

Subcontractor Landmines in Government Contracts: Protecting Your Property and Rights

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The Dream Scenario . . .

Your small business bid to provide software or technical data was just picked up by a prime contractor ("Big Prime") on a government contract. You are confident that your intellectual property ("IP") will lead to wealth and the growth of your company. So you proceed to put pen to paper on a lucrative contract with the government. Big Prime pays you a generous fee to use, distribute, modify and sell your software and documentation. The government, or a Department of Defense (DoD) service like the Army or Navy, is pleased with the software you provided.

. . . and then the Nightmare

Shortly thereafter, you learn that Big Prime has secured another contract with the DoD. You discover that Big Prime will use and support *your* software and documentation to fulfill *that* contract, and that they have even secured the DoD's approval to do so. But you were never informed, included, or involved in this decision. You assume there was some mistake or misunderstanding. You assume that they can't do that, because *you* own all of that IP. **But they can. And they will. This scenario happens far more often than you might think.**

What You Don't Know *Can* Hurt You

With respect to the DoD, IP that is in the form of software and "technical data," including documentation and databases, is especially complex. It is governed under a combination of copyright, contract, and trade secret laws, found within the DoD's Federal Acquisition Regulation Supplement (DFARS). This large and convoluted set of rules functions as the foundation of all DoD contracts.

Unfortunately, DFARS rules are very complex, hard to understand, and very difficult to follow. Noncompliance can be met with draconian penalties. What you don't know can very seriously hurt you

and your company. If you sign a DoD contract before understanding DFARS, you are stepping into a contractual minefield.

The Moving Variables of a DoD Contract

It's important to understand that your IP rights depend on three variables: who pays for the IP (you or the government), when the IP is developed, and how it is marked. Failure to appreciate any of these three pieces will likely result in the forfeiture of some or all of your IP rights.

For example, as a general rule, the more the DoD pays for your IP, the more rights they have to it. In extreme cases, the DoD can even acquire unlimited rights to your software and data.

Likewise, if your IP is developed at private expense, you can increase the chances of limiting the reach of the DoD. Part of this depends on whether the IP was developed before or after DoD funds were utilized. The specific use of those funds matters as well - money invested in research and development is different from money spent on actual production.

Finally, even if all other precautions were taken, if you fail to label your software or data with the specific and proper DFARS markings that identify your IP as "rights-restricted," you may end up losing those rights, simply from improper labeling. Such a loss could be fatal to your company, especially if your company relies on revenue from a single piece of IP.

It's Not Just the DoD You Need to Worry About

The DoD is not the only way to lose your IP rights. Many contracts are one-size-fits-all, difficult to interpret, and written specifically to be favorable to a prime contractor. Many such "primes" incorporate complex DFARS sections that may not even apply to your company. And many primes will assert the same rights as the government, even though such rights are not required by DFARS. These types of contracts can result in the loss of your IP rights to both the government and Big Prime.

Not All IP Lawyers are Created Equal

Navigating through the rough waters of DoD contracts is no task for the novice. It is neither a simple endeavor nor one that is easy to learn. With respect to DoD contracts that handle IP, having the right attorney is critical. Few firms are well positioned to make this process simple. Some firms specialize in contract law, others in IP law, others in government regulations, and still others in the inner workings of the DoD.

Martensen IP is uniquely qualified in *all* of these areas. Their attorneys are experts in government contracts, intellectual property, and DoD dealings. Martensen's mission is to protect the small business contractor from the hidden dangers of contracts, regulations, and government bureaucracy.

If you're contemplating a DoD or Big Prime contract, talk to us first. The initial consultation is free, and it could spell the difference between a rewarding, successful government contract, or the death of your company's dream.

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