



Proprietary Data and Marking

Proprietary



Business Sensitive



Limited Rights



Government Data Problem

- Nobody is paying attention to data marking and handling procedures
- Many Contractors are marking all of their documents as "proprietary"
- Government employees and prime contractors are accepting these documents without protest
- Government has tons of documents with improper markings
 - Difficult to use
 - Very expensive to fix
 - Can lead to litigation and possible injunction
- There is no authorization and consent for trade secrets infringement. So, an injunction can be brought against the government.



Contract Data Rights

- Generally, under a government contract:
 - Gov't has unlimited rights in data first produced in the performance of the Contract
 - In M&O contracts, Gov't has ownership of the data first produced under the Contract and right to have delivery of all data produced or used in the Contract
 - Contractor can use, release, reproduce, distribute or publish the data
- What about proprietary/limited rights data?
 - There is usually no requirement for the contractor to deliver limited rights data
 - If required to be delivered, contractor can withhold such data and submit in its place fit, form and function data



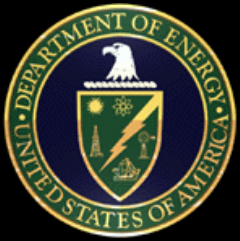
Data Rights

- Limited Rights Data
 - Definition. Data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.
 - "Private expense" means entirely funded by the contractor and without any Government reimbursement.
 - "Developed" means that the item or process exists and is workable.
 - Not first produced in the performance of the Contract.
 - Not in the public domain: open literature, patents, provided without restriction
 - Can only be used or duplicated by the Government and may not be disclosed outside the Gov't or used for manufacture without permission from Contractor



Data Rights

- Exceptions to use of limited rights data
 - DOE M&O contracts and assistance awards
 - (1) Used (except for manufacture) by support services contractors within the scope of their contracts;
 - (2) Disclosed for evaluation purposes under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;
 - (3) Disclosed to other contractors participating in the Government's program of which the Contractor is a part for information or use (except for manufacture) in connection with the work performed under their awards;
 - (4) Used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed; and
 - (5) Release to a foreign government, or instrumentality thereof, for information or evaluation, or for emergency repair or overhaul work by such government.
 - DOE Acquisition Awards
 - None. It's based on the FAR Rights in Data – General clause. It doesn't have any listed uses or releases. It has to be specifically modified. FAR 52.227-14



Data Rights

- Unauthorized marking
 - CO can return the data to the contractor or cancel or ignore the markings
 - CO will make written inquiry giving contractor 30/60 (at most 90 days, if extended) days to provide justification to substantiate the marking.
 - CO will consider the justification and provide a written determination to the contractor.
 - The determination will be final agency decision unless the Contractor files suit within 90 days of receipt of the CO letter
 - If contractor does not respond in time, Government has the right to cancel or ignore the markings
- Omitted marking
 - Contractor may make request within 60 days or as approved by the CO to have authorized notices placed on the data.
 - Contracting Officer may agree to do so if the Contractor:
 1. Identifies the data to which the omitted notice is to be applied
 2. Demonstrates that the omission of the notice was inadvertent
 3. Establishes that the proposed notice is authorized; and
 4. Acknowledges that the Government has no liability for the disclosure, use, or reproduction of any data made prior to the addition of the



CRADA Data Rights

- **Proprietary Data**
 - *Information which embodies (i) trade secrets or (ii) commercial or financial information which is privileged or confidential under the FOIA (5 USC 552(b)(4), either of which is developed at private expense outside of this CRADA and which is marked as Proprietary Information*
 - Cannot be disclosed without the approval of the providing party
 - Returned or destroyed at the end of the CRADA
- **Protected CRADA Information**
 - *Generated information which is marked as being Protected CRADA Information by a Party to this CRADA and which would have been Proprietary Information had it been obtained from a non-Federal Entity*
 - Cannot disclose the information for up to 5 years
 - There are specific listed exemptions
- **Generated Information**
 - *Information produced in the performance of the CRADA*
 - No obligation of nondisclosure between the parties
 - Government has unlimited rights



What to do

- Educated your employee to not ignore improper "proprietary/limited rights" markings
- Tell your PI's or program officials to send the document back to the contractor/participant to have the markings removed
- Remind the contractor that it can provide form, fit and function data.
- Use proper CO procedures and conduct proper legal review
- Contracting fixes
 - Use of an H clause to give the gov't a license to use any proprietary data used or incorporated into the facility.
 - Require the contractor to receive CO consent before submitting limited rights data



