

CHAPTER 6 - BONDS, INSURANCE, TAXES, AND INTELLECTUAL PROPERTY

<u>Part</u>	<u>Sec</u>	<u>Title</u>	<u>Page</u>
<u>6.1.</u>		<u>Bonds</u>	
	6.1.1.	General	2
	6.1.2.	Performance Bonds for Other than Construction Contracts	2
	6.1.3.	Payment Bonds for Other than Construction Contracts	2
	6.1.4.	Fidelity Bonds	3
	6.1.5.	Other Types of Bonds	3
	6.1.6.	Execution of Bonds	3
<u>6.2.</u>		<u>Sureties</u>	
	6.2.1.	Sureties	4
	6.2.2.	Deposit of Assets Instead of Surety Bonds	4
	6.2.3.	Irrevocable Letter of Credit	5
	6.2.4.	Contract Administration	6
<u>6.3.</u>		<u>Insurance</u>	
	6.3.1.	General	7
	6.3.2.	Types of Insurance	7
	6.3.3.	Self Insurance	8
	6.3.4.	Errors and Omissions Insurance	8
	6.3.5.	Insurance Policies	9
	6.3.6.	Notice of Cancellation or Change	9
<u>6.4.</u>		<u>Taxes</u>	
	6.4.1.	General	9
	6.4.2.	Federal Excise Tax	9
	6.4.3.	State and Local Taxes	9
	6.4.4.	Clauses	11
<u>6.5.</u>		<u>Rights in Data and Copyrights</u>	
	6.5.1.	Data Rights Policy	11
	6.5.2.	Unlimited Rights Data	12
	6.5.3.	Limited Rights Data	13
	6.5.4.	Restricted Computer Software	13
	6.5.5.	Copyrighted Data	14
	6.5.6.	Data Not First Produced in Performance of a Contract	15
	6.5.7.	Unmarked or Improperly Marked Data or Software	15
	6.5.8.	Special Works	15
	6.5.9.	Professional Services/Work for Hire	16
	6.5.10.	Acquisition of Existing Computer Software	16
	6.5.11.	Rights to Data in Successful Offers	16

CHAPTER 6 - BONDS, INSURANCE, TAXES, AND INTELLECTUAL PROPERTY

Part 6.1. Bonds

6.1.1. General A bond is a written instrument executed for the benefit of the judiciary as security for the offeror's or contractor's obligations, and to assure payment of any bond loss. A bond is executed by an offeror or contractor identified in the instrument as the principal, together with a second party identified as the surety. Bonds and performance guarantees will be obtained only when needed to protect the interest of the judiciary. Procurement plans (see Chapter 2) must describe and explain any requirements for bonds and performance guarantees. If contemplating the requirement of a bond, the CO must submit that request to the PE for written approval before including the requirement for a bond in the solicitation.

6.1.2. Performance Bonds for Other than Construction Contracts

a. Requirement A performance bond is a bond which secures performance and fulfillment of the contractor's obligations under the contract. Performance bonds may be required only when the CO determines that performance bonding is essential to the interest of the judiciary. Examples of situations when a performance bond may be needed include when:

- (1) a contract provides for the contractor's use of judiciary property, or judiciary funds in performance; or
- (2) a contractor has sold all its assets to, or has merged with, another firm and the judiciary needs assurance of the new firm's responsibility.

b. Amount The amount of the bond must be the minimum needed to protect the judiciary's interest.

c. Clause

- (1) Clause 6-1, "Performance Bond Requirements" must be included in solicitations for nonconstruction contracts that contain a requirement for both payment bonds (see 6.1.3) and performance bonds.
- (2) Clause 6-1 with its Alternate I is included when only a performance bond is required.

The CO must determine the amount of each bond for insertion in the clause. If the amount of the bond is less than 100 percent of the contract price, the provision must be modified accordingly. The amount must be adequate to protect the interest of the judiciary. The CO must also designate the period of time (normally ten days) for return of executed bonds.

d. Annual Performance Bonds Annual performance bonds may be used only for contracts other than construction. The amount of such a bond may not be more than the total amount of all contracts secured by the bond.

6.1.3. Payment Bonds for Other than Construction Contracts

a. Requirement A payment bond is a bond which assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract. Payment bonds may be required only when the CO determines that payment

bonding is essential to the interest of the judiciary. Examples of situations when a payment bond may be needed include when:

- (1) a contract is for products or services unique to the judiciary that can be obtained only from a source that is not the producer of the products or services;
 - (2) a contractor has sold all its assets to, or merged with, another firm and the judiciary needs assurance of the new firm's responsibility; or
 - (3) uninterrupted provision of the products or services is essential to the continued operation of judiciary functions.
- b. Amount** The amount of the bond must be the minimum needed to protect the judiciary's interest.
- c. Annual Payment Bonds** Annual payment bonds may be used only for contracts other than construction. The amount of such a bond must be sufficient to cover the bonded portions of the contracts awarded.

