

**Headquarters
Policy Flash**

FLASH 2002-08

DATE: February 12, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: 1. Treatment of Commercially Valuable Information (CVI)
Under Department of Energy (DOE) Management and
Operating (M&O) Contracts Memorandum
2. Suspension of Project Labor Agreement Implementation
3. Acquisition Letter 2002-01 and Financial Assistance Letter
2002-01

SUMMARY: 1. Treatment of Commercially Valuable Information (CVI) Under
Department of Energy (DOE) Management and Operating
(M&O) Contracts

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On February 4, 2002, the attached memorandum titled "Treatment of Commercially Valuable Information (CVI) Under Department of Energy (DOE) Management and Operating (M&O) Contracts" was distributed to all Heads of Contracting Activities. This memorandum provides guidance on the Department's position regarding application of the Freedom of Information Act to "commercially valuable information" first produced in performance of an M&O contract.

For questions related to this subject matter, please contact Bob Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov

2. Suspension of Project Labor Agreement Implementation

Executive Order (EO) 13202 was issued 2/17/01 to require that agencies and their construction managers remain neutral towards the use of project labor agreements (PLA) for all new construction projects. A subsequent EO was also issued 4/6/01 which authorized the agency head to exempt a particular construction project awarded after the date of the original EO where a PLA for that project was in effect before that date. The EOs applied to both contracts and financial assistance awards.

These orders have been the subject of litigation in the federal courts, and an appeal is currently pending. Based upon guidance received from White House Counsel and from the Department of Justice, the Office of Management and Budget has advised agencies to immediately cease implementation of EO's requirements pending resolution of the appeal.

The FAR Council is in the process of issuing an interim rule to suspend federal contract implementation at FAR 36.202(d). We will advise you as soon as the interim rule is published.

In light of the suspension of the EOs, this Flash is suspending FAL 2001-02, dated 7/30/01. This FAL provided a special provision to be incorporated in new or renewal grants or cooperative agreements, if the objective of the award is to construct, rehabilitate, alter, convert, extend, or repair buildings, highways, or make other improvements to real property.

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This special provision should not be included in prospective awards until further notice. Awards made since the issuance of FAL 2001-02 that include the special provision, should be modified to delete the special provision.

For questions related to the Procurement Actions, contact Bob Webb at (202) 586-8264 or at Robert.Webb@pr.doe.gov

For questions related to the Financial Assistance Actions, contact Trudy Wood at (202) 586-5625 or at trudy.wood@pr.doe.gov

3. Acquisition Letter 2002-01 and Financial Assistance Letter 2002-01

Acquisition Letter 2002-01, "Acquisition Letters Remaining in Effect," and Financial Assistance Letters 2002-01, "Financial Assistance Letters Remaining in Effect," were issued on February 11, 2002 and are available online at www.professionals.pr.doe.gov


Gwendolyn S. Cowan, Director

Attachment

cc: PPAG Members



ATTACHMENT

Department of Energy

Washington, DC 20585

FEB 04 2002

MEMORANDUM FOR HEADS OF CONTRACTING ACTIVITIES

FROM: RICHARD H. HOPF, DIRECTOR
OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT
DEPARTMENT OF ENERGY

ROBERT C. BRADEN, DIRECTOR
OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT
NATIONAL NUCLEAR SECURITY
ADMINISTRATION

SUBJECT: TREATMENT OF COMMERCIALY VALUABLE
INFORMATION (CVI) UNDER DEPARTMENT OF ENERGY
(DOE) MANAGEMENT AND OPERATING (M&O) CONTRACTS

The purpose of this memorandum is to inform you of the Department's position regarding application of the Freedom of Information Act to "commercially valuable information" first produced in performance of an M&O contract.

The Department has become aware that a question has arisen as to whether DOE M&O contractors may license "commercially valuable information" first produced in the performance of an M&O contract. The premise offered to justify such licensing is that DOE's Freedom of Information Act (FOIA) regulations at 10 CFR §1004(e)(2) provide for release under the FOIA of "information or technical data having commercial value" only where they are in DOE's possession and are not otherwise exempt under FOIA.

Attached to this memorandum is a legal analysis setting forth the Department's position on the proper interpretation of the FOIA regulation at 10 CFR §1004(e), the rights in data clause, and all surrounding considerations. This analysis and position of the Department should be provided to M&O contractors under your cognizance and should be followed in the handling of any Freedom of Information request for "commercially valuable information" first produced in the performance of an M&O contract.



