownership of the data (gov't opp'n at 15).

During the course of performing the contracts, Boeing has submitted numerous "technical data deliverables" to the government (more than 50 according to Boeing's complaint) but the government has rejected or disapproved them, contending that the marking legends placed by Boeing on the data are nonconforming (ASUMF at 1, 3).

What the parties refer to as Boeing's "current" legend is:

NON-U S GOVERNMENT NOTICE
BOEING PROPRIETARY
THIRD PARTY DISCLOSURE REQUIRES WRITTEN APPROVAL
COPYRIGHT 2016 BOEING
UNPUBLISHED WORK - ALL RIGHTS RESERVED

NON-U S GOVERNMENT ENTITIES MAY USE AND DISCLOSE ONLY AS PERMITTED IN WRITING BY BOEING OR BY THE U S GOVERNMENT

Current Boeing Marking Example

A second legend that Boeing proposed to resolve the dispute prior to the contracting officer's final decision is as follows:

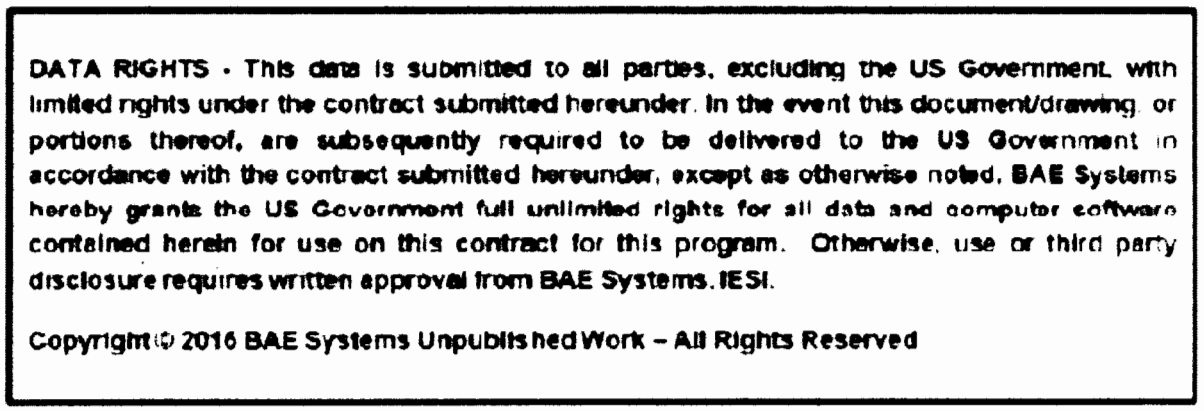
UNLIMITED RIGHTS MARKING FOR THE HEADER AND MEDIA OF THE COPY OF NON-COMMERCIAL COMPUTER SOFTWARE AND FIRST PAGE OF NON-COMMERCIAL TECHNICAL DATA BEING DELIVERED WITH UNLIMITED RIGHTS UNDER DOD PROCUREMENT CONTRACTS

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

Finally, the "current" legend from Boeing's subcontractor, BAE, is:



Current BAE Drawing Marking Example

(R4, tab 1 at 6-7, tab 2 at 6-7; ASUMF at 2-3)

On July 31, 2017, the contracting officer issued a final decision for each contract, in which she reproduced the legends above.* The contracting officer concluded that the legends were not authorized by the contracts. She contended that the only authorized legends are those found in DFARS 252.227-7013(f), namely, those for Government Purpose Rights, Limited Rights, and Specifically Negotiated Rights and that none of these include a propriety/third party notice. (R4, tab 1 at 3-4, tab 2 at 3-5; ASUMF at 2-3)

The contracting officer concluded that, because the legends did not conform with DFARS 252.227-7013(f), Boeing must remove them at its own expense and re-submit the data (R4, tab 1 at 4, tab 2 at 5; ASUMF at 3).

Boeing timely appealed the contracting officer's final decisions on October 27, 2017.

