

Hidden Dangers of Government Contracting

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It is the best of situations, it is the worst of situations: signing a contract with the government can seem like one but then quickly turn into the other.

Companies and individuals with intellectual property can be forgiven for thinking that there could be no better arrangement than doing business with a group like the U.S. Department of Defense. After all, what other entity on Earth has more power, resources, and reach than the U.S. government? Who wouldn't want such a wealthy and influential client purchasing their products or services?

Government Contracting Basics

Contracting with the government can indeed become a lucrative relationship that propels a company toward greater success. But the blunt and harsh reality is that the path to get there is riddled with hidden dangers, the kind that can spell the end of a dream and the destruction of a business.

Too often, companies and individuals possessing valuable intellectual property fail to adequately safeguard it with patents, trademarks, and copyrights, putting it at risk of:

- Unlawful use
- Unlawful reproduction
- Illegal distribution
- Theft

This is understandable - securing solid IP protection can be a long, complicated process that can involve considerable expense. It's easy to see why so many end up deciding the cost and confusion simply isn't worth it.

It's especially easy to see why a company might reach that conclusion if the U.S. government is about to

become a customer. Many businesses assume that patents and copyrights are irrelevant and unnecessary if a contract with their own government is on the table.

But in fact, there may be no other instance in which intellectual property protection is so critical as when doing business with the government. This is especially true in situations when a product may be the subject of multiple acquisitions over an extended period of time. The process may be particularly complex, but the protection is particularly valuable, much more so than in a typical commercial arena.

Federal Contracting Red Tape

At the most basic level, intellectual property that is acquired for use by the government is regulated by a mind-numbingly long and complex set of rules called the Federal Acquisition Regulations (FARS). The Department of Defense (DoD) has its own DOD intellectual property guide, the DFARS, which is even more nuanced and convoluted. (Visit FARS site to get an idea of just how complicated these rules and their language really are.)

There are dozens more additions, supplements, materials, and lists of rules, handed down from other government agencies. The Departments of Energy and Transportation, for example, have supplements unique to their offices just as the U.S. Coast Guard has its own protocol since it's regulated by the Department of Homeland Security.

In fact, just about every government department and agency has its own set of regulations on data rights in government contracts, and there are multiple interpretations of how intellectual property acquisitions will be applied to and handled by each. So, not only does one need a comprehensive understanding of the overarching position of FARS and DFARS (and other supplements), but also a thorough grasp of the often-subtle differentiations between individual departments and agencies.

And for the icing on the cake, government contracts are invariably written in the government's favor. All in all, it's enough to make one think that the whole process is designed to trap companies in compromising positions, tricking them through linguistic gotchas and technicalities.

Product and Data Rights in Government Contracts

Unfortunately, that happens all the time. Too often, individuals and companies don't realize or appreciate the extent of the government's reach, and even the best attorneys can fail to understand which sets of regulations apply, and when.

If contracts are signed before being fully understood, the rights of a company or individual to their own intellectual property can be dramatically affected, and not just with the government at large, but also with other commercial entities. At best, one might lose a financial interest or advantage, but at worst, one might lose all rights to the product or service altogether. And yes, that happens all the time, too.

With few exceptions, the government gains a broad license to products that are developed and delivered through a government contract and the data they produce. So broad are these rights, in fact, that the government can, and often does, shift production of the same product among contractors, despite the

origins and owners of the innovation.

But all hope is not lost. A contracting company can increase its competitive advantage and strengthen its position and protection through actions like carefully defining what is called the "deliverable" in the contract, and carefully considering the source of funding used to "develop" or enhance the capabilities of a product. Giving time and attention to just these two areas can create a substantial difference in how much protection the contract affords to the property's developers.

Federal Government Contracting Guidance

The team at Martensen IP can help. We are experts at navigating the rough waters of government contracts. Our attorneys will ensure that you get the right kind of protection for your product before it's too late, and that such protection aligns with all the regulations that exist at every level.

Martensen's mission is to protect small businesses from the hidden dangers of government contracting. So, if you're about to sign a contract or preparing to secure a patent, talk to us first. The initial consultation is free.



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