This memorandum addresses an issue that has arisen regarding whether the DOE regulations, 10 C.F.R. Part 1004, implementing the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), provide a basis for management and operating (M&O) contractors to license certain information and technical data owned by the Government under an M&O contract. Specifically, confusion has arisen with regard to whether 10 C.F.R. § 1004.3(e),¹ as applied to technical data and computer software first produced by the M&O contractor in the performance of the M&O contract, creates a licensable property right, in and of itself, in such technical data and computer software. As the analysis set out below indicates, our conclusion is that the DOE FOIA regulation does not create such a licensable property right.

Background

The FOIA regulation at 10 C.F.R. § 1004.3(e)(1) states that when a contract provides that DOE owns any records acquired or generated by the contractor, DOE generally will make such records that are in the possession of the Government or the contractor available to the public unless the records are exempt under FOIA. Subsection § 1004.3(e)(2) continues by providing that technical data or information having commercial value (hereinafter "commercially valuable information" or "CVI") owned by the Government for which the contractor claims CVI status will be made available for release under the FOIA only if it is in the possession of the Government and is not otherwise exempt under FOIA.

The contracts executed by M&O contractors and DOE govern all rights and responsibilities between the parties. The Department of Energy Acquisition Regulation (DEAR) requires that all M&O contracts contain a "Rights in Data" clause providing, *inter alia*, that the Government has ownership of all technical data and computer software first produced by the M&O contractor in

¹ 10 C.F.R. § 1004.3 provides:

(e) Contractor Records. (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)(2).

(2) Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in § 1004.3(e)(4) or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

(3) The policies stated in this paragraph:

(i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and

(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

(4) For purposes of § 1004.3(e)(2), "technical data and information having commercial value" means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data. 10 C.F.R. § 1004.3 (2001) (amended 1994).

the performance of the M&O contract.² The clause continues to provide that the Government has “unlimited rights”³ in technical data and computer software specifically used in the performance of the contract

except as provided herein regarding copyright, limited rights data⁴, or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information, ...or other data specifically protected by statute ...or, where approved by DOE, appropriate instances of the DOE Work for Others Program (emphasis added).

Technical data and computer software generated or acquired by the M&O contractor in the performance of the M&O contract whose disclosure the M&O contractor certifies to DOE would cause competitive harm to the commercial value or use of the information would fall within the definition of "technical data and information having commercial value" provided in 10 C.F.R. § 1004.3(e)(4).

The issue that arose is whether technical data or computer software owned by the Government but that is not in the possession of the Government and is claimed by the contractor to be CVI may properly be the subject of a license agreement between the M&O contractor and a third party, whereby the M&O contractor grants to the licensee a right (to the exclusion of others not licensed) to make, use, or sell the CVI. Implicit in such a license would be an assurance to the licensee that DOE would not request delivery of the licensed CVI to DOE and that the basis for the license is that the data is CVI and not that the data is patented or copyrighted. This issue also leads to the question of whether DOE may agree in advance that DOE will not in the future request delivery of a specific item of CVI from the contractor and whether DOE may create a licensable right on behalf of the M&O contractor in that specific item of CVI.

² For the current versions of the “Rights in Data” clauses, *see* 48 C.F.R. 970.5227-1 and 48 C.F.R. 970.5227-2. These clauses define “technical data” as: “recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.” *See* 48 C.F.R. 970.5227-2(a)(6).

³ “Unlimited rights” is defined as “the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, ... and perform publicly and display publicly, in any manner, ..., and for any purpose whatsoever, and to have or permit others to do so.” *See* 48 C.F.R. 970.5227-2(a)(7).

⁴ “Limited rights data” is defined as “data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential privileged.” *See* 48 C.F.R. 970.5227-2(a)(4).

