

Chapter 9

Patents and Data Rights

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Chapter 9 Patents and Data Rights

SECTION 1 GENERAL POLICIES

9.1.1 Acquiring Intellectual Property Rights

- 9.1.1.a *General.* Patents, copyrights, and other rights in data are valuable intellectual property. The Postal Service acquires patents, copyrights, and other rights in data as necessary to:
1. Enhance the competitive purchasing process;
 2. Ensure the ability to use, maintain, repair, and modify equipment or products procured under Postal Service contracts;
 3. Recoup development costs of, and fund improvements in, Postal products and equipment;
 4. Develop products and equipment for Postal Service and public use; and
 5. Protect its position in the competitive market place.
- 9.1.1.b *Non-Impairment of Private Rights.* The Postal Service's efforts directed toward competition (4.1) must not improperly demand or use data relating to privately developed intellectual property rights. The Postal Service complies with applicable laws regarding intellectual property rights. The Postal Service, however, will not refuse to award a contract on the grounds that the prospective contractor might infringe a patent. See 9.2.3.
- 9.1.1.c *Commercial Application.* The Postal Service encourages commercial application of inventions made under its contracts consistent with its expressed policies for acquisition of data rights and inventions.
- 9.1.1.d *Indemnification for Use of Private Patents for Commercial Items.* The Postal Service seeks indemnification for a contractor's use of private patents when the supplies or services procured are sold in the commercial open market.
- 9.1.1.e *Claims Against USPS.* Contractors must protect the Postal Service against claims resulting from contractors' use of data not supplied by the Postal Service.

SECTION 2 ACQUISITION OF RIGHTS

9.2.1 General

- 9.2.1.a The Postal Service acquires patent rights, rights in data, and rights in software to the degree necessary to protect the Postal Service's interests. Those rights can include:
1. Postal Service title to patents.
 2. Less than Postal Service title to patents, such as nonexclusive licenses.
 3. Unlimited rights or title to technical data and software.
 4. Limited rights to technical data and restricted rights in software. These rights may be exclusive or nonexclusive.
- 9.2.1.b Because the Postal Service is charged with behaving in a businesslike way, it is appropriate for it to consider acquiring these rights in manners consistent with its business purpose. Determinations in this regard are to be made by the contracting officer, with the advice of the requiring activity and counsel, giving full consideration to the costs and benefits of the chosen approach. Thus, for example, decisions to acquire Postal Service title to patents or unlimited rights to technical data developed by the contractor at private expense must take into account the impact of the decision on the cost of the contract and the extent to which prospective offerors may not wish to part with such rights. Conversely, determinations to take only lesser rights must consider the effect on the Postal Service of the exploitation of those rights by the contractor or others.

9.2.2 Acquisition of Patent Rights

- 9.2.2.a *Covered Contracts.* This part 9.2.2 applies to all contracts and subcontracts for research, experimental, developmental, or engineering work or for initial production of products or equipment developed under a Postal Service contract.
- 9.2.2.b *Postal Service Title.* Postal Service title must be acquired to subject inventions under a covered contract unless the contracting officer, after consultation with the requiring activity and the patent counsel, determines that an alternate arrangement is in the best interests of the Postal Service. The determination concerning alternate arrangements may be made at the time of solicitation (see c., or d. and e., below).
- 9.2.2.c *Less than Postal Service Title.* When appropriate, the Postal Service may acquire less than title to subject inventions under covered contracts. However, in no case may the Postal Service acquire less than a non-exclusive royalty-free license to make, use and sell each subject invention throughout the world on behalf of the Postal Service. If the Postal Service takes less than title, it may allow the contractor to retain title to all subject inventions, or may allow the contractor to elect whether to retain title on an invention-by-invention basis. When contractors are allowed to retain title, the contract must provide adequate provisions allowing the Postal Service to control the contractor's sale of the invention to competitors of the Postal Service. As an alternative, the contracting officer may consider providing for a sharing of revenue for all commercial sales of the invention, subject to a requirement that any sale of a subject invention to an organization which provides postal or parcel delivery services in competition with the Postal

Service requires the advance written approval of the contracting officer. Any such alternative must be coordinated with the patent counsel.

9.2.2.d *Alternate Proposals*

1. The contracting officer may consider any alternate proposal giving a contractor greater rights in an invention made in the performance of a contract than the solicitation contemplates if it will yield a net benefit to the Postal Service.
2. Provision 9-1, *Alternate Intellectual Property Rights Proposals*, may be included in all solicitations for covered contracts, and alternate proposals may be considered as part of the evaluation process.