6.1.4. Fidelity Bonds

A fidelity bond, in an amount sufficient to protect the interest of the judiciary, may be required for any contract that requires contractor employees to handle judiciary funds or judiciary employee funds. When a fidelity bond is required, Clause 6-5, "Fidelity Bond Requirements" must be included in the solicitation and contract and the amount must be reviewed periodically to ensure that the judiciary's interest is adequately protected. The CO will include the amount of the bond required in the contract's schedule.

6.1.5. Other Types of Bonds

Bonds, other than those discussed in this chapter, may be required only when the CO determines such bonds are necessary to protect the judiciary's interest.

6.1.6. Execution of Bonds

- a. Prescribed Formats** If the applicable clause has not specified a prescribed format for a bond, a suitable commercial bond form may be used, or an appropriate format may be prepared with the assistance of the PE in consultation with OGC.
- b. Original Copy** An original signed copy of any bond must be retained in the solicitation or contract file.
- c. Authority of Agents** Bonds signed by persons acting in a representative capacity must be accompanied by proof that the agent is authorized to act in that capacity. Proof may be a notarized power of attorney, a properly executed corporate certificate, or resolution attested to by the corporate secretary.
- d. Partnership as Principal** When a partnership is a principal, the names of all members of the firm must be listed in the bond following the trade name of the firm (if any) and the phrase: "a partnership composed of." When a corporation is a principal, the state of incorporation must be listed.
- e. Date** Unless an annual bond is accepted, performance or payment bonds must be dated after the effective date of the contract.
- f. Modifications**
 - (1) When a modification changes the contract scope or increases the contract price by

ten percent or more or when the CO determines that the amount of the original bond must be increased, the contractor and the surety must execute a consent of surety and increase of penal amount of the bond. This is then submitted to the CO. When more than one surety's consent is required, each surety must execute the form.

- (2) When an increased bond amount is obtained from a party other than the original surety, the original surety must execute a consent of surety. Novation agreements require the execution of a consent of surety.

Part 6.2. Sureties

6.2.1. Sureties

- a. General** Bonds must be supported by acceptable corporate sureties (see **b.** below), individual sureties (see **c.** below), by assets (see 6.2.2.) acceptable as security for the contractor's obligation, or irrevocable letters of credit (6.2.3.).
- b. Corporate Sureties** Any corporate or individual surety offered for a bond furnished the judiciary must appear on the list contained in Treasury Department Circular 570, which may be obtained from the following:
 - U.S. Department of the Treasury
 - Financial Management Service
 - Surety Bond Branch
 - 401 14th St., SW, 2nd Floor--West Wing
 - Washington, DC 20227
 - or at fms.treas.gov/c570/c570.html
- c. Individual Sureties** On a case by case basis, the judiciary may accept individual sureties.
- d. Amount of the Bond** The penal amount of the bond should not exceed that surety's underwriting limit as stated in Circular 570. "Penal amount" means the amount of money specified in a bond as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the judiciary in lieu of a corporate or individual surety for the bond.

6.2.2. Deposit of Assets Instead of Surety Bonds

- a.** In lieu of any bond, the contractor may deposit certain kinds of assets with the judiciary instead of furnishing a bond.
- b.** The only assets acceptable in place of a surety bond are described below:
 - (1) U.S. bonds or notes with a maturity date less than five years from the date of the contract, together with an agreement authorizing collection or sale in the event of default. The par value of the bonds or notes must be at least equal to the penal amount of the bond;
 - (2) a certified check, cashier's check, bank draft, postal money order, or currency. The deposit must be at least equal to the penal amount of the surety bond and payable to the finance office of the individual court unit, FPDO, or AO which required the bond.
- c.** The CO must turn all assets over to finance or another authorized judiciary official for

deposit into an interest bearing account at a Federal Reserve Bank (or branch with requisite facilities) with instructions to hold the funds for the benefit of the contractor. A perpetual inventory of all deposited items must be kept by the senior contracting official at the purchasing office.

- d. When the contractor pledges assets instead of providing a surety bond, the contractor must complete the bond form as principal and the bond form must describe the assets pledged.
- e. **Clauses**
 - (1) For all contracts involving the furnishing of bonds, Provision 6-10, "Deposit of Assets Requirements" must be included in the solicitation.
 - (2) Clause 6-15, "Deposit of Assets Instead of Surety Bonds" must be included in every solicitation and contract requiring a bond for which assets may be deposited in lieu of bonds.

