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AUTHORS

[Thomas J. Madden](#)

Washington, DC
tmadden@Venable.com
202.344.4803

[Paul A. Debolt](#)

Washington, DC
padebolt@Venable.com
202.344.8384

[James Y. Boland](#)

Washington, DC
jyboland@venable.com
202.344. 8273

Air Force Found Liable for Breach of a Cooperative Research and Development Agreement due to Unauthorized Disclosure of Proprietary Information

In December 2008, the U.S. Court of Federal Claims (“COFC”) published an unsealed decision in which the court found the U.S. Air Force liable for breach of a cooperative research and development agreement (“CRADA”) due to its disclosure of proprietary information protected under the agreement. *See Spectrum Sciences and Software, Inc. v. United States*, No. 04-1366C (Fed. Cl. Dec. 8, 2008). The Spectrum decision is notable because: (1) it reveals the extent to which agencies may seek to appropriate a company’s proprietary information—furnished to the government under a CRADA—without consent or compensation; (2) it illustrates the benefits of a fairly broad definition of “proprietary information” with potential application to contracts, small business innovative research (“SBIR”) programs and other forms of government funding agreements; and, (3) it demonstrates the court’s willingness to hold the government liable for breach of a nondisclosure agreement.

Case Background: In *Spectrum*, the Air Force entered into a CRADA with Spectrum Sciences and Software, Inc. (“Spectrum”) to share information relating to the improvement of the Munitions Assembly Conveyor (“MAC”)—a conveyor system used by the Air Force to assemble various components of aerial bombs near the airfield. The original MACs, designed in the late 1970s to handle approximately 500-lb munitions, were unable to accommodate effectively modern munitions, such as guided bombs that weigh close to 3,000 lbs each.

In early 2000, Spectrum independently developed and tested an improved MAC system that could accommodate heavier munitions due to the fact that the original MAC system was no longer capable of meeting the Air Force’s needs. Around this time, the Air Force decided to conduct an engineering analysis to determine whether it was feasible to improve the existing MAC system in lieu of a complete re-design as a way of meeting the Air Force’s needs. In recognition of the mutual benefits of collaboration, the Air Force negotiated a CRADA with Spectrum in which the parties agreed to “share in the exchange of ideas and demonstrate the form, fit, and function of newly designed and improved munitions related handling items.” *Spectrum* at 8. The CRADA included protections for each party’s proprietary information, which was defined to include, in part, confidential technical, business, and financial information that is “not generally known,” “has not been made available by the owners to others,” and is “identified as such by labels or markings designating the information as proprietary.” *Id.*

The Air Force’s Disclosure of Spectrum’s Proprietary Information: After the CRADA was negotiated, Spectrum provided the Air Force with various information it developed at private expense prior to the CRADA and gave Air Force officials access to drawings, prototypes, and Spectrum’s test facilities to observe various tests of its improved designs. Additionally, Spectrum reported to the Air Force that an improved MAC would not require a “radical design departure” from the original MAC design. *Id.* at 21. With this key information in hand, the Air Force drafted a solicitation for a new MAC system—without informing Spectrum that it was doing so—that was based upon and included information from other Air Force personnel that were directly involved in the CRADA.

Spectrum complained to the Air Force that the draft solicitation disclosed proprietary information subject to the CRADA. Although some information was removed, the Air Force issued a final solicitation without affording Spectrum an opportunity to review the final solicitation for its proprietary information. Ultimately, the Air Force awarded a contract to one of Spectrum’s competitors, which proposed a solution with many similar features to the one designed by Spectrum, including a solution that only required an upgrade to the MAC rather than a complete re-design.

Breach of Contract: Spectrum filed suit at the COFC alleging breach of contract based on the Air Force’s disclosure of its proprietary information. After a trial on the merits, the court concluded that the information disclosed by the Air Force was, in fact, “proprietary information.” In reaching this decision, the court observed that the appendix to the CRADA identified specific features of its improved MAC design that qualified as protected information, including the expanded weight limit, the braking system, and the improvements to the interface control board. Further, the court held that the Air Force’s reading of the agreement, which ignored the specific type of information listed in the appendix, would essentially allow the Air Force to disclose all unwritten information supplied by Spectrum under the CRADA, including such “information” as Spectrum’s achievement in proving that a new MAC system could be developed without a significant departure from the basic design. *Id.* at 30.

