

## A Practical Approach to IP Protection for Government Contractors

by Mike Martensen | Sep 13, 2021 | Government Contracts, Intellectual Property Due Diligence



A recurring concern voiced by small or emerging companies working in the government marketplace is, "How do I effectively protect my IP when I'm forced to work with large prime contractors?" A threat is perceived that a prime contractor will take or steal the IP from a subcontractor (small company) to eliminate competition or capture leverage with the government and that the government turns a blind eye to such actions.

Is there truth in this fear? Yes and no. It is exceptionally rare that companies, of any size, steal IP. Does it occur? Yes. Is it the norm? No. What is the norm is that companies often give away their IP. And such gifts are normally done unwittingly. It may be more accurate to state that they fail to take the necessary steps to protect their IP.

### Operating Effectively in the Government Marketplace

To deal effectively with this reality, it is important to recognize that the government marketplace is unique. [Jay Jesse](#), a friend and colleague of mine reminded me that the regulations that govern these transactions have been developed over the past 200 years and, as some would say, have been unimpeded by progress. They are what they are. No one company, large or small, is going to change the way the government operates.

The government gains the rights to data and inventions laid out in the applicable regulations. For most contracts, these rules are found in the Federal Acquisition Regulations (FAR) and its associated supplements. Contracting officers for the government are charged with protecting the government's best interest just as would be a contracting officer for any company. It's no surprise to find out then that disagreements on IP between a prime and subcontractor fall on deaf government ears when the

government's rights are not implicated.

Clearly the government, as a customer, is unique. One unique characteristic of the government as a customer is that it has little to no competition. In the government marketplace, the number of customers is usually one. In a commercial marketplace, the number of potential customers can be measured in the thousands if not more. So, protection and enforcement of IP differ.

## **Commercial and Government Environments Compared and Contrasted**

In a commercial marketplace, a competitor infringing an innovative company's IP rights likely will experience increasing scrutiny up to and including litigation. In many instances that competitor's customers are involved in the process in an ancillary way, and while not the target of the assertions, they are, nonetheless, collateral damage.

The likelihood of those customers jumping ship to your product is negligible. And the impact on the overall customer field is very low. The real goal in such an endeavor is to secure or protect the other thousands of would-be customers.

In the government marketplace, in which there is but one customer, trying to enforce IP against a competitor may have the less-than-desirable effect of implicating the very customer you want to impress. And in many cases, the government steps into the shoes of the contractor with respect to claims of IP infringement. So, rather than trying to limit a competitor, you may be fighting against the very customer to whom you're trying to sell your product, which is generally not a winning business strategy.

## **How to Protect Your IP in the Government Marketplace**

What can a company do to protect its IP in the government marketplace? This is an area where a penny of prevention is worth a pound of cure.

As in the commercial marketplace, recognizing what IP is of value and taking early steps to protect it can reap substantial benefits. What differs significantly in the government marketplace is how the IP rights are utilized to gain that competitive advantage.

It can be relatively easy in the government marketplace to have the government fund research and development. Yet, with a little foresight and prior planning, the rights to an innovative product can be secured through one or more patents, copyrights or trade secrets. This can be done without providing sweeping rights to the government while, nevertheless, enabling the government to assist in refining and productizing the product to meet its applications.

In this way, the background IP is solely owned and controlled by the company. While providing the government customer with any and all rights it needs, the company now possesses leverage with other competitors including large prime contractors. In doing so, the small, emerging subcontractor secures

not only an initial contract but follow-on work as well.

Timing is important as is learning what the regulations do and do not define as background IP. But with a proper strategy defined and processes to implement that strategy in place, the fear of having your IP stolen fades away.

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