6.2.3. Irrevocable Letter of Credit (ILC)

- a. Any person required to furnish a bond has the option to furnish a bond secured by an ILC in an amount equal to the penal sum required to be secured. A separate ILC is required for each bond.
- b. The ILC must be irrevocable and expire only as provided in g. below. ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.
- c. The ILC must be issued or confirmed by a federally insured financial institution rated investment grade or better. The contractor must provide the CO a credit rating that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC. If the CO learns that a financial institution's rating has dropped below the required level, the CO will give the contractor 30 days to substitute an acceptable ILC or will draw on the ILC using a sight draft.
- d. Letters of credit must indicate that the financial institution may not cancel the letter of credit before 90 days following the scheduled contract completion date (see 6.2.4.c.(2) for contract completion disposition of assets after final contract payment).
- e. If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the CO will immediately draw on the ILC.
- f. To draw on the ILC, the CO will use a sight draft and present it with the ILC to the issuing financial institution or the confirming financial institution, if any.
- g. The expiration dates of the ILC shall be the later of:
 - (1) 90 days following final payment; or
 - (2) until completion of any warranty period for performance bonds only.
- h. When the contract performance period is extended, the CO will require the contractor to provide an ILC with an appropriately extended maturity that meets the requirements in g. above.
- i. If, after the period of performance of a contract where ILCs are used to support payment bonds, there are outstanding claims against the payment bond, the CO will draw on the ILC prior to the expiration date of the ILC to cover these claims.

6.2.4. Contract Administration (also see Chapter 7)

a. Information and Notice to Sureties

- (1) **Correspondence** A copy of all correspondence relating to contract modification, termination, renewal, or nonperformance must be provided to each surety with proof of delivery requested. Additional information on contract performance and payment must be provided to sureties upon request.
- (2) **Failure to Perform** The CO must send each surety a copy of any notice of impending termination, demand for adequate assurances, assessment of liquidated or other damages, or other formal notice of failure to perform under the contract with a notice that the surety may be liable for damages suffered by the judiciary.
- (3) **Claims Against Sureties** If a contractor's failure to perform necessitates a claim against a surety, the CO must give the surety written notice of the amount of and reasons for the claim. If the surety refuses to pay or does not respond, the CO must obtain advice from the PE, who will consult with OGC.

b. Surety Takeover Agreements

- (1) Because of the surety's liability for damages resulting from a contractor's default, the surety has certain rights and interests in the completion of the contract work and the application of any undisbursed funds. Before terminating a contract for default, the CO must consider any offer by the surety for completion of the work. The surety must be permitted to complete the work unless the CO has reason to believe that the persons or firms proposed by the surety to complete the work are not competent or qualified.
- (2) Because of the possibility of conflicting demands for the defaulting contractor's unpaid earnings (including retained percentages), the surety may condition its offer of completion upon the execution of a takeover agreement establishing the surety's right to payment from the unpaid earnings. If so, with the prior written concurrence of the PE and after consulting with OGC, the CO may enter into such an agreement with the surety in writing after the effective date of contract termination. The CO must consider including the defaulting contractor as a party to the agreement in order to preclude any disagreement on the contractor's residual rights.
- (3) The agreement must provide that the surety will complete the work according to all contract terms and conditions and that the judiciary will pay the surety the balance of the contract price unpaid at termination but not more than the surety's costs and expenses, subject to the following conditions:
 - (a) Any unpaid earnings of the defaulting contractor, including retained percentages, for work accomplished before termination, are subject to debts owed the judiciary by the contractor except to the extent that the unpaid earnings are required to pay the completing surety the actual costs and expenses it incurs in completing the work exclusive of the surety's payments and obligations under the payment bond given in connection with the contract.
 - (b) The agreement may not waive or release the judiciary's right to liquidated damages for any delay in completion of the work that is not excusable under the contract.
 - (c) If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings unless the assignee consents

to the payment in writing.

- (d) The surety may be reimbursed for discharging its liabilities under the payment bond of the defaulting contractor only when:
 - 1) there is mutual agreement among the judiciary, the defaulting contractor, and the surety; or
 - 2) a court of competent jurisdiction orders payment.

c. Contract Completion

- (1) Upon contractor completion of all contract obligations, the CO must issue a Certificate of Completion to any surety. The certificate's terms may not release the surety from any obligation under a payment bond.
- (2) When the contractor has deposited assets instead of providing a surety on a payment bond, the CO must refund the assets, with accrued interest (see 6.2.2.c.), within 90 days after final completion of contract performance, unless notice of a claim is received during the 90-day period. If a claim is received, the assets may be released only with the agreement of the contractor or by order of a court of competent jurisdiction.
- (3) Assets deposited to secure any other bond may be refunded, with accrued interest, upon final completion and receipt of the contractor's written release.