DECISION

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When considering a motion for summary judgment, the Board's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id.* at 249. We are required to view the record in the light most favorable to the nonmoving party, in this case the government. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

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* With respect to the second legend reproduced above, the final decisions also included similar language for a footer to be used on subsequent pages after the initial marking (R4, tab 1 at 7, tab 2 at 7).

The Rights in Technical Data Clause

The Department of Defense has promulgated various regulations governing rights in technical data as a result of a statutory directive by Congress to protect the rights of both the government and contractors. Congress specified that the regulations should "define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process." 10 U.S.C. § 2320(a)(1). Congress further specified that the 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." *Id.*

The regulations promulgated by the Department of Defense include DFARS 227.7103-6, Contract clauses, which provides: "Use the clause at 252.227-7013, Rights in Technical Data–Noncommercial Items, in solicitations and contracts when the successful offeror(s) will be required to deliver to the Government technical data pertaining to noncommercial items." DFARS 227.7103-6(a).

As described above, the contracts incorporated the 1995 and 2014 versions of DFARS 252.227-7013. Neither party has identified any relevant differences between the 1995 and 2014 versions. We follow the parties' practice of citing to the 2014 version.

This clause has a number of provisions that are relevant to this dispute. First, it defines "Technical data" as:

> [R]ecorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

DFARS 252.227.7013(a)(15).

With respect to the contracts' unlimited data rights provisions, the clause provides:

> *Unlimited rights* means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

DFARS 252.227-7013(a)(16). The government receives unlimited rights when, among other things, the item, component or process has been developed exclusively with government funds. DFARS 252.227-7013(b)(1)(i).

The license granted to the government is nonexclusive. DFARS 252.227-7013(b). The contractor retains all rights not granted to the government. DFARS 252.227-7013(c).

The clause specifies how the contractor should mark the data:

> *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.... [O]nly 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).

Finally, the clause defines and specifies procedures for managing nonconforming technical data markings:

> *Nonconforming technical data markings*. A nonconforming marking is 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.... If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such marking within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

DFARS 252.227-7013(h)(2).

Boeing's Contentions

Neither party has cited precedent where a court or board has addressed marking legends comparable to Boeing's. We begin by considering whether declaratory relief

is appropriate in this appeal, including whether there is a live dispute and whether a declaration will resolve that dispute. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

Boeing contends that the DFARS clauses, as interpreted by the Air Force, fail to protect its intellectual property rights as required by 10 U.S.C. § 2320 (app. br. at 14). However, it does not dwell on what those rights are or how they would be protected by these legends. It contends that if it cannot place the legends on the data it "will be impaired in exercising its right to restrict who else may use or disclose technical data and under what circumstances they may do so." It then quotes the Supreme Court's opinion in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984), for the proposition that "[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest." (App. br. at 14) Two pages later Boeing states that it "maintains that it has trade secret and other proprietary rights in the technical data delivered under the Contracts" (*id.* at 16). In its reply brief, Boeing states that markings like those under appeal "allow contractors to protect the technical data's nonpublic (and potential trade secret) status" and that "technical data do not lose their trade secret status when delivered with unlimited rights" (app. reply br. at 11). Thus, Boeing seems to be focused on trade secrets.

The Supreme Court's opinion in *Monsanto* actually casts significant doubt on Boeing's trade secret theory because the Court also stated that "[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished." *Monsanto*, 467 U.S. at 1002; *see Conax Florida Corp. v. United States*, 824 F.2d 1124, 1128-30 (D.C. Cir. 1987) (contracting officer's reasonable determination that Navy received unlimited data rights meant that contractor had no trade secret to protect). As specified in the data rights clause, the government's unlimited rights allow it not only to "use, modify, reproduce, perform [or] display" the data but also to "release, or disclose" it and authorize third parties to do these same things. DFARS 252.227-7013(a)(16). Thus, the government is under no obligation to protect the confidentiality of the data and can give it to whomever it chooses or even publish it on the Department's website. *Monsanto* and *Conax Florida* provide that Boeing does not possess a trade secret in such technical data.

