2019-2147

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE BOEING COMPANY,

Appellant,

v.

SECRETARY OF THE AIR FORCE,

Appellee.

Appeal from the Armed Services Board of Contract Appeals in Nos. 61387, 61388, Administrative Judges Michael N. O'Connell, Richard Shackleford, and J. Reid Prouty.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PROFESSIONAL SERVICES COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Steven P. Lehotsky
Jonathan D. Urick
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337
slehotsky@uschamber.com

Matthew J. Dowd
Robert J. Scheffel
Dowd Scheffel PLLC
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, D.C. 20006
(202) 559-9175
mdowd@dowdscheffel.com

Counsel for Amici Curiae

CERTIFICATE OF INTEREST

Counsel for *amici curiae* certifies the following:

1. Full name of party represented by me:

Chamber of Commerce of the United States of America; and Professional Services Council

2. Name of real party in interest represented by me:

Chamber of Commerce of the United States of America; and Professional Services Council

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Matthew J. Dowd, Robert J. Scheffel of Dowd Scheffel PLLC

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None.

Dated: December 27, 2019

/s/ Matthew J. Dowd

Matthew J. Dowd
Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Professional Services Council ("PSC") is the voice of the government professional and technology services industry. PSC's more than 400 member companies represent small, medium, and large businesses that provide federal departments and agencies with a wide range of services, including information technology, engineering,

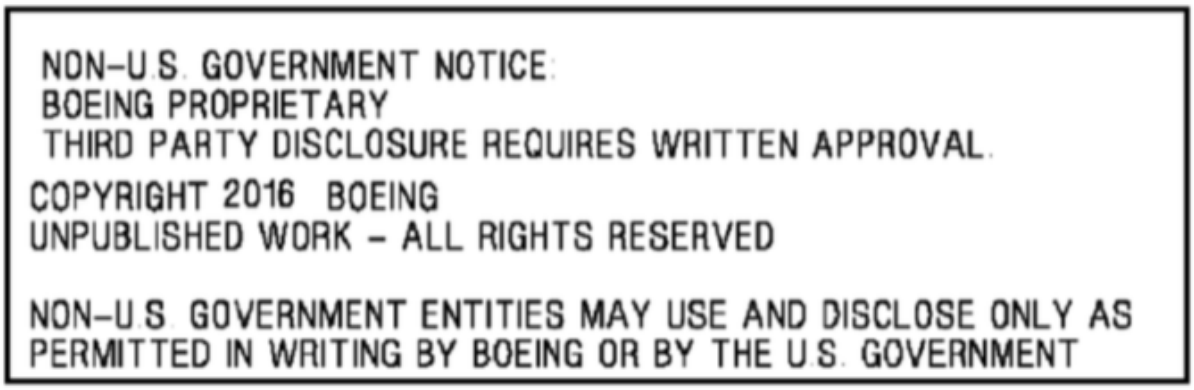
[1] All parties have consented to the filing of this amicus brief. No person other than *amici*, their members, or their counsel authored this brief in whole or in part or contributed money intended for the funding of this brief.

logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environmental services. The federal government relies on PSC's members for many types of essential services, including extensive contracting with the Department of Defense ("DoD"). Many of these DoD (and federal) contracts involve rights in technical data and include the standard DoD data-rights clauses at issue here.

The administrative tribunal's decision has the significant potential to adversely impact businesses and innovators who license technology, intellectual property, and other know-how to the federal government. The tribunal's decision may prevent companies from validly notifying the public about ownership rights in technical data and intellectual property developed for and licensed to the federal government through the contracting process. Many of *amici*'s members regularly contract with the federal government. For these reasons, *amici* submit this brief.

SUMMARY OF THE ARGUMENT

The Armed Services Board of Contract Appeals understood DFARS § 252.227-7013(f) as not allowing Boeing's legends, which notify third parties that the "technical data deliverables" contain data and information proprietary to Boeing. One of Boeing's legends was the following:



Current Boeing Marking Example

Appx5. A second legend included the following wording: "Non-US Government recipients may use and disclose only as authorized by Boeing or the U.S. Government." Appx5.