Part 6.3. Insurance

6.3.1. General COs may require contractors to carry insurance only when necessary to protect the interest of the judiciary. Examples of situations that may warrant insurance are when:

- (1) it is desirable to use the facilities and services of the insurance industry (for example, safety protection and claim services);
- (2) insurance is necessary or desirable in connection with performance; or
- (3) commingling of property or other contract conditions makes insurance reasonably necessary for protection of the parties' interests.

6.3.2. Types of Insurance The CO will specify the kinds of insurance and the minimum amounts in the schedule for the contract.

a. Workers' Compensation and Employers' Liability Insurance Compliance with applicable workers' compensation and occupational disease statutes is required, and employers' liability coverage must be obtained when available. In jurisdictions where occupational disease is not compensable by law, the contractor must carry insurance for occupational disease under the employers' liability section of the insurance policy.

b. General Liability Insurance

- (1) The contractor must carry bodily injury liability insurance, with minimum limits of \$200,000 per person and \$500,000 per occurrence for death or bodily injury.
- (2) The contractor must carry property damage liability insurance in an amount of at least \$20,000 per occurrence.
- (3) **Automobile Liability Insurance** The contractor must carry automobile liability insurance on a comprehensive form of policy that provides for bodily injury and property damage liability covering the operation of all automobiles used in contract performance. Minimum limits of \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage

must be carried.

c. Clauses

- (1) Clause 6-20, "Insurance - Work on a Judiciary Installation" is included in solicitations and contracts when:
 - (a) a fixed-price contract is contemplated;
 - (b) the contract amount is expected to exceed the judiciary's small purchase threshold (see 3.4.1.c .and *Guide* Volume 1, Chapter 8, Part B); and
 - (c) the contract will require work on a judiciary installation; unless only a small amount of work is required (i.e. a few brief visits per month).
- (2) Clause 6-25, "Insurance - Liability to Third Persons" is included in solicitations and contracts (other than those for construction contracts and architect-engineer services) when a cost-reimbursement contract is contemplated.
- (3) Clause 6-30, "Insurance" is included in all solicitations, contracts, RFQs, and purchase orders when the CO requires insurance in the contract's schedule.

6.3.3. Self-Insurance If contemplating acceptance of a contractor's self-insurance, the CO must submit that request to the PE for written approval before accepting the contractor's self-insurance. A qualified program of self-insurance covering any kind of liability may be approved in place of any type of insurance discussed in 6.3.2. when found to be in the interest of the judiciary. However, in a jurisdiction where workers' compensation does not completely cover employers' liability to employees, a program of self-insurance for workers' compensation may be approved in writing only if:

- (1) the contractor also maintains a written approved program of self-insurance for any employer's liability that is not covered; or
- (2) the contractor has shown that the combined cost to the judiciary of self-insurance for workers' compensation and commercial insurance for employers' liability will not exceed the cost of covering both kinds of risks by commercial insurance.

6.3.4. Errors and Omissions Insurance

- a. Professional Services** Contractors providing the following categories of services must carry errors and omissions (malpractice) insurance:
 - (1) accountants;
 - (2) architects;
 - (3) engineers; and
 - (4) fiscal agents.
- b. Amount** Insurance coverage must be at least \$200,000. However, the CO may determine that a different limit is needed to protect the interest of the judiciary. This limit is then set forth in the schedule of the contract.
- c. Waiver** The CO may waive the requirement for errors and omissions insurance, in whole or in part, after first conferring with the PE, who will consult with OGC.
- d. Other Professional Services** The CO may require other professional services contractors to carry errors and omissions insurance when in the interest of the judiciary.
- e. Clauses** Clause 6-35, "Errors and Omissions" is included in solicitations, contracts, RFQs and purchase orders when errors and omissions insurance is required in accordance with this section.

6.3.5. Insurance Policies

When insurance is required, it may be provided either by a specific insurance policy or by the contractor's existing insurance policy. When an existing policy is used, it must be amended to name the loss payee as the finance office for the individual court unit, FPDO or AO (whichever required the insurance).

6.3.6. Notice of Cancellation or Change

When insurance (other than errors and omissions insurance issued on an occurrence basis) is required by the CO, the insurance policy must contain an endorsement to the effect that a cancellation of, or material change in, the policy that adversely affects the interest of the judiciary will not be effective until at least 30 days after written notice of the cancellation or change is given to the CO.