Laboratory Subcontract Problem



•Defective Components



•NDA



•Subcontractor

Give us
\$\$millions or
we'll sue

•Circuit Diagrams

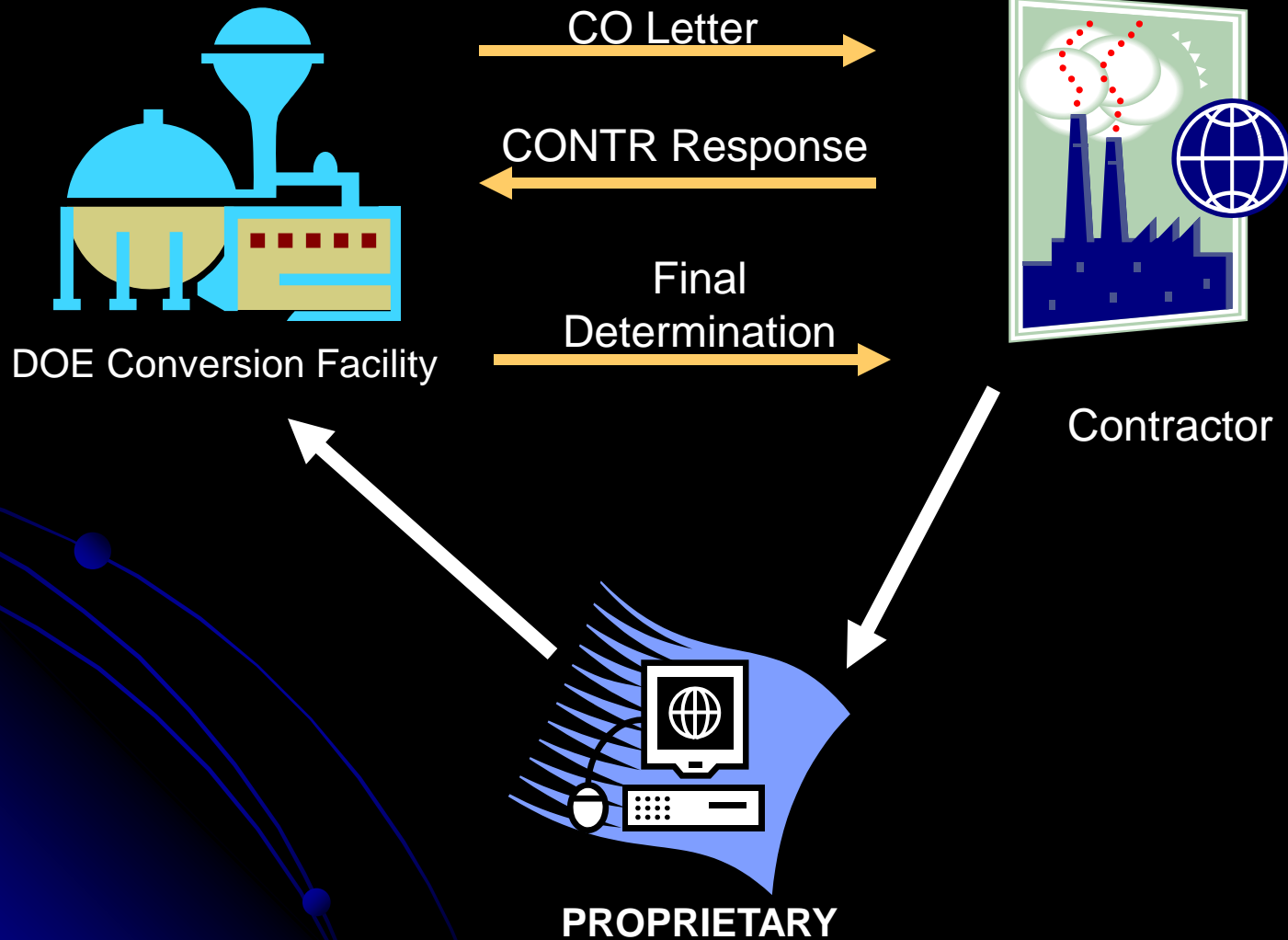
Marked Proprietary



•Competitor



Marking Problem

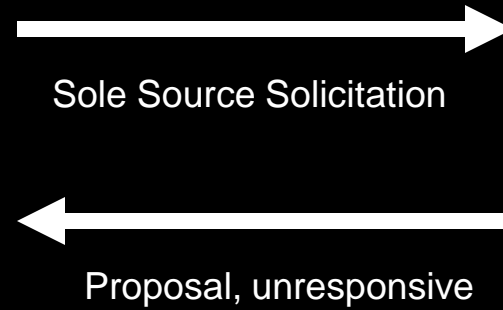




RFP Problem



Prime Contractor



- Threatening Letter
- Complaint to EM-1



Proposer/Subcontractor

RFP

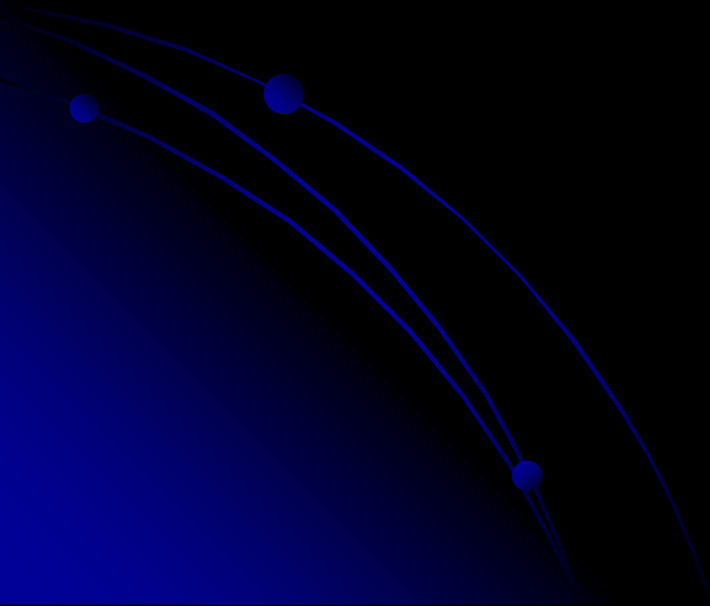
Contained marked data



Other Proposers



- Spectrum Sciences Case - Michelle



Quiz

- Which of these restrictive markings are OK?
 - CONFIDENTIAL
 - BUSINESS SENSITIVE
 - PROPRIETARY
 - LIMITED RIGHTS
 - RESTRICTED COMPUTER SOFTWARE
 - RESERVED
 - PROTECTED CRADA INFORMATION
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