9.2.2.e *Alternate Agreements after Award.* An alternate agreement on patent rights for inventions developed at contractor expense but intended for delivery under a covered contract may be negotiated after award when in the interest of the Postal Service. Before initiating negotiations, the contracting officer must seek the advice of patent counsel.

9.2.2.f *Other Contracts.* The contracting officer may provide for Postal Service acquisition of patent rights or may solicit alternate agreements for contracts not covered by this part with the concurrence of patent counsel. Particular consideration should be given to including such provisions in non-covered contracts if it appears likely that the contractor will make an invention in performing the contract.

9.2.2.g *Clauses.* Clause 9-1, *Patent Rights*, must be included in contracts in which the Postal Service will take title to inventions. Clause 9-15, *Patent Rights — Contractor Retention*, must be included in contracts providing for the contractor's election to retain invention rights. If an alternate patent proposal is accepted, the clause must be appropriately modified, with the concurrence of counsel, to reflect the specific rights in subject inventions that will be acquired by the Postal Service. The modified clause must clearly state that all other Postal Service rights in subject inventions remain in effect with full force. When Clause 9-15 is included in contracts, Clause 9-16, *Postal Service Title in Technical Data and Computer Software*, must also be included.

9.2.3 Use of Private Patents

9.2.3.a *Authorization and Consent*

1. When the government has authorized or consented to the manufacture or use of an invention described in and covered by a U.S. patent, suit for recovery of the reasonable and entire compensation for the manufacture or use of the invention by or for the United States by a contractor (including a subcontractor at any tier) can be maintained only against the government in the United States Court of Federal Claims and not against the contractor or subcontractor (28 U.S.C. 1498). To ensure that work by a contractor or subcontractor under a Postal Service contract may not be enjoined by reason of patent infringement, the Postal Service provides its authorization and consent to the use of private patents by its contractors and subcontractors in certain situations. Broad authorization and consent is provided in the conduct of research and development activities so that the contractor or subcontractor need not avoid or invent around particular technology areas. In contracts for supplies or construction, a more limited authorization and consent is provided.

2. The liability of the Postal Service for damages in a suit of the nature described in subparagraph a.1 above against it may ultimately be borne by the contractor or subcontractor in accordance with the terms of any patent indemnity clause included in the contract, and an authorization and consent clause does not detract from any patent indemnification commitment by the contractor or subcontractor. Therefore, both a patent indemnity clause and an authorization and consent clause may be included in the same contract.
3. Clause 9-2, *Authorization and Consent*, must be included in all covered contracts except those awarded using simplified procedures (see 4.3) or performed outside the United States.

9.2.3.b *Notice and Assistance*

1. Clause 9-3, *Notice and Assistance Regarding Patent and Copyright Infringement*, must be included in all covered contracts except those awarded using simplified procedures (see 4.3) or performed outside the United States.
2. If the contracting officer receives notice of an infringement claim, patent counsel must be notified immediately.

9.2.4 Patent Indemnification

9.2.4.a *Indemnification by Postal Service.* The contracting officer may not use any contract clause providing for indemnification by the Postal Service for patent infringement by a contractor or subcontractor.

9.2.4.b *Indemnification by Contractor*

1. The Postal Service's policy is to acquire indemnification for the use, by or on behalf of the Postal Service, of private patents without the authorization or consent of the patentee, when the use relates to supplies or services that the contractor offers or provides to the commercial open market.
2. Except as provided in paragraph c below, Clause 9-4, *Patent Indemnity*, must be included in all contracts not awarded using simplified procedures. The clause may be used in other contracts if patent infringement is likely.

9.2.4.c *Waiver or Modification of Patent Indemnity*

1. If it is in the interest of the Postal Service to do so, the contracting officer may waive or modify the right to patent indemnification, with the prior approval of patent counsel. If the waiver or modification to the right to patent indemnification is for research or development, Clause 9-5, *Waiver of Indemnity*, must be used, and the contract must be modified as applicable patents are identified.
2. If patent indemnification will be waived completely, Clause 9-4 may not be used.
3. Clause 9-5, *Waiver of Indemnity*, must be used if the waiver applies only to specific patents. Those patents to which the waiver applies must be listed in the clause.

