



Navigating Data Rights

MARTENSEN 

Why This Presentation?



Experience is the best teacher, but the tuition is high.

– Norwegian Proverb

Road Map



- Big Picture on IP and where Data Rights fit in
- Data Rights - What are they
- The Regulations ...
- Segregation and Reintegration

Big Picture

- The Government generally receives only a license in the IP being acquired; the contractor retains title or ownership, and all other rights that are not granted to the Government.
- All technology licensing is divided up between two mutually exclusive categories of deliverables: technical data (TD), and computer software (CS). The policies and procedures governing acquisition of technical data are based on statutes; analogous policies and procedures are generally extended to computer software by policy.
- To ensure a successful acquisition, the contract must address both the delivery requirements, and the associated data rights, in all technologies developed or delivered under the contract.
- The Government generally seeks to acquire only the minimum deliverables, and associated license rights, necessary to meet its needs.
- The Government's license rights are determined in one of three primary ways: (1) by using one of the standard, Government-unique license categories that are defined in the acquisition regulations; or (2) by using the contractor's standard license agreement for a commercial technology; or (3) by negotiation of the parties to create specialized, mutually acceptable terms and conditions.

Big Picture

- The acquisition must distinguish noncommercial and commercial technologies; there are special policies and presumptions, and streamlined procedures, that govern acquisition of commercial technologies.
- In most cases, the scope of the Government's standard license rights in noncommercial technologies are directly proportional to the relative level of Government funding provided for development of the technology: more Government funding results in a license of more broad scope.
- For commercial technologies the Government generally receives the same deliverables, and same license rights, that are customarily provided to the public. Commercial technologies are presumed to have been developed entirely at private expense and thus would otherwise result in the Government receiving a license of narrow scope.

Big Picture

- In all cases, the parties are free to negotiate specialized license rights that most effectively balance the parties' interests. In some cases, the statutes or regulations provide certain minimum license rights that the Government must receive.
- The regulations generally require that the parties identify and resolve these issues as early as possible in the acquisition—preferably prior to contract award.
- The regulations generally apply the same rules at both the prime and subcontract levels; in most cases, the Government and subcontractor may transact matters directly regarding rights in data or software.

Eye Chart

Technical Data		Computer Software	
Limited Rights (Technical Data)		Restricted Rights (Computer Software)	
<u>FAR</u> <ul style="list-style-type: none"> • Developed at private expense <u>and</u> not developed in performance of a contract • Includes minor modifications • Gov't may use or reproduce; may not disclose outside gov't or use for manufacture (other permitted uses listed in clause) 	<u>DFAR</u> <ul style="list-style-type: none"> • Developed at private expense • Properly marked • Gov't may use, modify, reproduce, release, perform, display, or disclose within the gov't; may not disclose outside gov't or use for manufacture (with limited exceptions such as emergency repair and foreign gov't) 	<u>FAR</u> <ul style="list-style-type: none"> • Developed at private expense <u>and</u> not developed in performance of a contract • Includes minor modifications • Gov't may use on main computer, for backup / archive; may modify, adapt, and combine with other software; may disclose for service 	<u>DFAR</u> <ul style="list-style-type: none"> • Developed exclusively at private expense • Gov't may: access by one computer at a time; backup / archive; modify and disclose for service; disclose to contractors for emergency repair / overhaul
Unlimited Rights		Unlimited Rights	
<u>FAR</u> <ul style="list-style-type: none"> • First produced in performance of a gov't contract, irrespective of funding; all other data delivered unless marked • "First produced" is broad 	<u>DFAR</u> <ul style="list-style-type: none"> • Developed exclusively with gov't funds or publicly available, except detailed process / manufacture data • "Developed" = 's "workable" and need not be reduced to practice 	<u>FAR</u> <ul style="list-style-type: none"> • First produced in performance of a gov't contract, irrespective of funding; all other data delivered unless marked • "First produced" is broad 	<u>DFAR</u> <ul style="list-style-type: none"> • Developed exclusively with gov't funds or documentation required to be delivered under the contract • "Developed" = 's programs run, software source code exists, and documentation is written
Government Purpose Rights		Government Purpose Rights	
<u>FAR</u> <ul style="list-style-type: none"> • Applies to cosponsored research and development • Right to unlimited use within the gov't and for gov't purpose by any others (reprocurement) 	<u>DFAR</u> <ul style="list-style-type: none"> • Applies to component or process developed with mixed funding or technical data developed with mixed funding 	<u>FAR</u> <ul style="list-style-type: none"> • Applies to cosponsored research and development • Right to unlimited use within the gov't and for gov't purpose by any others (reprocurement) 	<u>DFAR</u> <ul style="list-style-type: none"> • Applies to component or process developed with mixed funding or technical data developed with mixed funding