Part 6.4. Taxes

6.4.1. General Contract tax problems are essentially legal in nature and vary widely. Specific tax questions must be resolved by reference to the applicable contract terms and pertinent tax laws and regulations. Therefore, when tax questions arise, COs must confer with the PE, who will consult with OGC.

6.4.2. Federal Excise Taxes

- a. **Applicability** Federal excise taxes are levied on the sale or use of particular products and services. Questions on the applicability of federal excise taxes must be directed to the PE, who will consult with OGC.
- b. **Solicitations** COs must solicit price offers on a tax-exclusive basis when it is known that the judiciary is exempt from federal excise taxes and on a tax-inclusive basis when no exemption exists.

6.4.3. State and Local Taxes

- a. State and local taxes means taxes levied by the states, the District of Columbia, Puerto Rico, possessions of the United States, or their political subdivision.
- b. **Applicability** Although the judiciary, as an establishment of the federal government, is constitutionally immune from state and local taxes imposed directly on it, the applicability of particular taxes is a legal question often requiring the advice and assistance of OGC. The applicability of a tax depends on the nature of the tax and whether its legal incidence falls directly on the judiciary (as the purchaser) as compared to a tax imposed directly on a vendor with the vendor passing the cost of the tax on to its customers (including the judiciary) as part of its cost of doing business. In this latter instance, the legal incidence would not fall directly on the judiciary, but on the vendor, and the judiciary would probably not be immune. Each state's taxing laws are different; therefore, immunity in one state does not automatically transfer to another state. Most states have provided GSA with a copy of their respective state tax letters regarding purchases made with the government purchase card, and can be found on the internet at:

<http://www.gsa.gov>. Search for “*State Tax Letters*.” These may provide helpful information concerning an individual state’s taxes.

- c. Prime contractors and subcontractors may not normally be designated as agents of the judiciary for the purpose of claiming exemption from state and local taxes. Such designation, when appropriate, must be accomplished in the solicitation and only after coordination with the PE, who will consult with OGC.
- d. **Exemption from Tax**
 - (1) Whenever a state or locality asserts its right to tax judiciary property directly or to tax a contractor's possession, use of, or interest in, judiciary property, the CO must obtain advice from the PE, who will consult with OGC, concerning the appropriate course of action.
 - (2) If the solicitation or contract includes Clause 6-40, “Federal, State and Local Taxes” or Clause 6-45, “Federal, State and Local Taxes (Noncompetitive Contract),” it is the offeror's responsibility to determine to what extent state and local taxes are applicable to its offer. The CO must make no representations concerning the applicability of any state or local tax and, except as provided in paragraph (3) below, the judiciary will have no involvement in resolving any dispute between the contractor and a taxing authority concerning tax applicability.
 - (3) The judiciary will, upon the contractor's request, furnish the contractor evidence to establish exemption from any specified tax if a reasonable basis for the exemption exists.
- e. Evidence of exemption may include:
 - (1) a copy of the contract;
 - (2) copies of other documents (such as shipping documents or invoices) identifying the judiciary as the buyer;
 - (3) a U.S. Tax Exemption Certificate (Standard Form 1094)
<http://www.gsa.gov/Portal/formslibrary.jsp?type=view&category=Standard+Forms&expandview>;
 - (4) a state or local form indicating that the products or services are for the exclusive use of the judiciary or the federal government;
 - (5) any other state or locally required document for establishing exemption; or
 - (6) shipping documents indicating that shipments are in interstate or foreign commerce.
- f. **Matters Requiring Special Consideration** The resolution of tax issues requiring special consideration must be coordinated with the PE, who will consult with OGC, in the course of solicitation preparation. The following are examples of state and local tax issues that may require special treatment:
 - (1) When there is a reasonable question of the applicability or allocability of a tax or when the applicability of a tax is in litigation, the contract may:
 - (a) state that the contract price includes or excludes the particular tax and is subject to adjustment upon resolution of the tax question; or
 - (b) require the contractor to take specific actions regarding payment, non-payment, refund, protest, or other treatment of the tax.
 - (2) When the applicability of state and local taxes depends on the place and terms of delivery and the effect of tax on the contract price will be substantial, alternative places of delivery and contract terms should be considered in light of tax consequences.