SECTION 3 RIGHTS IN DATA

9.3.1 Definitions

- 9.3.1.a *Computer.* A device capable of accepting data, performing prescribed operations on the data, and supplying the results of those operations. It includes any device that operates on (1) discrete data by performing arithmetic and logic processes on the data or (2) analog data by performing physical processes on the data.
- 9.3.1.b *Computer data base.* A collection of data in a form capable of being processed and operated on by a computer.
- 9.3.1.c *Computer program.* Instructions or statements including, but not limited to, source code, object code, and algorithms, in computer usable form, that cause a computer to perform specified operations. Computer programs may be machine-dependent or machine-independent, and may be general or specific in purpose.
- 9.3.1.d *Computer software.* Computer programs, computer data bases, and their documentation.
- 9.3.1.e *Computer software documentation.* Information, including computer listings and printouts in human-readable form, that (1) documents the design or detail of computer software, (2) explains its capabilities, or (3) provides operating instructions for using it.
- 9.3.1.f *Data.* Recorded information, regardless of form or the medium on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.
- 9.3.1.g *Firmware.* Hardware-embedded and hardware-oriented programming that is used for machine control, error recovery, mathematical functions, applications programs, and the like, including firmware furnished with a computer, commercially available proprietary firmware acquired separately, and all related vendor documentation and manuals.
- 9.3.1.h *Form, fit, and function data.* Data relating to an item component, or process that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software, it means data identifying origin, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulas, and machine-level flow charts of the computer software.
- 9.3.1.i *Limited rights.* The rights of the Postal Service in limited rights data, as set forth in a Limited Rights Notice if included in a data rights clause of the contract.
- 9.3.1.j *Limited rights data.* Data, other than computer software, developed at private expense.
- 9.3.1.k *Restricted computer software.* Computer software developed at private expense that is a trade secret, is commercial or financial and confidential or privileged, or is published copyrighted computer software, including minor modifications of this computer software.
- 9.3.1.l *Restricted rights.* The rights of the Postal Service in restricted computer software, as set forth in a Restricted Rights Notice included in a computer software rights

clause of the contract, or as otherwise may be included or incorporated in the contract.

9.3.1.m *Technical data.* Data, other than computer software, of a scientific or technical nature.

9.3.1.n *Unlimited rights.* The rights of the Postal Service in technical data and computer software 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.

9.3.2 Data Rights Acquisition Policy

9.3.2.a *General.* It is the policy of the Postal Service to acquire only the technical data, computer software and firmware and the rights to them essential to its needs. These needs include competitive procurement, operation and maintenance of equipment and supply items, dissemination of research and development contract data to users, recoupment of investments in technology or product developments and position in the competitive marketplace, personnel training, inspection and quality assurance, logistics support, and packaging. These needs must be balanced against the valid economic interest that commercial organizations have in technical data and computer software developed at their own expense for competitive purposes.

9.3.2.b *Unlimited Rights in Data*

1. Unless paragraph c below applies, technical data in the following categories must be acquired with unlimited rights (except for copyrights):
 - (a) Data first produced in the performance of a Postal Service contract (except to the extent that they constitute minor modifications of data that are limited rights data).
 - (b) Form, fit, and function data (including such data describing Limited Rights Data subject to the contract) delivered under the contract.
 - (c) Data that constitute manuals or instructional and training materials for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under the contract (but see 9.3.2.g).
 - (d) All other technical data delivered under the contract unless they are limited rights data (see paragraph c below).
2. If any of the foregoing data are published copyrighted data, the Postal Service acquires them under a copyright license, as provided in paragraph f below, rather than with unlimited rights.
3. Unless paragraph c below applies, computer software in the following categories is acquired with unlimited rights:
 - (a) Computer software first produced in the performance of a Postal Service contract (except to the extent that it constitutes minor modifications of computer software that is restricted computer software).
 - (b) Form, fit, and function data (including such data describing Restricted Computer Software subject to the contract) required to be delivered under the contract.
 - (c) All other computer software delivered under the contract unless it is restricted computer software.

9.3.2.c *Acquisition of Rights in Data.* When it has been determined by the contracting officer and the requirements organization program manager, with the consultation and concurrence of the patent counsel, that it is in the best interests of the Postal Service to take title to technical data or computer software first produced in the performance of a Postal Service contract, Clause 9-16, *Postal Service Title in Technical Data and Computer Software*, must be incorporated into the contract schedule.