Different Rules

- The Sovereign writes the rules
 - Pre-set rules FAR
 - DFAR Department of Defense
 - DEAR Department of Energy
 - AGAR Department of Agriculture
 - HHSAR Department of Health and Human Services
 - HSARA Department of Homeland Security
 - ... and 17 other FAR supplements

- Executive departments, military departments, or independent establishments and any wholly owned government corporations are generally required to follow the FAR.
- However, the FAR does not apply to all executive branch agencies, or to all organizational components of an executive branch agency (e.g., the FAA and the US Mint).

DFAR

- DFARS is probably the most well-known and commonly encountered FAR supplement.
- The DFARS typically add more specificity to the FAR, and in some cases actually add details that are advantageous to the contractor.

Definitions

- Technical data
 - Recorded information, regardless of the form or method of recording, of a scientific or technical nature (including software documentation)
 - Does not apply to the item or component itself
 - Does not apply to computer software
 - Includes data bases
 - Excludes financial, administrative, cost or pricing, or management data or other information incidental to contract administration

Definitions

- Software
 - Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations
 - Recorded information that comprise source code, design details, algorithms, processes, flow charts, formulas and related material that would enable the computer program to be produced, created or compiled.

Definitions

- Form, Fit and Function data
 - Data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size configuration, mating and attachment characteristics, functional characteristics and performance requirements.
 - For computer software, this means data identifying source, functional characteristics, and performance requirements but specifically excludes source code, algorithms, processes, formulas, and flow charts of software

Rights

Unlimited

means the rights of the government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly, in any manner and for any purpose, and to have or permit others to do so. ... but

*For copyrighted works, the contract grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly **by or on behalf of the Government**, for all data (other than computer software) first produced in the performance of a contract. For computer software, the scope of the Government's license includes all of the above rights **except the right to distribute to the public**.*

Limited (technical data) / Restricted (Software)

Essentially commercial rights

Government Purpose Rights

Somewhere in the middle

Hybrid

Copyright

- – Reproduce
- – Prepare Derivatives
- – Perform
- – Display
- – Distribute

Trade Secret

- Any/all activities
- Focus on release & disclosure

Data Rights

- Use
- Reproduce
- Modify
- Perform
- Display
- Release
- Disclose
- (FAR) Distribute

Who gets what – Unlimited Rights

- Generally
 - **Developed exclusively** with Government Funds
 - Unlimited Rights
 - But note
 - FAR
 - First produced in the performance of a government contract
 - Regardless of funding
 - Other
 - Form, Fit and Function – Always Unlimited
 - » Manuals, installation instructions, documentation, etc.

... the details

- “Developed” and “Delivered”
 - An item, component or process exists and is workable
 - The item or component has been constructed or process practiced
 - Workability is established when the item or component or process has been analyzed or tested sufficiently to demonstrate to one of reasonable skill in the applicable art that there is a high probability that it will operate as intended
 - Compare.... Actual reduction to practice...

