GOVERNMENT DATA POLICY STATEMENT (NASA's proposed version)

The following statement of Government data policy principles is provided by the FCCSET Committee for consideration by the appropriate FAR committees in developing technical and other data provisions for the Federal Acquisition Regulation (FAR) or supplements thereunder.

I. General.

It is necessary for Government departments and agencies, in order to carry out their missions and programs, to acquire or obtain access to many kinds of data developed under or used in performing their contracts. Such data is required in order to obtain competition among suppliers; to meet acquisition needs; to ensure logistic support; to fulfill certain responsibilities for disseminating and publishing the results of their activities; to ensure appropriate use of the results of research, development, and demonstration activities; and to meet other programmatic and statutory requirements.

At the same time, contractors may have a legitimate proprietary interest (e.g. a property right or other valid economic interest) in certain data resulting from private investment, and its protection from unauthorized use and

disclosure is required in order to preclude the compromise of such property right or economic interest, jeopardizing the contractor's commercial position and impairing the Government's ability to obtain access to or use of such data. Protection of data is also necessary to encourage qualified contractors to participate in Government programs and apply innovative concepts to such programs. In addition, certain data produced in whole or in part with Federal funding may have use for commercial development, and limiting or restricting the Government's use and disclosure of the data in appropriate circumstances may be an added incentive for marketing technology supported with Federal funding.

Thus the acquisition regulations regarding the rights to, and acquisition of, technical and other data produced or used in contract performance should be framed in light of the above considerations to strike a balance between agency needs, mission requirements, full and open competition in Government procurement, the purposes of contracting, a contractor's legitimate proprietary interests, and the enhancement of commercial use of Federally-supported research and development. The specific factors set forth below are to be used as a guide.

II. Rights in Technical and Other Data.

1. As to data resulting exclusively from private investment, especially that relating to items, components, or processes developed at private expense, a contractor's legitimate proprietary interest will be protected by limiting delivery of such data, or if delivery is needed, by restricting its use and disclosure. Normally form, fit, and function data should be sufficient to meet agency needs, and a contractor should be afforded the opportunity to withhold more detailed data from delivery. If delivery of more detailed data is needed, it should be under agreement (reflected in express contract provisions) limiting or restricting its use and disclosure so as not to compromise a contractor's property right or economic interest in the data. A contractor should not be required to deliver such data with unlimited rights or reprocurement rights as a condition of the contract unless such rights are to be separately negotiated on a fair and equitable basis.

2. As to data resulting partially from private expense and partially from Federal funding, particular care must be given to the contractor's economic interests therein. For example, if the Federal funding is only for minor

modifications of items, components, or processes developed at private expense, the data relating thereto should normally be treated as set forth in 1., above. Beyond that, rights to such data must be considered in light of the purpose of the contract, agency needs, and the respective contributions of the contractor and the agency. As a rule, if the contract involves co-sponsored research and development and the contractor is required to make substantial contributions of funds or resources (i.e. by cost-sharing or repayment of nonrecurring costs), and the respective contributions to any item, component, or process developed under the contract are not readily segregable, the agency may enable the contractor to limit or restrict disclosure and use of all technical and other data produced under the contract, with the agency acquiring only such rights as are needed to carry out the specific purposes of the contract.

3. As to technical data resulting exclusively from Federal funding, an agency normally may acquire such data with unlimited rights (i.e. without limitation on its use and disclosure by the Government). Particular consideration must be given to an agency's needs, assuring full and open competition, mission objectives, and statutory requirements in acquiring such rights. In

addition, when an agency acquires unlimited rights, limitations and restrictions should normally not be imposed on the contractor's right to also use and disclose the data for its own purposes unless required by Federal export laws, regulations, and policies, or for national security reasons.

However, notwithstanding the foregoing, agencies are not precluded from acquiring less than unlimited rights to data fully funded by the Government in the performance of a contract under circumstances specified in the acquisition regulations, consistent with agency needs, assurance of full and open competion, mission objectives, and statutory requirements.

4. The factors set forth in 1.-3., above, shall be implemented in a manner consistent with express requirements of Pub. L. 98-577.

III. Acquisition of Technical and Other Data.

1. In order to maintain the balance between agency needs and contractor interests, the ordering of data for delivery under a contract will be kept to a minimum,

consistent with paragraph I., above, and the considerations set forth below.

2. Agencies are to determine, to the extent feasible, their data requirements in time for inclusion in solicitations. Such requirements should be subject to revision during contract negotiations. Since preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep data ordering requirements in a contract to a minimum. In no event should any data delivery requirements be construed to require a contractor to deliver such data with unlimited rights as a condition for award of the contract unless such rights are specifically addressed and agreed-to in the contract.

3. Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be possible or appropriate to ascertain all data delivery requirements at the time of contracting, deferred ordering of data should be used to minimize over-ordering of data at the time of contracting. When used, deferred ordering should be limited to only that data for which a need has been ascertained during

contract performance, and when ordered the rights to such data are to be consistent with paragraph II., above.

4. Normally only form, fit, and function data should be required for any items, components, and processes developed at private expense. If more detailed data is needed it should be acquired with limited rights (if the data so qualifies), and the Government's right to disclose and use such data should be limited to the Government's needs for the data.

5. In addition to 1.-4., above, ordering requirements for data (in terms of both quality and quantity) are to be consistent with the express requirements of Pub. L. 98-577.

IV. Computer Software.

The same basic principles set forth herein with respect to technical and other data should apply to computer software. However, since computer software is also an end item deliverable in itself, particular care should be taken in specifying agency needs for computer software and assuring that it is to be furnished, with attendant rights regarding its use and disclosure, to enable the purposes

of the contract to be fulfilled. This includes identification prior to contract, to the extent feasible, of computer software developed at private expense which may be needed to fulfill contractual requirements so that delivery of the software with adequate rights can be assured. In addition, in recognition of standard commercial practices regarding the vending of computer software, any restrictions on the software may limit its use and disclosure of the software to specified sites, locations, or designated computers within the Government or of those acting on behalf of the Government, consistent with the purposes for which the software is being acquired.

V. Proposal Information.

Proposals, both solicited and unsolicited, furnished to the Government should be used and disclosed only for evaluation purposes. They may be disclosed outside the Government for evaluation, but only if the evaluator agrees to prohibitions against further use and disclosure.

The Government's limited use of proposals should not require a restrictive marking on the proposal, but a marking shall be prescribed and use permitted to maximize

protection of a proposer's or offeror's legitimate proprietary interest in any information contained in the proposal, in which case the proposal will be treated as confidential. But even if not marked, proposals should be protected to the extent permitted by law, except that the Government assumes no liability for use or disclosure of information to which the prescribed marking has not been appropriately applied.

Agencies may also, in consideration of contract award, acquire unlimited rights in technical data (but not commercial and financial information) contained in the successful proposal upon which a contract is based, but only pursuant to express agreement with the prospective contractor. The prospective contractor must be afforded an opportunity to exclude any technical data in which the contractor has a legitimate proprietary interest from that for which the unlimited rights are sought by the Government. If the Government has a need for any such excluded data, it should be acquired with restrictions or limitations on its use and disclosure consistent with paragraph II., above.