9.3.2.d *Privately Developed Data*

1. Data developed at private expense including minor modifications thereof, normally is acquired with limited rights. To assert that technical data are limited rights data, the contractor must identify such data in accordance with Provision 9-2, *Representation of Rights in Data*, and, when they are delivered to the Postal Service, place on them the limited rights legend required by the contract.
2. 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 9-2, *Representation of Rights in Data*, and, when it is delivered to the Postal Service, place on it the contract-required restricted rights legend.
3. 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 deemed to be computer software developed at private expense to which restricted rights may attach.
4. A contractor's claim that data or software has been developed at private expense must be supported by clear and convincing evidence that the data or software was developed and is related to a workable device, computer program, or software routine (including separately identifiable components, modules, subsystems, and subroutines) incorporated into larger systems or programs responsive to a contract requirement, before Postal Service funding was introduced into the development process.
5. The Postal Service's recognition of Limited Data Rights or Restricted Computer Software Rights must be incorporated into the contract using Clause 9-17, *Delivery of Limited Rights Data and Restricted Computer Software*.

9.3.2.e *Unmarked or Improperly Marked Technical Data or Software*

1. Technical data or software received without a restrictive legend are deemed to have been furnished with unlimited rights. However, the contracting officer may permit the contractor to place a restrictive legend on the technical data or software within six months of delivery if the contractor demonstrates that (a) its omission was inadvertent, and (b) use of the legend is authorized. The Postal Service has no liability with respect to the use or disclosure of the technical data or software made before the actual addition of the legend to the data or software.
2. Technical data or software received with a restrictive legend not permitted by the terms of the contract may only be used with limited rights 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 contracting officer may obliterate the legend, notify the contractor accordingly, and thereafter use the technical data or software as if they were acquired with unlimited rights.

3. If the contract authorizes the contractor to furnish technical data or software with limited rights, but the restrictive legend employed by the contractor is not in the form prescribed by the contract, the technical data or software must be used with limited rights, and the contractor will be required to amend the legend to conform with that specified in the contract. If the contractor fails to so amend the legend within 30 days after notice, the contracting officer may correct the legend and notify the contractor of the action.
4. The procedures of this paragraph e may be modified in accordance with regulations implementing the Freedom of Information Act (5 U.S.C. 552) (see 1.7.4) if necessary to respond to a request under the Freedom of Information Act. The contractor is not precluded from bringing a claim in connection with any dispute that may arise at the result of the Postal Service's action to remove any markings on technical data, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

9.3.2.f *Copyrighted Data*

1. Under contracts for basic research, contractors may establish claim to copyright in technical or scientific articles based on, or containing, data first produced in the performance of work under a Postal Service contract only if the data are to be published in academic, technical, or professional journals, symposia proceedings, or similar works. Otherwise, the permission of the contracting officer must be obtained if the contractor desires to establish claim to copyright in data first produced in the performance of a contract.
2. Unless otherwise approved by the contracting officer with concurrence of patent counsel, whenever a contractor establishes claim to copyright first produced in the performance of a contract, the contractor must grant the Postal Service a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, and perform and display publicly by or on behalf of the Postal Service, covering all such data.
3. If any data not first produced in performing a contract are subject to a claim of copyright, the contractor may not incorporate them in data delivered under the contract without either:
 - (a) Acquiring for or granting to the Postal Service copyright license rights in them; or
 - (b) Obtaining permission from the contracting officer to do otherwise.
4. The copyright license the Postal Service acquires for the data in subparagraph e.3 above will normally be of the same scope as discussed in subparagraph e.2 above. However, contracting officers may, on a case-by-case basis, obtain a license of different scope if the contracting officer determines that it is consistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the delivered data. In addition, if computer software not first produced in the performance of a Postal Service contract is delivered with a claim of copyright, the Postal Service's license will be as set forth in paragraph c of Clause 9-9, *Rights in Computer Software*, or as otherwise may be provided in a collateral agreement incorporated in or made part of the contract.
5. If contractor action causes limited rights data or restricted computer software to be published with the claim of copyright after the data have been delivered to the Postal Service without a notice, the Postal Service is relieved of disclosure and use limitations and restrictions regarding the data, and the

contractor should advise the Postal Service, request that a copyright notice be placed on the copies of the data delivered to the Postal Service, and acknowledge that the applicable copyright license described in subparagraph f.2 above applies.