6.4.4. Clauses

- (1) Clause 6-40, “Federal, State and Local Taxes ” is included in solicitations and contracts if the contract is to be performed wholly or partly within the United States, its possessions, or Puerto Rico, when a fixed-price competitively awarded contract is contemplated; and the contract is expected to exceed the judiciary’s small purchase threshold., unless Clause 6-45 is included in the contract;
- (2) Clause 6-45, “Federal, State, and Local Taxes (Noncompetitive Contract)” is included in fixed-price noncompetitive contracts exceeding the judiciary’s small purchase threshold to be performed wholly or partly within the United States, its possessions, or Puerto Rico, and when the CO is satisfied that the contract price does not include contingencies for state and local taxes, and that, unless the clause is used, the contract price will include such contingencies.

Part 6.5. Rights in Data and Copyrights

6.5.1. Data Rights Policy

- a. **General** It is the policy of the judiciary to acquire only those rights in data which are necessary to the fulfillment of its mission and programs. For purposes of this chapter, the term “data” means recorded information, regardless of the form or media on which it is recorded. The term includes technical data and computer software, but does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information. The judiciary requires rights to data to:
 - (1) obtain competition among potential suppliers of products and services;
 - (2) fulfill certain responsibilities for disseminating and publishing the results of activities;
 - (3) ensure appropriate use of the results of development and demonstration activities, including the dissemination of technical information to foster subsequent developments; and
 - (4) meet other programmatic and statutory requirements.
- b. **Contractor Proprietary Interest** The judiciary recognizes that its contractors may have a legitimate proprietary interest (a property or other economic interest) in data resulting from private development and investment. Protection of such data from unnecessarily wide dissemination and use is necessary in order to avoid jeopardizing the contractor’s commercial position and economic interest and to preclude impairment of the judiciary’s ability to obtain access to or use such data. Protection of such data is also necessary to encourage prospective contractors to contract with the judiciary.
- c. In light of the considerations identified in **a** and **b** above, COs should pay particular attention to the interests of the judiciary and the contractor when deciding the scope of data rights protection to be included in each procurement. All procurements that require data to be produced, furnished, acquired or specifically used in meeting contract performance requirements must contain terms that delineate the respective rights and obligations of the government and the contractor regarding the use, duplication and disclosure of such data.
- d. As a general rule, the data rights Clause 6-60, “Rights in Data - General,” is appropriate in solicitations and contracts for data. However, in certain instances, the particular subject matter of the contract or the intended use of the data may require the use of other

prescribed clauses.

6.5.2. Unlimited Rights Data

- a.** “Unlimited rights data” is data that the government procures to use, disclose, reproduce, prepare derivative works, distribute copies to the public and perform and display publicly, in any manner and for any purpose, and to have or permit others to do so.
- b.** Generally, data in the following categories should be acquired with unlimited rights (except for copyrights):
 - (1) data first produced in the performance of a judiciary procurement, including computer software;
 - (2) form, fit and function data delivered under a procurement. Form, fit, and function data are data relating to items, components, processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, functional characteristics and performance requirements; for computer software. This term refers to data identifying source, functional characteristics and performance requirements, but excludes source code, algorithm, process, formulae, and flow charts to software;
 - (3) data that constitute manuals or instructional and training material for installation, operation, or routine maintenance of items, components, or processes delivered or furnished under a procurement; and
 - (4) all other data delivered under the procurement unless it is limited rights data or restricted computer software.
- c.** The “Rights in Data - General” clause recognizes that the contractor has the right to use, release to others, reproduce, distribute, or publish data first produced in the performance of the procurement. The CO may, however, place restrictions on the contractor’s right to use the data for these purposes. However, such restrictions should not be imposed unless they are determined to be necessary to the furtherance of judiciary mission objectives, needed to support specific judiciary programs, or necessary to meet statutory requirements.

6.5.3. Limited Rights Data

- a.** “Limited rights data” is data developed at private expense and which embody trade secrets or commercial or financial and confidential or privileged data. In asserting that such data is limited rights data, the contractor must identify such data in accordance with Provision 6-50, “Representation of Rights in Data.” The contracting officer must include this provision in solicitations and RFQs. Such limited rights data will not, without the permission of the contractor, be used by the judiciary for manufacture, and will not be disclosed outside the government except for certain specific purposes as may be set forth in the notice.
- b.** The following are examples of specific purposes which may be added to the Limited Rights Notice:
 - (1) use by support contractors (except for manufacturing);
 - (2) use by non government evaluators in evaluating contractor offers;
 - (3) use by other contractors participating in judiciary programs for use and information in connection with performance under the procurement.

In such instances, the CO will add paragraph (c) of Provision 6-50, "Representation of Rights in Data" to the solicitation or RFQ.