In the Air Force's view, these notices violate DFARS § 252.227-7013(f) because they purportedly restrict the Government's unlimited rights in the technical data. The Air Force advanced this argument to the Board. *See* Air Force Br. 12–13 (arguing that "Boeing's nonconforming legend is not permitted because it limits the

Government's right to freely use and distribute unlimited rights technical data"); *see also id.* at 4 ("By imposing a limitation on the Air Force's ability to use the delivered technical data, Boeing is denying the Government the ability to use the data 'in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.'" (quoting DFARS § 252.227-7013(a)(16))). The Board recognized a potentially significant conflict between DFARS § 252.227-7013(f) and 10 U.S.C. § 2320(a)(1). Rather than tackle that conflict, the Board concluded that "whether the Air Force is in compliance with the statute will have to be resolved at a later time." Appx10.

But that conclusion and those arguments are not sustainable. To begin with, the Board interpreted DFARS § 252.227-7013(f) in isolation from the controlling statute, 10 U.S.C. § 2320(a)(1). Its approach violates settled rules of interpreting agency regulations. When analyzed in full context, the Board's interpretation of § 252.227-7013(f) displays numerous infirmities. The regulation's plain text applies only to markings that restrict government rights in the licensed technical data. The regulation does not, on its face, apply to the types of general ownership notices Boeing proposed.

Beyond the plain text, the Board's interpretation impairs a contractor's ownership rights in the licensed technical data. Such an impairment does not comport with 10 U.S.C. § 2320(a)(1). Moreover, the Board's interpretation of the regulation likely impairs a contractor's trade secret rights in the licensed technical data—again in apparent violation of 10 U.S.C. § 2320(a)(1).

ARGUMENT

I. The Board Erred In Its Interpretation Of DFARS § 252.227-7013(f) And 10 U.S.C. § 2320(a)(1).

The Board was tasked with construing DFARS § 252.227-7013(f), and it recognized a potentially significant conflict between DFARS § 252.227-7013(f) and 10 U.S.C. § 2320(a)(1). Rather than tackle that conflict, the Board concluded that "whether the Air Force is in compliance with the statute will have to be resolved at a later time." Appx10. The Board's avoidance of this important statutory conflict was improper.[2]

Here, the controlling statute mandates, among other things, that

[2] The Contract Disputes Act, 41 U.S.C. §§ 7101–7109, governs this Court's review of the Board's decision. *Garco Constr., Inc. v. Sec'y of Army*, 856 F.3d 938, 943 (Fed. Cir. 2017). The interpretation of DFARS § 252.227-7013(f) is a legal issue, and the Board's decision is reviewed de novo. *Gen. Dynamics Corp. v. Panetta*, 714 F.3d 1375, 1378 (Fed. Cir. 2013); *accord* 41 U.S.C. § 7107(b).

"[t]he Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process." 10 U.S.C. § 2320(a)(1). The statute also requires that any such regulations "shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation." *Id.* And most important for this case, "[s]uch regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law." *Id.*

That last sentence is important here. Under the statute, any regulation promulgated by the Department of Defense cannot "impair any right . . . of any contractor or subcontractor with respect to . . . any other right in technical data otherwise established by law." *Id.* The relevant question is thus whether DFARS § 252.227-7013(f) impairs any rights the contractor has in its technical data, with "rights" being understood broadly as any right "established by law."

The Board acknowledged the potential statutory issue but failed to recognize the necessity of deciding it. The Board thought it could bypass

this element of regulatory interpretation. But it was incumbent upon the Board to determine whether its interpretation of DFARS § 252.227-7013(f) conflicts with 10 U.S.C. § 2320(a)(1). The Board did not, and this was a fundamental shortcoming with its analysis that (at a minimum) warrants vacatur and remand.

If remanded, the Court should direct the Board to apply the traditional interpretative tools to ensure that statutes and regulations do not become continually shifting directives, divorced from their text. "[A] statute is not a chameleon. Its meaning does not change from case to case. A single law should have one meaning . . . ." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring)). As a result, "[i]t is not at all unusual" to apply "a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). This common sense one-statute/one-interpretation rule applies equally to regulatory interpretation. *See Kisor v. Wilkie*, 129 S. Ct. 2400, 2415 (2019)

(reaffirming that courts must apply all the same "traditional tools" of construction when interpreting regulations).

The lowest common denominator here is the controlling statute. So even assuming, for argument's sake, that Boeing's contract reveals no protected intellectual property, the Board cannot duck the potential statutory conflict because its interpretation of the regulation applies in *all* cases. "[I]f fairly possible, legislative regulations must be construed to avoid conflict with a statute." *Exxon Corp. v. United States*, 40 Fed. Cl. 73, 90 (1998); *see also Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994) (rejecting a regulatory interpretation that would "raise a serious question as to the [regulation's] consistency" with the governing statute). "[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Trs. of Ind. Univ. v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980) (Friedman, C.J.). An interpretation that is "consistent with the [governing] statute" is "preferred." *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996) (internal quotation marks omitted).