9.3.2.g *Acquisition of Additional Rights in Data*

1. The Postal Service may purchase as a separately priced contract item specific rights in privately developed data (such as, unlimited rights in limited rights data) when the contracting officer determines that there is a clear need for these rights in order to accomplish an essential function of the Postal Service. The acquisition of such data rights must be based on a specific written determination of the contracting officer evaluating all alternative methods of accomplishing the function and demonstrating that the acquisition of data rights is the most cost-effective method available to the Postal Service.
2. When additional rights in data are needed, it is possible that the Postal Service does not need unlimited rights but only the right to use the data for Postal Service purposes. One method of acquiring additional rights is to acquire the right to direct the contractor to license other contractors to use the data to perform work for the Postal Service.
3. When additional rights are acquired, Clause 9-14, *Acquisition of Additional Rights in Data*, must be included in the contract and the contract Schedule must list:
 - (a) The items, components, or processes for which additional rights in technical data will be furnished; and
 - (b) The computer software for which additional rights will be furnished.
4. This list must specify for each listed item whether the contractor will furnish unlimited rights, limited rights, directed license rights (see subparagraph f.2 above), or some other form of rights agreed to by the parties.

9.3.2.h *Manuals and Instructional Materials.* Manuals or instructional and training materials comprising technical data must be obtained with unlimited rights to allow use by Postal Service employees and Postal Service contractors in the course of installation, training operation, or routine maintenance and repair of equipment. Contractors may request the exclusion of specified limited rights data from the specifications for manuals or training materials. However, if the contracting officer determines that such data are necessary to perform any of these functions, the data must be delivered with unlimited rights.

9.3.2.i *Technical Data Necessary to Procure Repair Parts*

1. When a solicitation is for the development or manufacture of equipment or a supply item that will require the future procurement of substantial quantities of repair parts, and it appears likely that the contractor will incorporate limited rights data in the drawings and specifications, the contracting officer must consider including in the contract the Postal Service right to use the data to obtain competition in procuring repair parts. When unknown factors, such as cost, make the feasibility of acquiring such rights uncertain, the solicitation may include the rights as a separately priced optional line item.
2. If the solicitation contemplates the acquisition of this additional right, Provision 9-3, *Use of Limited Rights Data for Procurement of Repair Parts*, must be included in the solicitation, and the Limited Rights Notice in Clause 9-6, *Rights in Technical Data*, must be modified by Clause 9-18, *Manufacture of Repair Parts*.

- 9.3.2.j *Subcontracts.* It is the responsibility of the contractor to obtain from subcontractors all the data and rights in data necessary to fulfill the contractor's obligations under the contract. If a subcontractor refuses to accept a contractor's terms giving the Postal Service the required data and rights in data, the contractor must notify the contracting officer and seek approval for the subcontract data provisions.
- 9.3.2.k *Modification of Postal Service Rights.* The Postal Service's rights in technical data and computer software may not be modified except as provided in this part 9.3.2 or in 9.3.4. Acceptance from one source of technical data or computer software subject to limited or restricted rights does not affect the Postal Service's rights in such data or similar data acquired from other sources.

9.3.3 Data Ordering

- 9.3.3.a *Basic Policy.* To the extent that the Postal Service's requirements for data are known at the time of contract award, the contract Schedule should specify the data to be delivered to the Postal Service under the contract.
- 9.3.3.b *Additional Ordering of Data.* In some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at the time of contract award. Clause 9-8, *Additional Data Requirements*, is used to enable the later ordering of additional data as the actual requirements become known. The clause must be used in solicitations and contracts involving experimental, developmental, research, or demonstration work unless there is certainty that all the requirements for data are specified in the contract. The contracting officer may permit the contractor to identify in the contract data not to be ordered for delivery under Clause 9-8, *Additional Data Requirements*, if they are not necessary to meet the Postal Service's requirements.

9.3.4 Solicitations

- 9.3.4.a *Contractor's Representation*
1. When the Postal Service needs title to data first developed under the Postal Service contract or data with unlimited rights, but there is a possibility that one or more offerors will propose to deliver technical data or computer software with restrictions on use or disclosure, the solicitation must contain Provision 9-2, *Representation of Rights in Data*.
 2. The solicitation may require the contractor to identify all limited rights data and restricted computer software after award if identification is impracticable before award, and to identify limited rights data and restricted computer software relating to any changed requirements.
- 9.3.4.b *Data Offered with Restrictions.* After review of the data to be furnished with restrictions, the contracting officer may:
1. Negotiate to acquire unlimited rights or an option for unlimited rights;
 2. Modify the requirement for title or unlimited rights;
 3. Negotiate to acquire additional data rights necessary to accomplish the purpose for which the data are being acquired; or
 4. Reject the proposal as not in the interest of the Postal Service.

