

U.S. DEPARTMENT OF
ENERGY

Office of
**ENERGY EFFICIENCY &
RENEWABLE ENERGY**

Leveraging Existing Bioenergy Data Workshop: DOE Legal Perspective

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Government Data Rights

- The **mission of the Energy Department** is to ensure America's security and prosperity by addressing its **energy**, environmental and nuclear challenges through transformative science and technology solutions. To further this mission, DOE funds R&D efforts and disseminates the results (data). Data is any recorded information, including software, in any format.
- R&D efforts may be via financial assistance (e.g., grants or cooperative agreements with industry, universities, or nonprofit entities), funding our National Laboratories, or via lab partnering agreements (e.g., CRADAs).
- Two types of data – (1) data first produced under the award or under another agreement (*i.e.*, at least partially produced with government funds or cost share funds) and (2) proprietary data produced with all private funds and outside any award or government contract.

Government Data Rights

- **General Rule:** DOE is required to make public, by law, the findings of research it helps to fund, i.e., trade secrets cannot be developed with public funds, so data produced under awards cannot be protected indefinitely.
- **Government has unlimited rights to all data first produced under the agreement;** this type of data is often referred to as unlimited rights data
- **Government obtains only limited or restricted rights to recipients' proprietary data produced outside award with private money;** this type of data is often referred to as limited rights data or restricted rights software.
- **Exception: Special Data Protection –** a few statutes allow data protection for up to 5 years for data that would have been a trade secret if privately funded. This limited protection time may aid in commercialization of taxpayer-funded technology. (e.g., EAct, CRADA statute)

Take-Home Messages

- **Taxpayers will not pay for the same data twice: If data is developed under a Government agreement, DOE will not pay for it a second time. We already have unlimited rights in that data.**
- **If you are engaged in an effort to obtain existing bioenergy data, be sure your system is able to differentiate Government-funded data from privately-funded data, so that it can be valued accordingly.**

BETO Funding Opportunity Announcements (FOAs)

- FOAs are one of DOE's mechanisms for soliciting applications from bioenergy industry entities, National Laboratories, academia and other stakeholders for research, development, demonstration and deployment projects.
- DOE FOAs are subject to minimum cost share requirements established by § 988 of the Energy Policy Act of 2005. "Cost Share" refers to the portion of the project costs contributed by non-Federal sources (recipients and other third parties)
 - **20% for research and development programs or activities; and**
 - **50% for demonstration or commercial programs or activities.**
- Cash v. "In Kind" Cost Share

Reasonableness Requirement

- Costs under a DOE-funded project (including cost share) are allowable only after they're determined to be **reasonable** and allocable to the award.

2 CFR §200.404 defines reasonable costs as follows:

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the non-Federal entity is predominantly federally-funded.

Reasonableness Requirement (continued)

- The definition of reasonableness for Financial Assistance awards to commercial organizations under FAR §31.201-3 is very similar to §200.404, but it relates the concept to a competitive business.
- Where government entities are generally subjected to competition requirements in procurement, corporations might choose to acquire items without soliciting multiple bids to get competitive pricing.
- Therefore, no presumption of reasonableness can be attached to commercial entities' costs.

Valuation of Bioenergy Technical Data as In Kind Cost Share

- **Value Measurement Guidance:** What would it cost if it weren't free?
- **Obstacles and Concerns:**
 - Must be a supportable valuation, using concrete numbers for the actual value of the data
 - There may not be a recognized marketplace for the data
 - Since the recipient already owns the data, it's not incurring any cost for it
 - Additional issues where the data was developed and funded through a prior government contract or award (and related difficulties with identifying the source of the data)