The plain meaning of the first sentence of DFARS § 252.227-7013(f) does not forbid a contractor from providing notice about its ownership

and other residual rights in the "unlimited rights" technical data. The first sentence of § 252.227-7013(f), titled "Marking requirements," requires that a contractor, such as Boeing, "may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction."[3] That sentence contains no restriction on providing notice to third parties about a contractor's residual ownership rights in the licensed technical data.

On their face, Boeing's markings do not assert, convey, or imply any restriction on the Government's rights in the data. The markings inform a reader that, subject to the unlimited rights license, Boeing retains

[3] DFARS § 252.227-7013(f) reads in full:

> Marking requirements. The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (f)(2) of this clause; the limited rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

ownership and other residual rights in the data. The Air Force does not dispute Boeing's ownership of the underlying technical data. *See* Air Force Br. 15 (agreeing that "Boeing remains the owner of the data"). Importantly, by using the disjunctive "or," the markings expressly convey that authorization for data use can be granted by either the U.S. Government or Boeing—not that both entities must provide authorization. *See* Appx5 ("Non-US Government recipients may use and disclose only as authorized by Boeing *or* the U.S. Government." (emphasis added)).

In a sense, then, the key question is whether § 252.227-7013(f) applies to Boeing's legends. It does not. Boeing's legends merely provide notice to third parties about Boeing's residual rights in the data—such as ownership and whatever additional rights may exist. The legends, on their face, do not restrict the Government's ability to use the data in accordance with an unlimited rights license. Section 252.227-7013(f) thus does not—and cannot properly—prohibit an "ownership notice," such as Boeing's, because the ownership notice does not "assert[] restrictions on the Government's right" to use the data.

But if DFARS § 252.227-7013(f) does prevent notices of the type Boeing offered, then there appears to be a serious question about the regulation's validity. The right to provide notice flows from 10 U.S.C. § 2320(a)(1)'s mandate that no regulations may "impair" the contractor's rights in the technical data. Otherwise, without that notice right, the contractor will have its retained rights (whatever they are) impaired by its inability to put third parties on notice about ownership and other retained rights. Such an impairment is impermissible under 10 U.S.C. § 2320(a)(1).

II. The Board's Decision Presents Substantial Concerns For Companies That Contract With The Federal Government.

The Board's interpretation of DFARS § 252.227-7013(f) creates substantial problems for companies that contract with the Government. Its construction of § 252.227-7013(f) impairs rights that contractors have in technical data—in violation of 10 U.S.C. § 2320(a)(1). The incorrect interpretation will likely cause significant economic harm to private companies in the government contracting space.

An important right for all property owners, including a government contractor who owns technical data licensed to the federal government, is the ability to provide notice to third parties about the contractor's

ownership and other appurtenant data rights. A contractor must be permitted to notify third parties about ownership and other rights, *e.g.*, trade secrets, in any technical data. If a contractor cannot provide such notice, the contractor might lose its rights for failing to put the public on notice of the ownership interest in the property, *i.e.*, the technical data.

The same holds true in the context of general data rights. In the modern economy, data rights are extremely valuable. The value of data remains high, even outside the context of trade secret protection. *See, e.g.*, Moritz Godel, *et al.*, *The Value of Personal Information: Evidence from Empirical Economic Studies*, 88 Communications & Strategies 41 (2012); Alessandro Acquisti, *et al.*, *What Is Privacy Worth?*, 42 J. of Legal Studies 249 (2013). For this reason, the private marketplace is replete with data-rights licensing activity.

Ultimately, if a contractor cannot include ownership notices with its licensed technical data, the contractor will be impaired—in violation of 10 U.S.C. § 2320(a)(1)—in its ability to discourage competitors from any unauthorized use of its technical data. *Cf. Defense Federal Acquisition Regulation Supplement; Rights in Technical Data*, 60 Fed. Reg. 33,464, 33,465 (June 28, 1995) (noting that "[s]uch markings are

commonly used in commercial practice to protract proprietary data or trade secrets"); Kurt A. Kappes & Daniel D. Straus, *ASBCA Decision Underscores Need for Federal Government Contractors to Protect Data Rights and Trade Secrets*, GT Alert (Jan. 10, 2019)[4] (explaining that the inclusion of legends may "discourage competitors from engaging in unauthorized use of the contractor's technical data or computer software"). The blanket prohibition on ownership notices will be particularly damaging in instances of unauthorized access to the licensed technical data.