9.3.4.c *Alternate Proposals*

1. The Postal Service may consider an alternate proposal giving a contractor greater rights in data if they are necessary to permit the commercial use of the data or yield a net benefit to the Postal Service.
2. Provision 9-1, *Alternate Intellectual Property Rights Proposals*, may be included in all solicitations for contracts requiring the delivery of data, and alternate proposals must be considered as part of the evaluation process.

9.3.5 **Technical Data Contract Clauses**

9.3.5.a *Basic Clauses*

1. Clause 9-6, *Rights in Technical Data*, and Clause 9-7, *Withholding Payment (Technical Data and Computer Software)*, must be included in the contract when technical data will be acquired.
2. Clause 9-16, *Postal Service Title in Technical Data and Computer Software*, must be included in the contract when title to technical data or computer software will be acquired.
3. If the data requirements are not adequately fixed and specified at the time of contracting, Clause 9-8, *Additional Data Requirements*, must also be included in the contract.

9.3.5.b *Alternate Arrangements*. When, in accordance with 9.3.2.f, the contracting officer determines to acquire specific technical data items with Postal Service rights greater than those specified in Clause 9-6, *Rights in Technical Data*, the contract Schedule must specifically describe the applicable data items sought and Clause 9-14, *Acquisition of Additional Rights in Data*, must also be included in the contract. If an alternate data rights proposal is accepted in accordance with 9.3.4.c, clause 9-6 (see subparagraph a.1 above) must be appropriately modified by special provision to reflect the data rights being acquired.

9.3.5.c *Computer Software*. When computer software is to be generated or produced under a contract, the contracting officer must include Clause 9-9, *Rights in Computer Software*, in the contract in addition to the appropriate clauses prescribed in paragraphs a and b above.

9.3.6 **Acquisition of Rights in Computer Software**

9.3.6.a *Covered Contracts*. This part 9.3.6 applies to contracts under which computer software (computer programs, computer data bases, and their documentation) will be generated, developed, or modified using Postal Service funds and those for specific acquisition of computer software developed at private expense.

9.3.6.b *Computer Software Developed at Private Expense*

1. If restricted computer software will be delivered, Clause 9-9, *Rights in Computer Software*, must be used. Unless otherwise agreed to, the restricted rights obtained by the Postal Service are as set forth in the Restricted Rights Notice contained in that clause. Restricted computer software may not be used or reproduced by or disclosed outside the Postal Service, except to the extent provided for by the contract. The restricted computer software may be:

- (a) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Postal Service installation to which the computer or computers may be transferred;
 - (b) Used or copied for use in or with a backup computer if any computer for which it was acquired becomes inoperative;
 - (c) Reproduced for safekeeping (archives) or backup purposes;
 - (d) Modified, adapted, or combined with other computer software, provided the modified, adapted, or combined portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights, unless otherwise agreed to by the parties;
 - (e) Disclosed to and reproduced for use by support service contractors, subject to the same restriction under which the Postal Service acquired the software; and
 - (f) Used in accordance with b.1(a) through (e) above, without disclosure prohibitions, if the computer software is published copyrighted computer software.
2. The restricted rights set forth in subparagraph b.1 above are the minimum rights the Postal Service normally obtains in restricted computer software and automatically apply when it is provided under the Restricted Rights Notice of Clause 9-9, *Rights in Computer Software*. Either greater or lesser rights, consistent with the purposes and needs for which the software is to be procured, may be specified by the contracting officer in a particular contract. For example, consideration should be given to any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and data bases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice must be expressly stated in the contract or in a collateral agreement incorporated in the contract, and the notice modified accordingly.
 3. When needed to determine whether restricted computer software must be delivered by a contractor, Provision 9-2, *Representation of Rights in Data*, may be included in any solicitation containing Clause 9-9, *Rights in Computer Software*. This representation requests that an offeror state, to the extent feasible, whether restricted computer software is likely to be used in meeting the contract requirements.
- 9.3.6.c *Marking of Computer Software*. Restricted computer software delivered to the Postal Service must contain the legend prescribed by paragraph g of Clause 9-9, *Rights in Computer Software*, if the contractor desires to protect the restricted computer software. All markings (notices, legends, identifications) concerning restrictions on the use, duplication, or disclosure of computer software required or authorized by the terms of the contract under which delivery is made must be in human-readable form that can be readily and visually perceived, and in addition may be in machine-readable form as appropriate and feasible under the circumstances. These markings must be affixed by the contractor to the computer software before its delivery to the Postal Service.
- 9.3.6.d *Clauses*
1. Contracts that call for the delivery of computer software and contracts that call for development, generation, or modification of computer software (whether or not delivery of the computer software is required) must include