This leads to the question of whether Boeing has some other intellectual property right besides trade secrets. As stated, DFARS 252.227-7013(f) authorizes "a notice of copyright as prescribed under 17 U.S.C. 401 or 402" and, presumably for that reason, there is no dispute about Boeing placing a notice of copyright on the data. Patents are mentioned fleetingly in the parties' briefs but it suffices to say that the government has represented without objection that Boeing has not identified any patent at issue (gov't opp'n at 14), and it is not clear why the above legends would be necessary to protect patent rights.

The best that can be said for Boeing's position is that the government might not publish the data or provide it to anyone and that Boeing might still have something worth protecting, notwithstanding the grant of unlimited rights. But how this conjecture translates into a legally-cognizable property right is unclear. Until we identify with some precision the nature of Boeing's property right (if any) we cannot determine if the Air Force is complying with the congressional mandate that it 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." 10 U.S.C. § 2320(a)(1). Accordingly, whether the Air Force is in compliance with the statute will have to be resolved at a later time.

The Government's Contentions

The government contends it will be harmed by the proposed legends but it is difficult for us to assess how real its concerns are. As stated above, the government concurred with Boeing's proposed facts, and did not propose additional facts of its own. Somewhat confusingly, however, it states in the penultimate sentence of its brief that "to the extent Boeing disputes the Air Force's evidence that Boeing's proposed markings create a burden on the Government, which impedes the Government's unlimited rights, that dispute concerns a material fact and, therefore, precludes granting Boeing's motion." (Gov't opp'n at 15-16)

In support of this contention, the Air Force submits a declaration from Michael E. Wills, a first-line supervisor in the Product Data Acquisition team at Robins Air Force Base, Georgia. Among other things, Mr. Wills testifies that:

> Deviations from the standard DFARS marking legends, entailing nonconforming markings on unlimited rights technical data, can cause downstream confusion; non-standard legends can be confusing to programs and third parties. This confusion engenders added costs, time, and resources as programs and third parties try to determine what rights the Air Force has received. Members of my team and I have been involved in disputes with contractors concerning marking legends that lasted for up to three years.

(Gov't opp'n, ex. 1, Wills Decl. ¶ 11)

Mr. Wills does not state with specificity what he finds confusing about Boeing's proposed marking legends, nor does he state whether he has encountered similar markings. While there are some differences in the language of the three markings at issue, Boeing's compromise legend clearly states that the government has

unlimited rights and can grant authority to others so it is not clear what type of "downstream confusion" this might cause. While one might think that a legend stating that the government has unlimited rights might be preferable to one that is silent on this issue, that apparently is not the Air Force's position.

The Air Force further contends that "'[a]uthorizing' a third party to use and distribute the data, as Boeing purports to require, would be highly burdensome on the Government and, therefore [would be] inconsistent with its unlimited rights" (gov't opp'n at 3-4). Despite this contention, the clause speaks of this very thing, defining unlimited rights to mean "rights to use, modify...and to have or authorize others to do so." DFARS 252.227-7013(a)(16) (emphasis added). The Air Force does not explain why it would be burdensome to do what a government-drafted clause expressly contemplates.

In sum, while only Boeing has filed a motion for summary judgment, neither party has convinced us that it has a whole lot to lose from an adverse ruling. But the contracting officer has directed Boeing to remove the legends and it would appear that doing so would require Boeing to incur some costs, however minor. Thus, we conclude that there is a live dispute for us to resolve. *See Alliant Techsystems,* 178 F.3d at 1271.

The Air Force Correctly Interpreted the Contract Language

When interpreting a contract, "the language of [the] contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999) (quoting *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)). We construe a contract "to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract." *LAI Servs., Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (quoting *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002)). Contract terms that are plain and unambiguous must be given their plain and ordinary meaning and the Board may not resort to extrinsic evidence to interpret them. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

Although we expressed uncertainty over the harm claimed by the government as a result of the markings, we also recognize that the government is generally entitled to strict compliance with its plans and specifications. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1342 (Fed. Cir. 2006). This is so even though it might be contrary to customary practice or the contractor's belief that the requirements are wasteful or imprudent. *R.B. Wright Construction Co. v. United States*, 919 F.2d 1569, 1572 (Fed. Cir. 1990).