6.5.4. Restricted Computer Software

- a.** "Restricted computer software" is software developed at private expense; that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software. The contracting officer must include Provision 6-50 in solicitations or RFQs. Restricted computer software normally is acquired with restricted rights. Contractors claiming that software is restricted computer software must identify such software in accordance with Provision 6-50, "Representation of Rights in Data," and, when it is delivered to the judiciary, place on it the procurement required restricted rights legend.
- b.** Unlike other data, computer software is also an end item in itself, such that if withheld and form, fit and function data are provided in lieu thereof, an operational program may not be acquired. Thus, if delivery of restricted computer software is anticipated to be needed to meet contract performance requirements, the CO should assure that the restricted rights afforded the judiciary to such computer software permit the following, where appropriate:
 - (1) used or copied for use in or with the computer or computers for which it was acquired, including use at any government installation to which such computer(s) may be transferred;
 - (2) used or copied for use with a backup computer if any computer for which it was acquired becomes inoperative;
 - (3) reproduced for safekeeping or backup purposes;
 - (4) modified, adapted, or combined with other computer software, provided that the modified, combined or adapted portions of any derivative software incorporating restricted computer software are subject to the same restricted rights;
 - (5) disclosed to and reproduced for use by support; or
 - (6) used or copied for use in or transferred to a replacement computer.
- c.** When computer software developed at private expense is modified or enhanced as a necessary part of performing a contract, only that portion of the resulting product in which the original product is recognizable will be restricted computer software.
- d.** The restricted rights set forth above are the minimum rights the judiciary will obtain with restricted computer software. However, either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired, may be specified by the CO in a particular procurement. For example, consideration should be given to any networking needs or any requirements for use of the computer software from remote terminals. Also, the scope of the restricted rights may be different from the documentation accompanying the computer software than for the programs and databases. Any additions to, or limitation on the restricted rights set forth in the Restricted Rights Notice are to be expressly stated in the procurement or in a collateral agreement incorporated in and made part of the contract.
- e.** Clause 6-55, "Delivery of Limited Rights in Computer Software" When the contractor has, in its offer, identified pre-existing proprietary data or restricted computer software pursuant to Provision 6-50, "Representation of Rights in Data" of the solicitation, then Clause 6-55 must be included in contracts and purchase orders.

6.5.5. Copyrighted Data

- a. In order to facilitate the dissemination of information produced at government expense, contractors are normally authorized, without prior approval of the CO, to establish claim to copyright in technical or scientific articles based on or containing data first produced in performance of work under a contract containing the Clause 6-60, "Rights in Data-General," and published in academic, technical, or professional journals, symposia proceedings and similar works. Otherwise, the permission of the CO must be obtained if the contractor desires to establish claim to copyright in data first produced in the performance of a contract.
- b. Usually, permission for a contractor to establish copyright in data first produced under the contract will be granted when copyright protection will enhance the transfer or dissemination of data and the commercialization of products or the process to which it pertains. The request for permission must be in writing, should identify the data involved or furnish copies of the data for which permission is sought, as well as a statement with the intended publication or dissemination media or other purpose for which copyright is requested. The request will normally be granted unless:
 - (1) the data consist of a report that represents the official views of the judiciary or that the judiciary is required by statute to prepare;
 - (2) the data are intended primarily for internal use by the government;
 - (3) the data are of the type that the judiciary itself distributes to the public;
 - (4) the judiciary determines that data should remain in the public domain and be disseminated without restriction.
- c. Whenever a contractor establishes claim to copyright subsisting in data first produced in the performance of a contract, the government is granted a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the government, all such data. The judiciary may, on a case by case basis, obtain a license of different scope than set forth in this paragraph, only with the concurrence of the PE, who will consult with OGC, and only if such a license will not interfere with the judiciary's use of the data as contemplated by the procurement.
- d. Whenever a contractor establishes claim to copyright, the contractor is required to affix the applicable copyright notices of 17 U.S.C. 401 and 401 and acknowledgment of government sponsorship (including the contract number) to the data whenever such data are delivered to the government, published, or deposited for registration as a published work in the U.S. Copyright Office. Failure to do so could result in such data being treated as unlimited rights data.

6.5.6. Data Not First Produced in Performance of a Contract Contractors are not to incorporate in data delivered under a contract any data that is not first produced under the contract and that is marked with the copyright notice of 17 U.S.C. 401 or 401, without either:

- (1) acquiring for or granting to the government certain copyright license rights, as set forth in paragraph (c) of Clause 6-60, "Rights in Data - General"; or
- (2) obtaining permission from the CO to do otherwise.