Clause 9-9, *Rights in Computer Software*, and Clause 9-7, *Withholding Payment (Technical Data and Computer Software)*.

2. If technical data, as well as computer software, are to be delivered, Clause 9-6, *Rights in Technical Data*, must also be included in the contract.
3. If the computer software deliverables are not fixed at the time of contract award, Clause 9-8, *Additional Data Requirements*, must be included in the contract.

9.3.7 Special Works

9.3.7.a *Covered Contracts*. This part applies to all contracts for special works if the Postal Service specially commissions the works and requires ownership and control of them. Examples of such contracts may include those for (1) the production of audiovisual works (including motion pictures and television recordings) or the preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like; (2) histories of the Postal Service; (3) works pertaining to recruiting, morale, training, or career guidance; (4) surveys of facilities; (5) works pertaining to the instruction or guidance of Postal Service employees in the discharge of their official duties; or (6) production of technical reports, studies, or similar documents not otherwise covered by paragraph 9.3.2.

9.3.7.b *Restrictions on Release*

1. Because the release of works covered by this part 9.3.7 by the contractor preparing the works would prejudice the Postal Service's activities, release must be restricted.
2. Contracts for items such as audiovisual works and sound recordings may include limitations in connection with music licenses, talent releases, and the like that are consistent with the purpose for which the works are acquired.

9.3.7.c *Assignment of Copyrights*. The contract must enable the Postal Service to obtain ownership of the copyright in the works described above. This is to be accomplished by contract provisions requiring the contractor to assign copyrights to the Postal Service in those works in which the Postal Service would not otherwise be considered the author under section 201(b) of Title 17, United States Code.

9.3.7.d *Indemnification*. Preparation of certain types of copyright works requires talent releases and other permission from artists, models, and — in some cases — other copyright owners. Therefore, an indemnification for any liability that may be incurred by the Postal Service for any violation of proprietary rights, including copyrights, or right of privacy or publicity, or for libelous or other unlawful matter arising out of or contained in any production or compilation of data, should be acquired from the contractor.

9.3.7.e *Clauses*. Clause 9-10, *Rights in Data — Special Works*, must be included in covered contracts. When appropriate, Clause 9-7, *Withholding Payment (Technical Data and Computer Software)*, may also be included in the contract.

9.3.8 Existing Works

9.3.8.a *Covered Contracts*. Contracts for the procurement of existing works (other than computer programs and audiovisual works), such as books and periodicals,

generally require no specific contract coverage for data rights. When reproduction rights are required in such works, specific contract coverage is needed.

- 9.3.8.b *Clause.* If reproduction rights are to be obtained for existing works (other than computer programs and audiovisual works), Clause 9-11, *Rights in Data — Existing Works*, must be included in the contract.

9.3.9 **Royalties**

9.3.9.a *Reporting Royalties*

1. Provision 9-4, *Royalty Report*, must be included in any solicitation that may result in other than a firm-fixed-price contract.
2. The contracting officer must forward any information received regarding royalties to the General Counsel.
3. The General Counsel must advise the contracting officer concerning any royalties that are excessive or that the Postal Service is not obligated to pay.

- 9.3.9.b *Refunds of Royalties.* When the price of a contract described in subparagraph a.1 above is based in part on a contingency for patent royalties that may not have to be paid by the contractor, Clause 9-12, *Refund of Royalties*, must be included in the contract.

9.3.10 **Professional Services**

Contracts for professional consultant, research, technical development or other specialized support services may require access to Postal Service information. The products of such contracts may not otherwise be covered by the policies of 9.2 or 9.3, and generally have unknown long-term implications and therefore require broad rights in intellectual property to flow to the Postal Service. Clause 9-13, *Intellectual Property Rights*, must be included in such contracts.