Analysis

As stated at 10 C.F.R. § 1004.1, Part 1004 contains DOE's regulations that implement the FOIA and provide information concerning the procedures by which records may be requested by members of the public from DOE offices. The regulation is not directed to, and does purport to cover, the creation of contractor rights to license CVI. Section § 1004.3(e) addresses, *inter alia*, application of the FOIA to contractor records that are the property of the Government but are not in possession of the Government. Specifically, 10 C.F.R. § 1004.3(e) states: "DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under FOIA (emphasis added)," and 10 C.F.R. §1004.3(e)(2) states that, notwithstanding §1004.3 (e)(1), CVI will "shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b)(2)." The regulation continues, however, by confirming DOE's contractual rights to obtain contractor generated records and to determine their disposition:

- (3) The policies stated in this paragraph:
 - (i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and
 - (ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

10 C.F.R. § 1004.3(e)(3) (emphasis added).

The "Rights in Data" clause included in all M&O contracts (*see* 48 C.F.R. 970.5227-1 and 48 C.F.R. 970.5227-2) provides at paragraph (b)(1)(i) that the Government has ownership of all technical data and computer software first produced in the performance of the M&O contract, and in (b)(1)(ii) the Government has "unlimited rights" in technical data and computer software specifically used in the performance of the contract except as otherwise provided in the contract. Section 970.5227-2 (b)(iv) provides that the Government has the right to have such first produced data delivered to the Government at any time during the term of the M&O contract. Further, the "Access to and Ownership of Records" clause (*see* 48 C.F.R. 970.5204-3) provides in paragraph (a) that, unless exempted in (b), all records acquired or generated by the M&O contractor in the performance of the contract are the property of the Government and shall be delivered to the Government at any time during the term of the M&O contract. In paragraph (b), technical data and computer software first produced under the M&O contract are not exempted from Government ownership, the only relevant exceptions being protected CRADA information (in (b)(5)(ii)) and patent, copyright, mask work, and trademark application files and related contractor invention disclosures and documents (in (b)(5)(iii)).

Therefore, under the terms and conditions of the M&O contracts, Government-owned records falling under § 1004.3(e)(2), which include those containing information or technical data having commercial value as defined in § 1004.3(e)(4), must be provided to DOE upon DOE's request, whereupon DOE has the right to determine their disposition, including public dissemination. This conclusion is confirmed by § 1004.3(e)(3) which specifies that the policies expressed in the regulation, including the contractor's ability to claim a privilege under state or Federal law for a record containing commercially valuable information, do not alter the contractor's obligation to provide DOE upon request any DOE-owned record or DOE's rights to obtain contractor records "and to determine their disposition, including public dissemination." Thus, rather than providing contractors a basis to license Government-owned data, DOE's FOIA regulations expressly address DOE's right to make available to the public records the Government owns under an M&O contract, and a license executed by an M&O contractor that restricts the dissemination of records of this type is, without the express consent of DOE, inimical to DOE's authorities.

Beyond our interpretation of the DOE FOIA regulation, any determination by DOE to withhold CVI must consider DOE's statutory duty to disseminate technical data first produced in the performance of DOE-funded research activities. In fact, DOE's right to determine whether CVI will be publically released under § 1004.3(e)(2) underscores its mission to disseminate technical data generated under its research programs as mandated by its enabling acts. The Atomic Energy Act of 1954, as amended, provides for broad dissemination of DOE-owned data, with few exceptions.⁵ The Act contains restrictions on the dissemination of data for national defense and security and for pending patent applications, but, other than those notable exceptions, the Atomic Energy Act established as a mandate as well as a policy that data should be disseminated for the progress of science and industry, public understanding, and to enlarge the fund of technical information.

⁵ Relevant provisions of the Atomic Energy Act of 1954 include 42 U.S.C.S. § 2051(d) (1999) ("No such arrangement shall contain any provisions or conditions which prevent the dissemination of scientific or technical information, except to the extent such dissemination is prohibited by law"), and 42 U.S.C.S. § 2161(b) (1999) ("The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information").

The Energy Reorganization Act of 1974, as amended, uses almost the same language as the Atomic Energy Act in setting forth Congress' position on broad dissemination of information.⁶ The Federal Nonnuclear Energy Research and Development Act of 1974, as amended, echoes that position.⁷ The Department of Energy Organization Act of 1977 establishing the Department of Energy restated Congress's position that information be freely disseminated, and extended the scope of the subject matter from atomic energy to all energy sources.⁸

Given that DOE's FOIA regulations do not create a licensable property right in CVI, and that DOE's enabling statutes strongly favor the dissemination of data generated under its contracts, a question arises as to when it would be appropriate for DOE to agree that CVI will not be delivered to DOE and thereby not be released in response to a FOIA request. In the past, DOE has determined that it may protect first produced data from public release under FOIA by not asking for delivery for reasonable, fixed periods of time when withholding the data is complementary to and consistent with the technology transfer provisions of the M&O Contract. For example, if, after receipt by DOE of an FOIA request, an M&O contractor requests that DOE withhold copyrightable data from the public while the M&O contractor determines whether permission to assert copyright from DOE should be obtained, DOE may, in its sole discretion,