6.5.7. Unmarked or Improperly Marked Data or Software

- a. Data or software received without a restrictive legend are deemed to have been furnished with unlimited rights. However, the CO may permit the contractor to place a restrictive legend on the data or software within six months of delivery if the contractor demonstrates that:
 - (1) its omission was inadvertent; and
 - (2) use of the legend is authorized.
- b. The judiciary has no liability with respect to the use or disclosure of data or software made before the addition of the legend to the data/software.
- c. Data or software received with a restrictive legend not permitted by the terms of the contract may be used with limited rights only pending inquiry to the contractor. If no response has been received within 30 days, or if the response fails to show that the restriction is authorized, the CO, after consultation with the PE, who will consult with OGC, may obliterate the legend, notify the contractor accordingly, and thereafter use the data/software as if acquired with unlimited rights.

6.5.8. Special Works

- a. Special works may be used in procurements, or portions thereof, that are primarily for the production or compilation of data for the judiciary's own use. Examples of such procurements may include those for:
 - (1) the production of audiovisual works;
 - (2) histories of the judiciary;
 - (3) works pertaining to training or career guidance;
 - (4) works pertaining to the instruction or guidance of judiciary employees in the discharge of their duties.
- b. Where the procurement involves the acquisition of special works, the CO will insert Clause 6-65, "Rights in Data - Special Works" in solicitations, contracts, RFQs, and purchase orders.

6.5.9. Professional Services/Work for Hire

- a. Contracts for professional consultant, research or other highly specialized services, such as those under 5 U.S.C. 3109 for expert or consultant services, may require that the judiciary retain broad intellectual property rights. In such cases, the work may be specifically characterized in the contract as a work for hire, in which case the intellectual property rights which accrue to the judiciary are those that would arise if the work were performed by a government employee. In such an instance, the contract must specify that the work is a "work for hire." When the work is classified as a "work for hire," the contractor enjoys no right to the data produced under the contract but rather, all materials, data and other information developed, delivered, furnished or otherwise called for under the contract are works of the United States and are in the public domain. Because the government's needs can generally be met by acquiring unlimited rights in data, as set forth in Clause 6-65, the inclusion of a clause treating all data as a work for hire should be used cautiously and only in those instances where the judiciary or public's needs cannot otherwise be adequately met.
- b. Where the contract or purchase order involves the procurement of professional services and it is determined by the CO that the contract should be treated as a "work for hire,"

the CO will insert clause 6-70, "Work for Hire" in solicitations, contracts, RFQs, and purchase orders.

6.5.10. Acquisition of Existing Computer Software

- a.** When contracting other than from GSA Multiple Award Schedule contracts for the acquisition of existing computer software (i.e. software which is privately developed and normally sold commercially under a license or lease agreement restricting its use, disclosure, or reproduction), no specific contract clause need be used, but the procurement must specifically address the judiciary's right to use, disclose and reproduce the software, and these rights must be sufficient for the judiciary to fulfill the need for which the software is being acquired. Such rights may need to be negotiated and set forth in the procurement. If the computer software is to be acquired with unlimited rights, the procurements must specifically provide for this. In negotiating these rights, the CO must also consider any computer programs and or data bases, the form (tapes, punch cards, disk pack, etc.) as well as all necessary documentation.
- b.** If the procurement incorporates, makes reference to, or uses a contractor's standard commercial license, lease, or purchase agreement, the CO must review the agreement to assure that it is consistent with other procurement provisions and the judiciary's needs. Caution should be exercised in accepting a contractor's terms and conditions since these may conflict with other procurement provisions and may not be appropriate. Any inconsistencies in a contractor's standard commercial agreement will be addressed in the procurement and the terms will specify that the procurement terms take precedence over the contractor's standard commercial agreement. (Also see 5.4.)

6.5.11. Rights to Data in Successful Offers

- a.** COs may, in consideration of award, desire to acquire unlimited rights in technical data contained in a successful offer upon which an award is based. However, before such unlimited rights are acquired, the prospective contractor must be afforded the opportunity either:
 - (1) to advise the CO that the data, or portions thereof (to be identified by the prospective contractor) are covered by any restrictive notice regarding the disclosure and use of offer information; or
 - (2) establish to the CO's satisfaction that identified portions of technical data do not relate directly to or will not be used in the work to be performed under the procurement, and request that such portions be excluded from the judiciary's rights.
- b.** If unlimited rights to data in successful offers are to be acquired, the use of the Clause, 6-75, "Rights to Data in an Offer" will be used in solicitations, contracts, RFQs, and purchase orders. Any excluded data will be identified by inserting appropriate offer page numbers in the clause. If there is a need to have access to any of the excluded data during contract performance, consideration should be given to its acquisition as limited rights data, if it so qualifies. The CO will appropriately fill in the contract's blank spaces.