The strength and enforceability of continued ownership rights often depend on proper notice to third parties. Providing notice about property ownership—whether real property or intangible property, such as technical data—is often necessary to ensure a proper remedy if the property right is violated. *See, e.g.*, 35 U.S.C. § 287 (marking requirement for patents). Failure to provide notice can diminish the value of the ownership right in the underlying data.

[4] https://www.gtlaw.com/en/insights/2019/1/asbca-decision-underscores-need-for-federal-government-contractors-to-protect-data-rights.

If the Board's decision applies to situations beyond the "unlimited rights" context, then its reasoning may raise similar concerns about the improper restrictions on a contractor's ability to provide notice about its ownership rights in the technical data. The fact that the Board did not address these additional possible conflicts is a further reason to caution against the Board's apparent blanket rule that DFARS § 252.227-7013(f) prohibits a general ownership notice.

The Board's decision, then, would have far-reaching adverse effects on many businesses that contract with the federal government. Those businesses will likely suffer a loss of revenue associated with the licensed technical data they continue to own. That in turn will have adverse consequences on the federal government by discouraging business from contracting with the Government. These additional policy reasons underscore the erroneous interpretation of DFARS § 252.227-7013(f) advanced by the Air Force and adopted by the Board.

In the context of government contracts, the contract price depends on many factors, including the cost of acquiring a license to the technical data versus outright ownership of the technical data. With an unlimited rights license, the Government obtains a wide range of rights to use the

technical data. *See, e.g.*, DFARS § 7013(a)(16); DFARS § 252.227-7013(b)(1). But the Government does not obtain ownership of the technical data developed during the contracting period. Ownership of the data remains with the contractor, and the contractor retains the ability to recoup its investment by commercializing the technical data, *e.g.*, separately licensing the data to third parties in different transactions.

If a contractor's rights to the underlying technical data are impaired because it cannot put third parties on notice of its ownership, then the value of the technical data decreases. The contractor will have less incentive and less ability to commercialize the data and recoup its investment (beyond the payment from the contract). Knowing this, contractors will be compelled to submit high bids for contracts to ensure that the market value of its work is rewarded through the contract—since the contractor will be less likely to obtain commercial value for the technical data in the private marketplace.

The Board's decision thus creates a legally suspect obstacle for private companies who want to protect the value of their proprietary technical data and software that is bad for both contractors and the Government (and thus the public at large).

CONCLUSION

For the foregoing reasons, the Court should reverse or vacate and remand the decision of the Armed Services Board of Contract Appeals.

Date: December 27, 2019

Respectfully submitted,

/s/ Matthew J. Dowd

Matthew J. Dowd
Robert J. Scheffel
Dowd Scheffel PLLC
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, D.C. 20006
(202) 559-9175
mdowd@dowdscheffel.com

Counsel for Chamber of Commerce of the United States of America and Professional Services Council

FORM 19. Certificate of Compliance With Rule 32(a)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a) or Federal Rule of Federal Circuit Rule 28.1.

☒ This brief contains [*state the number of*] 2,817 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), or

☐ This brief uses a monospaced typeface and contains [*state the number of*] _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Federal Circuit Rule 28.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

☒ This brief has been prepared in a proportionally spaced typeface using

[*state name and version of word processing program*] Microsoft Word 2019 in

[*state font size and name of type style*] Century Schoolbook font size 14, or

☐ This brief has been prepared in a monospaced typeface using

[*state name and version of word processing program*] _____ with

[*state number of characters per inch and name of type style*] _____.

/s/ Matthew J. Dowd

(Signature of Attorney)

Matthew J. Dowd

(Name of Attorney)

Counsel for Amici Chamber of Commerce of the United States of America and Professional Services Council

(State whether representing appellant, appellee, etc.)

December 27, 2019

(Date)

Reset Fields

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on December 27, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matthew J. Dowd
Matthew J. Dowd
Dowd Scheffel PLLC
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, D.C. 20006
(202) 559-9175
mdowd@dowdscheffel.com

Dated: December 27, 2019