⁶ "Subject to the provisions of Chapter 12 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2161-2166), and other applicable law, the Administrator shall disseminate scientific, technical, and practical information acquired pursuant to this title through information programs and other appropriate means, and shall encourage the dissemination of scientific, technical, and practical information relating to energy so as to enlarge the fund of such information and to provide that free interchange of ideas and criticism which is essential to scientific (2001). "The responsibilities of the Administrator shall include, but not be limited to ...(6) developing, collecting, distributing, and making available for distribution, scientific and technical information concerning the manufacture or development of energy and its efficient extraction, conversion, transmission, and utilization; (7) creating and encouraging the development of general information to the public on all energy conservation technologies and energy sources as they become available for general use, and the Administrator, in conjunction with the Administrator of the Federal Energy Administration shall, to the extent practicable, disseminate such information through the use of mass communications...." 42 U.S.C. § 5813 (2001) (amended 1977 and 1992).

⁷ The Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C.S. § 5916 (2001), provides: "The Secretary shall promptly establish, develop, acquire, and maintain a central source of information on all energy resources and technology in furtherance of the Secretary's research, development, and demonstration mission The information maintained by the Secretary shall be made available to the public, subject to the provisions of section 552 of title 5 and section 1905 of title 18, and to other Government agencies in a manner that will facilitate its dissemination"

⁸ "The Congress therefore declares that the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs. It is the purpose of this chapter: ... (5) To carry out the planning, coordination, support, and management of a balanced and comprehensive energy research and development program, including - ... D) disseminating information resulting from such programs, including disseminating information on the commercial feasibility and use of energy from fossil, nuclear, solar, geothermal, and other energy technologies." 42 U.S.C. § 7112.

permit the data to be withheld from delivery to DOE and likely release under FOIA under §1004.3(e)(1) by not requesting delivery to DOE. However, such data would be licensable only after approval to copyright is granted, and then only in accordance with the M&O contract. Thus, the procedures in §1004.3(e)(2) can be used to temporarily withhold from release by DOE in response to an FOIA request, a recognized form of intellectual property that may be ultimately licensable by the M&O contractor. However, any data temporarily withheld would not be licensable, and the decision to withhold and the period of temporary withholding are entirely within DOE discretion.

If and when DOE should determine that an additional form of licensable intellectual property protection should be made available for use by its M&O contractors, DOE would circumscribe the parameters of such a right within the M&O contracts at issue. Memorializing any potentially licensable data rights within the M&O contract would protect all parties, including any potential licensees. The M&O contractor's failure to obtain DOE's approval to license such data could leave the licensee holding a worthless license. Furthermore, a question could arise as to whether the contractor was in breach of its M&O contract for making representations regarding the licensability of the data.

Summary

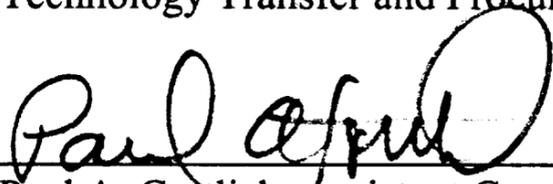
DOE's FOIA regulations, in and of themselves, do not create a property right in CVI that would permit CVI to be licensed. Under the M&O Contracts' "Rights in Data Clause, M&O contractors have no right to license CVI unless they first seek and receive DOE approval before licensing the data. DOE's long-standing interpretation of various statutes requiring DOE to disseminate information is that the licensing of technical data first produced by a contractor that is not covered under extant forms of intellectual property protection is prohibited. Any attempt by a contractor to utilize DOE's FOIA regulations as a basis to license technical data, except as provided by contract, is not authorized by DOE.



Mary H. Egger
Deputy General Counsel
Technology Transfer and Procurement

12/10/01

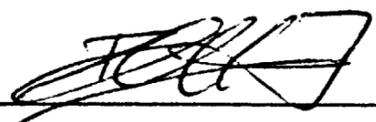
Date



Paul A. Gottlieb, Assistant General Counsel
Technology Transfer and Intellectual Property

12-7-01

Date



David S. Jonas
Deputy General Counsel
National Nuclear Security Administration

1/23/02

Date