After concluding that the information disclosed was “proprietary” the court reached the “inescapable” conclusion that the Air Force “repeatedly breached its confidentiality obligations” under the CRADA. *Id.* at 36. The court found that the Air Force did not obtain permission from Spectrum to disclose any information and that it had provided protected information to other Air Force contracting officials that did not need to have it and were not associated with the CRADA. These officials, in turn, shared the protected information with other members of the new MAC procurement team, which incorporated the protected information into the solicitation that was shared with other vendors.

Key Points From Decision: The key points companies should take from this decision are listed below.

- While CRADAs can be very beneficial to a prospective contractor, the *Spectrum* decision demonstrates that collaborating with the government on any research and development effort is no guarantee that you will be selected for an award of a contract or other type of funding agreement.
- The court broadly interpreted the CRADA’s definition of “proprietary information” to include not only technical data developed at private expense but also unwritten information and knowledge, including Spectrum’s demonstration and proof that a new MAC could be improved to meet the Air

Force's needs without a major re-design. The court's broad understanding of "proprietary information" and willingness to hold the government liable for breach should encourage companies that may benefit from a collaboration with the government under research and development contracts, SBIR programs, cooperative agreements, other transactions and the like and to discourage the government from making improper use of a contractor's proprietary information.

- The CRADA in this case included an appendix that expressly identified information that the company considered proprietary and wanted to be protected under the agreement. Under their contracts and other agreements with the government, companies should broadly and specifically define the proprietary information including technical data and software that they want protected so that there is no confusion as to what information the company intends to keep confidential.
- The *Spectrum* decision illustrates that incorporating information learned under a CRADA into a competitive solicitation is one way in which the government may intend to disclose proprietary information. If "proprietary information" is defined broadly enough under the CRADA, the government should be liable to the company for damages for breach of contract if they publish such information in a solicitation without the company's consent.

Upcoming Events

Contractor Compliance Programs in an Era of Mandatory Requirements: How to Maximize Effectiveness and Minimize Risks

Please join Venable LLP, PNC Bank and Beers + Cutler on Thursday, February 12, 2009 for an informative breakfast program on how government contractors can protect their interests in an era of increased oversight and accountability. Hear from our experienced and dynamic panel on the following topics:

- New law and regulations requiring mandatory reporting of fraud and overpayments: The most recent challenge for contractors
- Regulations requiring mandatory codes of conduct, ethics training, and internal controls: The compliance basics
- Building federal compliance into a commercial company: Key components and costs of an effective ethics program
- Tone at the Top: Building a culture of ethics from the top down

Panelists will include **Maryanne R. Lavan**, Vice President of Internal Audit, Lockheed Martin Corporation and formerly Vice President of Ethics and Business Conduct, **Tony Fuller** from Beers + Cutler, as well as Venable's **Robert Burton** and **Rebecca Pearson**. Panel will be moderated by **Doug Brown**, Government Contracting Group Manager and Senior Vice President of PNC Bank.

Venable office locations

BALTIMORE, MD

750 E. PRATT STREET
NINTH FLOOR
BALTIMORE, MD 21202
t 410.244.7400
f 410.244.7742

LOS ANGELES, CA

2049 CENTURY PARK EAST
SUITE 2100
LOS ANGELES, CA 90067
t 310.229.9900
f 310.229.9901

NEW YORK, NY

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TWENTY-FIFTH FLOOR
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f 212.307.5598

ROCKVILLE, MD

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FIFTH FLOOR
ROCKVILLE, MD 20850
t 301.217.5600
f 301.217.5617

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TOWSON, MD 21204
t 410.494.6200
f 410.821.0147

TYSONS CORNER, VA

8010 TOWERS CRESCENT DRIVE
SUITE 300
VIENNA, VA 22182
t 703.760.1600
f 703.821.8949

WASHINGTON, DC

575 SEVENTH STREET NW
WASHINGTON, DC 20004
t 202.344.4000
f 202.344.8300

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