

27.404-5 Unauthorized, omitted, or incorrect markings.

(a) Unauthorized marking of *data*.

(1) The Government has, in accordance with paragraph (e) of the clause at 52.227-14, the right to either return *data* containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies *shall* not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(i) If the contractor fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the Government *may* cancel or ignore the markings.

(ii) If the contractor provides a written justification substantiating the propriety of the markings, the *contracting officer shall* consider the justification.

(A) If the *contracting officer* determines that the markings are authorized, the contractor will be so notified *in writing*.

(B) If the *contracting officer* determines, with concurrence of the *head of the contracting activity*, that the markings are not authorized, the contractor will be furnished a written determination which becomes the final agency decision regarding the appropriateness of the markings and the markings will be cancelled or ignored and the *data* will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. The markings will not be cancelled or ignored until final resolution of the matter, either by the *contracting officer's* determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed.

(3) The foregoing procedures *may* be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request. In addition, the contractor *may* bring a *claim*, in accordance with the Disputes clause of the contract, that *may* arise as the result of the Government's action to remove or ignore any markings on *data*, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(b) Omitted or incorrect notices.

(1) *Data* delivered under a contract containing the clause without a *limited rights* notice or *restricted rights* notice, and without a copyright notice, will be presumed to have been delivered with *unlimited rights*, and the Government assumes no liability for the disclosure, use, or reproduction of the *data*. However, to the extent the *data* has not been disclosed without restriction outside the Government, the contractor *may*, within 6 months (or a longer period approved by the *contracting officer* for good cause shown), request permission of the *contracting officer* to have the omitted *limited rights* or *restricted rights* notices, as applicable, placed on qualifying *data* at the

contractor's expense. The *contracting officer* may permit adding appropriate notices if the contractor-

- (i) Identifies the *data* for which a notice is to be added;
- (ii) Demonstrates that the omission of the proposed notice was inadvertent;
- (iii) Establishes that use of the proposed notice is authorized; and
- (iv) Acknowledges that the Government has no liability with respect to any disclosure or use of any such *data* made prior to the addition of the notice or resulting from the omission of the notice.

(2) The *contracting officer* may also-

- (i) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the *data* on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or
- (ii) Correct any incorrect notices.

Parent topic: [27.404 Basic rights in data clause.](#)