... the details

- “At Private Expense” .. or not **exclusively** with Government Funds
 - Was accomplished entirely with costs charged to indirect cost pools, costs not allocated to the government contract, or any combination thereof
 - Made at the lowest practical level
 - Segregable
 - Additional costs not considered for rights allocation (FFP contract)

So let's look at a circuit

- The widget
- The design drawing
- The specifications
- Performance data
- Code
- Interfaces

Take Homes

- Restrictions on government rights are not self-executing
 - Assert Copyright Ownership
 - Copyright protection may preclude third parties from using technical data and software for anything other than government purposes
 - Scrutinize the statement of work and deliverables list, especially with respect to “development” tasks
- Painstakingly include prescribed legends on data and software
 - Confidential proposal data should be protected with a prescribed legend on the title page and at the foot of each page containing such data
 - Identify limited rights/restricted rights material in response to RFPs
- Confidential proposal data should be protected with a prescribed legend on the title page and at the foot of each page containing such data

Take Homes

- Accounting system should permit the segregation of development costs (by product and, if feasible, by component)
- Accounting system should identify funding source for development effort
- IR&D counts as private expense, even though a portion may be recovered under government contracts through indirect cost rates
- Mark all deliverables

Take Homes

- If possible, develop at private expense key segregable tech data / software; avoid ‘fully integrating’ developments with pre-existing tech data / software
- If practical, generate rights-specific tech data (e.g., 1 drawing with LR “baseline” data, another with GPR data, etc.)
- Limit what is required to be delivered to USG and deliver no more than what is required
- Satisfy admin requirements (marking, track development costs, etc.)
- If commercial item, use commercial license (with minor changes – e.g., venue, indemnification)
- Training of staff



Q&A

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Big Picture

- Government Contractors retain ownership of IP developed under a government contract
- Government gets rights in the IP; for the DoD this is based on funding
- For IP developed with 100% government funding the government gets unlimited rights
- For IP developed without government funding (at private expense) the government gets limited / restricted rights (commercial item)
- For IP developed with mixed funding the government gets government purpose rights

Definitions

- Segregation and Reintegration Data
 - Technical data or computer software that is more detailed than form, fit, and function data and that a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes is necessary for the segregation of an item, or process from the reintegration of that item or process (of physically or functionally equivalent item or process) with, other items or processes.
 - Segregation and reintegration data may include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

Government Wants More

- The Government realized the need to swap one company's system or component with another company's to maintain the viability of a major weapon's system over a long period of time
- It needs the interface, the software, the hardware, the connections to hook these components together
- Company's typically hold those interfaces as proprietary

Segregation and Reintegration

“no man’s life, liberty, or property is safe while the Legislature is in session”

- Introduced rights to Segregation and Reintegration data (developed at private expense) so that the government can take and give this data to anyone ... when
 - The DoD decides what information is necessary to reintegrate or segregate a portion of a weapon or system
 - The idea was to allow contractors to keep rights to their segment of a system but not block competition to the rest of the system
 - Congress left the details to the DoD to get this done

What is this

- Plug and Play
- Modular
- Interfaces
- Open Architecture
- Open Systems Architecture
- Definition of Segregation and Reintegration Data ... only that data is clearly necessary for an interface between different systems
- These are things that one skilled in the art will clearly be able to recognize and define... something like obscenity... you know it when you see it
- Delayed delivery capped to 6 years and limited to only those items developed under the contract, not data utilized in the development

Are these issues ?

- On one hand the new rules suggest the government can gain a company's secrets (competitive advantage), developed at private expense, and disclose them to a competitor... with an "agreement" only to use it for government purposes...
 - but once disclosed can a competitor really forget it exists ?
- Or is this an expansion of the emergency repair and overhaul clause that already exists and gives the government rights when it makes a mistake ..
 - Is the government simply asking for data it should have recognized when it drafted the contract but didn't

- Technical data or computer software that is more detailed than form, fit, and function data and that is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, of the reintegration of that item or process (of physically or functionally equivalent item or process) with, other items or processes.
- Data identified as Segregation and Reintegration data, even if developed at private expense, can be shared by the government to your competitors ... albeit only for government purposes.
- This may include source code to this segregation and reintegration data.
- The government can go back 6 years to modify the delivery of a contract to include Segregation and Reintegration data



Q&A

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