Much of the parties' dispute centers upon their competing interpretations of the two sentences in DFARS 252.227-7013(f) set forth above that specify the technical

data marking requirements. Boeing focuses on the first sentence, which provides that "[t]he Contractor...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." In Boeing's view, because it (Boeing) is not asserting restrictions on the government's right to use, modify, etc., this paragraph has no bearing on the dispute.

The government focuses on the second sentence, which provides "only the following legends are authorized under this contract: the government purpose rights legend...; the limited rights legend...; or the special license rights legend...; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402." DFARS 252.227-7013(f). The government contends that these are the only allowable legends concerning data rights. Boeing counters that this sentence should be read in light of the previous sentence to mean that these are the only permitted legends if the contractor seeks to limit the government's rights.

We agree with the government. The sentence that the government relies on speaks not only of 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. Thus, we read the sentence to mean that these are the only permissible legends for limiting data rights and no other data rights legends are allowed.

Our interpretation is confirmed by the section of the clause addressing nonconforming technical data markings. DFARS 252.227-7013(h)(2) defines nonconforming markings as those "not in the format authorized by this contract." Accordingly, any legend not specified in the contract is nonconforming. Because there is no third party marking legend of the type proposed by Boeing, it falls under the definition of nonconforming. This is buttressed further by a separate regulation, DFARS, 227.7103-12. Government right to establish conformity of markings, which delivers the message with slightly more clarity. It provides that "[a]uthorized markings are identified in the clause at 252.227-7013, Rights in Technical Data—Noncommercial Items. All other markings are nonconforming markings." DFARS 227.7103-12(a)(1) (emphasis added). While this regulation does not appear in the contracts, contractors are charged with constructive notice of pertinent regulations. *Hunt Constr. Group, Inc. v. United States*, 281 F.3d 1369, 1372-73 (Fed. Cir. 2002) ("Although Hunt claims to have been unaware of section [FAR] 29.303(a) when it prepared its bid, and this section apparently was not included in the contract, it is not unfair to charge Hunt with constructive notice of pertinent regulations published in the Federal Register.").

The Rights in Technical Data–Noncommercial Items clause has been the subject of critical commentary. *See Postscript: Protecting Unlimited Rights Data*, 22 No. 5 NASH & CIBINIC REP. ¶ 28; *Protecting Unlimited Rights Data: The Inadequate Clauses*, 18 No. 5 NASH & CIBINIC REP. ¶ 21. The commentators lament

the clause's prohibition on markings such as those at issue, and suggest that contractors attempt to negotiate a special contract provision allowing them; they also propose amendments to the FAR and DFARS. While their opinion is not binding on us, we share their interpretation of the contract language.

Moreover, the contract language, the DFARS regulation cited above (227.7103-12), and this critical commentary demonstrate that there were ample warning signs for Boeing. A prudent contractor would have sought clarification prior to entering into the contract, if it interpreted the clause differently. *See, e.g., Baldridge v. GPO*, 513 F. App'x 965, 968 (Fed. Cir. 2013) (contract was unambiguous; crediting contractor's interpretation would only create a glaring ambiguity triggering the duty to clarify, which it failed to do).

Finally, Boeing contends that DFARS 252.227-7013(f) cannot identify all permissible markings because other statutes or regulations provide for other markings, such as International Traffic in Arms Regulations (ITAR) 22 C.F.R. ch. I, subch. M (R4, tab 3 at 27-28; app. br. at 12). We disagree because the existence of potential markings on other issues does not speak to the range of permissible markings concerning data rights.

In summary, we agree with the Air Force that under the pertinent DFARS clauses, Boeing's marking legends are nonconforming. However, the issue of whether those clauses adequately protect Boeing's property rights as required by 10 U.S.C. § 2320(a)(1) cannot be resolved based on the current briefs and the record developed to date.

CONCLUSION

We deny Boeing's motion. The parties shall submit a joint status report within 30 days proposing further proceedings.

Dated: November 28, 2018

Michael N. O'Connell

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61387, 61388, Appeals of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals