

Data Rights Developments

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Agenda

- Data Rights
 - Overview of Typical Data Rights Considerations and Licenses
 - Copyright and the FAR
 - Distinguishing between Data Rights and Deliverables
 - Notice and Marking
 - Non-FAR/DFARS Based Rights
 - Considerations when Working as or With a Subcontractor
- Recommended Practices

Setting the Table

- Who Owns Tech and Data Developed Under Government Contracts
 - Look at both technical data (TD) and computer software (CS)
- What are the Contractor's and the Government's Rights in this TD and CS
 - What can the Government do with the TD and CS
 - How do we determine what the Government can do
 - How do you preserve your rights – Notice and Marking
- What happens when the FAR/DFARS Don't Apply (*e.g., OTAs*)
- What happens when working as or with a sub to develop TD or CS
- What About Inventions – Overview of GovCon Patent Policy
 - Who owns the invention, and what can the Government and contractor do with it
- Recommended practices to protect your IP

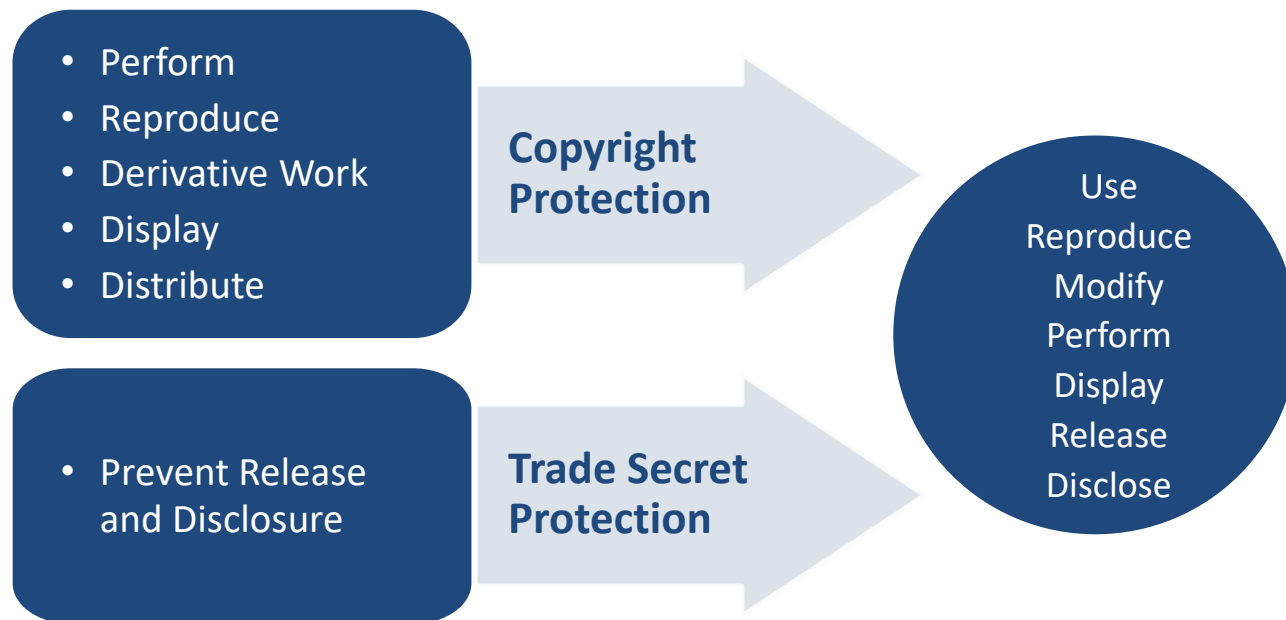
DATA RIGHTS OVERVIEW

Data Rights Overview

- What types of rights are we dealing with
- What are the foundational questions to consider
- High-level differences between the FAR and DFARS
- The different types of data and how they are treated
- The primary ways to determine rights allocations

Gov't Data Rights

- Contract clauses effectively grant the Gov't rights that would otherwise be reserved for the owner through a combination of copyright and trade secrets protections



Data Rights: *Foundational Questions*

1. What does the contract say?
 - Is this contract governed by the DFARS or the FAR?
 - What clauses are included?
 - What rights were asserted?
2. What type of data are we dealing with?
3. Who paid for development?
4. What is being delivered?
5. How are the deliverables marked?

Data Rights: *What Does the K Say?*

Know Whether Your Contract is Governed by the FAR or DFARS

- Agency supplements usually augment, but do not supersede the FAR,
 - ***BUT***
- For DoD contracts, the DFARS data rights provisions supersedes the FAR data rights provisions
 - ***THUS***
- Instead of augmenting the FAR, DFARS Part 227 supersedes FAR Part 27 for DoD contracts

Data Rights: *Governed by the FAR or DFARS?*

Civilian Agencies (*FAR Part 27*)

- Generally, protect data by withholding
- No provision for Gov't Purpose Rights
- Infrequently litigated

DoD (*DFARS Part 227*)

- Protect data by marking
- Gov't Purpose Rights contemplated in mixed funding (*usually 5 yrs. then Unlimited Rights*)
- Relatively well defined and well litigated

Data Rights: *What Types of Data?*

- Data Rights can generally be separated into four categories (*displayed on the chart below with relevant DoD references*). The type of data determines which contract clauses apply.

	Technical Data 10 USC §§ 3771-3772	Computer Software No specific statutes
Commercial	227.7102 252.227-7015 <i>(and/or -7013 if funded at gov't expense)</i>	No DFARS clause. Generally, take modified std. commercial license. 227.7202
Non-Commercial	227.7103 252.227-7013	227.7203 252.227-7014

Data Rights:

Primary Ways to Determine Rights

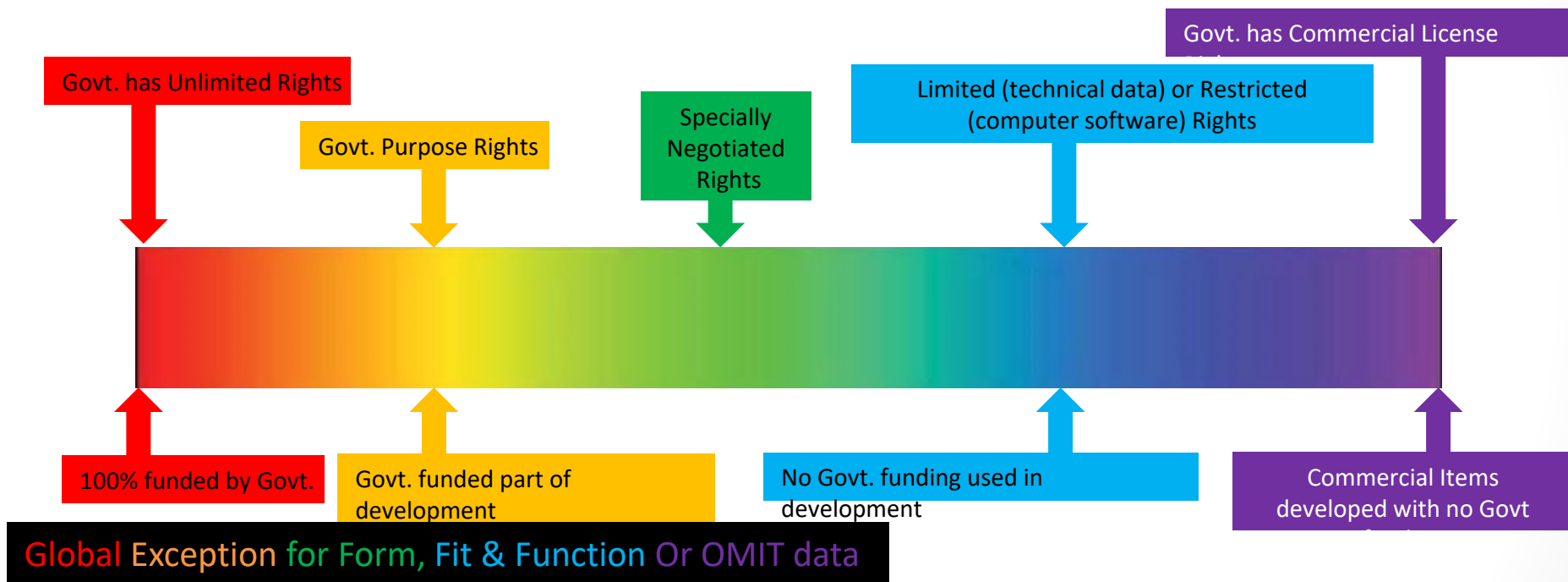
1. Use of one of the standard license categories defined in the acquisition regulations;
2. Use of the contractor's standard license agreement for a commercial technology; or
3. Negotiation of the parties to create specialized, mutually acceptable terms and conditions

Data Rights:

Standard Rights in Non-Commercial Tech Data and Computer Software under the DFARS

	Applicability	When Applicable	Permitted Internal Gov't Use	Permitted External Gov't Use
Unlimited Rights	Tech Data & CS	FFF Data; OMIT Data; where development was exclusively at Gov't expense	No restrictions	
Gov't Purpose Rights	Tech Data & CS	Development with mixed funding	No restrictions	No commercial use
Limited Rights	Tech Data	Developed exclusively at private expense	Limited only by prohibition against use to manufacture	Limited to emergency repair/overhaul and for eval. by foreign gov't
Restricted Rights	CS	Developed exclusively at private expense	Use on one computer at a time; can make backups and modify	Limited to emergency repair/overhaul and for eval. by foreign gov't

Data Rights: *Who Paid for Development?*



Exception to Data Rights Based on Development Funding

Exceptions to allocation of data rights that are based on the source of funding:

- Government obtains broad, unlimited rights in certain categories of information, such as: “Form, Fit and Function” data or “OMIT” data necessary for “operations, maintenance, installation, or training”
- For commercial computer software, government takes the same deliverables and license rights as a commercial customer would

Defining “Technical Data”

***Raytheon Co. v. United States*, 160 Fed. Cl. 428 (2022)**

- Raytheon’s contract contained DFARS 252.227-7013 (Rights in Technical Data –Other Than Commercial Products and Commercial Services) and the data in dispute was lists of its vendors that Raytheon periodically delivered to the Government
- Raytheon initially marked these lists as:
 - “Distribution Statement E. Distribution authorized to DoD Components only due to Proprietary Information”
 - Containing “technical data whose export is restricted by the Arms Export Control Act (Title 22,U.S.C., Sec. 2751 et seq) or the Export Administration Act of 1979, as amended, Title 50, U.S.C., app. 2401 et seq.”

Defining “Technical Data” (cont.)

Raytheon Co. v. United States, 160 Fed. Cl. 428 (2022)

- After the Government challenged the markings, Raytheon applied the following marking and removed the reference to “technical data:”
 - RAYTHEON COMPANY PROPRIETARY DATA Information contained herein is proprietary to Raytheon Company, is submitted in confidence, and is privileged and exempt from disclosure by the U.S. Government under paragraph (b) of the Freedom of Information Act (5 USC 552) and subject to 18USC 1905
- After a three-year dispute over the markings, the Contracting Officer issued a final decision ordering Raytheon to remove the proprietary markings from the lists and directed Raytheon to replace its legend with one that recognized “government purpose rights” in the vendor lists
- On appeal at the Court of Federal Claims, Raytheon argued that the vendor lists were not “technical data” as defined by DFARS 252.227-7013, and thus not subject to the technical data rights provisions and marking requirements

Defining “Technical Data” (cont.)

***Raytheon Co. v. United States*, 160 Fed. Cl. 428 (2022)**

- The Court noted that the regulations do not define “scientific or technical nature” but “[i]n the Court’s view, the information on the vendor lists is not inherently or essentially technical in nature”
 - “The lists alone do not reveal anything of substance about the parts other than that Raytheon purchased them within the preceding two years and from whom they were purchased.”
- The Court upheld the contractor’s proprietary markings, reasoning that vendors lists are not “technical data” and thus rejected the Government’s claim that the data had to be delivered with “government purpose” rights

COPYRIGHT & THE FAR

Overview: *Copyright and the FAR*

- What's different about the FAR from the DFARS re copyright
- When can a contractor assert copyright under the FAR

Copyright and the FAR

- Under the FAR, to assert copyright in software and technical data first produced in performance of a government contract, the contractor generally must get the express written permission of the Contracting Officer. FAR 52.227-14(c)(1)(i).
- Without this permission, the Government typically receives what is essentially an unlimited license
 - “*Unlimited rights* means the rights of the Government to use, disclose, reproduce, prepare derivative works, ***distribute copies to the public***, and perform publicly and display publicly, ***in any manner and for any purpose, and to have or permit others to do so.***” FAR 52.227-14(a) (emphasis added).

Copyright and the FAR

- When the Government grants the contractor permission to assert copyright, the Government receives a copyright license that authorizes activities “by or on behalf of the Government”
 - This provides the Government the right to use, duplicate, or disclose Data, in whole or in part, and in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only.
 - Government Purpose Rights includes competitive procurement but does not include the right to have or permit others to use Data for commercial purposes
 - For software, the Government does not have the right to distribute copies to the public

Copyright and the FAR

Different licenses can apply if alternate versions of 52.227-14 are included

- **52.227-14 (Alt. II):** the contract can identify and specify delivery of limited rights data, in which the Government would have a Limited Rights license as set forth in the contract clause.
- **52.227-14 (Alt. III):** the contract can identify and specify delivery of restricted computer software, in which the Government would have a Restricted Rights license as set forth in the contract clause
- **52.227-14 (Alt. IV):** grants blanket permission to assert copyright. Typically used for universities but is used for other purposes too if the CO so chooses (*see FAR 27.409(b)(5)*)

DATA RIGHTS VERSUS DATA DELIVERABLES

Overview: *Rights v. Deliverables*

- How are rights and deliverables different
- Why does this distinction matter
- How to approach data deliverables

Distinguishing Rights and Deliverables

- **Data Deliverables** = The specific technical data or computer software that is required to be delivered or otherwise provided to the Gov't under the contract
- **Data Rights** = The legal right to use, reproduce, modify, perform, release, or disclose the technical data or computer software

Distinguishing Rights and Deliverables

- Standard Data Rights Clauses do not specify deliverables – only specify rights
- Deliverables should be specified in CDRLS and DIDs
- Deliverables should consist of three aspects:
 - Content – level of detail, nature of content, purpose for the info.
 - Recording/storage format – image files or native
 - Delivery/storage medium – disc, paper, on-line, etc.
- **Distinguish between human readable source code and object/executable code**

NOTICE & MARKING

Overview: *Notice and Marking*

- Difference in the FAR and DFARS approach
- Why notice and marking are critical to protecting your IP
- What markings are required

Notice and Marking

- **DoD:** Advanced Notice of Intent to Deliver Less Than Unlimited Rights
 - DFARS 252.227-7017 requires advance notice to Gov't
 - Failure to correct within time specified can preclude award
 - No corrections if source selection would have been affected
- Civilian agencies have no corollary advanced notice format
 - But, Alternate FAR clause provides some flexibility to provide notice and deliver with less than unlimited rights

Notice and Marking

- Must Mark Deliverables with the Markings Prescribed in the applicable Contract Clauses
 - Do not deviate from the prescribed markings
 - Should include a copyright notice
- During Performance Failure to Mark can Forfeit Rights
 - Deliverable presumed to convey “Unlimited Rights” if not marked
 - 6 months to correct
 - Indemnify government for release of unmarked materials

Notice and Marking

FlightSafety Int'l, Inc., ASBCA No. 62659, 23-1 BCA ¶ 38,245 (Nov. 29, 2022)

- Contractor appealed COFD, in which the Air Force invalidated commercial proprietary markings on contractor's commercial technical data
- Contractor argued, inter alia, that because the Air Force failed to prove that the data was not developed exclusively at private expense, the contract's data rights validation clause (DFARS 252.227-7037) prevented the Air Force from challenging the validity of its commercial proprietary markings
- The Air Force did not dispute that the 21 drawings of technical data at issue were developed exclusively at private expense

Notice and Marking

FlightSafety Int'l, Inc., ASBCA No. 62659, 23-1 BCA ¶ 38,245 (Nov. 29, 2022)

- The Air Force contended that it considered such data necessary for operation, maintenance, installation or training (“OMIT”), and therefore any restriction placed on its use violated the government's unlimited rights, but FlightSafety asserted that only 3 of the 21 drawings at issue were OMIT data
- The Board held that the Government can remove commercial proprietary markings from commercial technical data if the markings restrict the government’s data rights regardless of whether the contractor developed such data exclusively at private expense

Notice and Marking

FlightSafety Int'l, Inc., ASBCA No. 62659, 23-1 BCA ¶ 38,245 (Nov. 29, 2022)

- Contractor used the following three legends in various instances:
 - PROPRIETARY MATERIAL
Copyright © 2014. All rights reserved.
FlightSafety International Inc.
 - FlightSafety International Proprietary
Rights Reserved
 - FlightSafety Technical Data provided to the US. Government with unrestricted rights only pursuant to the requirements in CymSTAR Purchase Order PO003174-3 under US Government Contract #FA8621-15-D-6257, DO: FA8621-17-F-6255, the procedures specified in DFARS 252.227-7015 and limited by DFARS 227.7103-1.
- The Board held that the Government can remove commercial proprietary markings from commercial technical data if the markings restrict the government's data rights regardless of whether the contractor developed such data exclusively at private expense

Proposed Rule on SBIR/STTR Data Rights

Small Business Innovation Research Data Rights (DFARS Case 2019–D043) (87 Fed. Reg. 77680, Dec. 19, 2022)

- Adopts new term, “SBIR/STTR data,” which encompasses all technical data or computer software developed or generated in the performance of a phase I, II, or III SBIR/STTR contract or subcontract
- Changes the SBIR/STTR data protection period from an extendable 5-year period to a single, non-extendable 20-year period
- Provides DoD with perpetual government purpose rights (GPR) after the expiration of the SBIR/STTR data protection period, rather than unlimited rights as provided under the current rule

Proposed Rule on SBIR/STTR Data Rights

Small Business Innovation Research Data Rights (DFARS Case 2019–D043) (87 Fed. Reg. 77680, Dec. 19, 2022)

- Updates marking requirements, in response to *The Boeing Co. v. Secretary of the Air Force*, 983 F.3d 1321 (Fed. Cir. 2020), by limiting restrictive markings on noncommercial technical data and software to those specified in the clauses (including prohibiting restrictive markings directed to non-Governmental third parties) to require an “unlimited rights” marking for technical data or software furnished to the government without restrictions, and to indicate that restrictive markings on commercial technical data accurately reflects the government’s license rights

NON-FAR/DFARS BASED RIGHTS

Overview: *Non-FAR based Rights*

- What types of agreements aren't subject to the FAR and agency supplements
- What rules apply to these agreements, focusing on OTAs

Non-FAR based Rights

- Rights Not Covered by the FAR or DFARS
- Other Transactions Agreements
- Grants, Cooperative Agreements, Technology Investment Agreements (TIAs)
 - 32 CFR Part 21, DoD Grants and Agreements Regulations (DoDGARs)
 - 10 U.S.C.A. § 2358 and 32 CFR PART 37 for TIAs
- Cooperative Research & Development Agreements (CRADAs)

Non-FAR based Rights

- ***The Boeing Company, ASBCA No. 60373 (July 17, 2018)***
 - TIA is a cooperative agreement, and not a “contract” as defined in FAR 2.101
 - For software funded by a TIA, the costs were not allocated to a government contract and therefore satisfy the definition of “developed exclusively at private expense” under DFARS 252.227-7014
 - Gov’t funds paid to Boeing pursuant to the TIA do not result in technology being “developed with mixed funding” because the funds were not provided pursuant to a Gov’t contract

Non-FAR based Rights

- Other Transactions Agreements
- Lots of Flexibility
- No statutory limitations or mandatory allocation of rights – inventions & patents, or technical data & computer software
- May look to familiar DFARS-based definitions, but ... be careful to tailor the language

Non-FAR based Rights

- Other Transactions Agreements:
- 3 Primary Types of OTs:
 - Research –
 - Can be for basic, applied, or advanced research
 - But, cannot have more than incidental prototype work
 - Must instead push the state of the art
 - Prototype –
 - Objective is to develop no more than a reasonable number of prototypes to test in the field
 - Production –
 - Typically flow from prototype OTs
 - Can be awarded sole source if the prototype OT was competitive and noticed the opportunity for the production follow-on

Non-FAR based Rights

- What an OTA isn't:
 - It is not a procurement contract
 - It is not a grant
 - It is not a cooperative agreement
 - It is not a Cooperative Research and Development Agreement
- What is an OTA:
 - It is a contract
 - “[A]ny agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including offer and acceptance, consideration, and a Government representative with actual authority to bind the Government.” Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1326 (Fed. Cir. 1997).

Non-FAR based Rights

- What does NOT apply to OTAs:
 - The FAR and agency supplements
 - Data rights statutes at 10 U.S.C. §§ 2320 & 2321 and their implementing FAR and DFARS provisions and data rights clauses do NOT apply
 - DCAA audit clauses do not apply
 - *But see* 10 U.S.C. § 2371b(c)(1) mandating Comp. Gen. access to prototype OTs where payments > \$5M
 - The Bayh-Dole Act

Non-FAR based Rights

- What does apply to OTAs:
 - Contract law – can sue for breach

What data rights apply to OTAs

- Choose your own adventure:

*“It is important that the Government team have a baseline understanding of the allocation of intellectual property (IP) rights under the Bayh-Dole Act (35 U.S.C. §201-204) for patents, and 10 U.S.C. §2320-21 for technical data, even though none of these statutes apply to OTs. **IP rights are fully negotiable under all types of OTs.**”*

— DoD OT Guide at 17 (v. 1.0, 2018) (emphasis added)

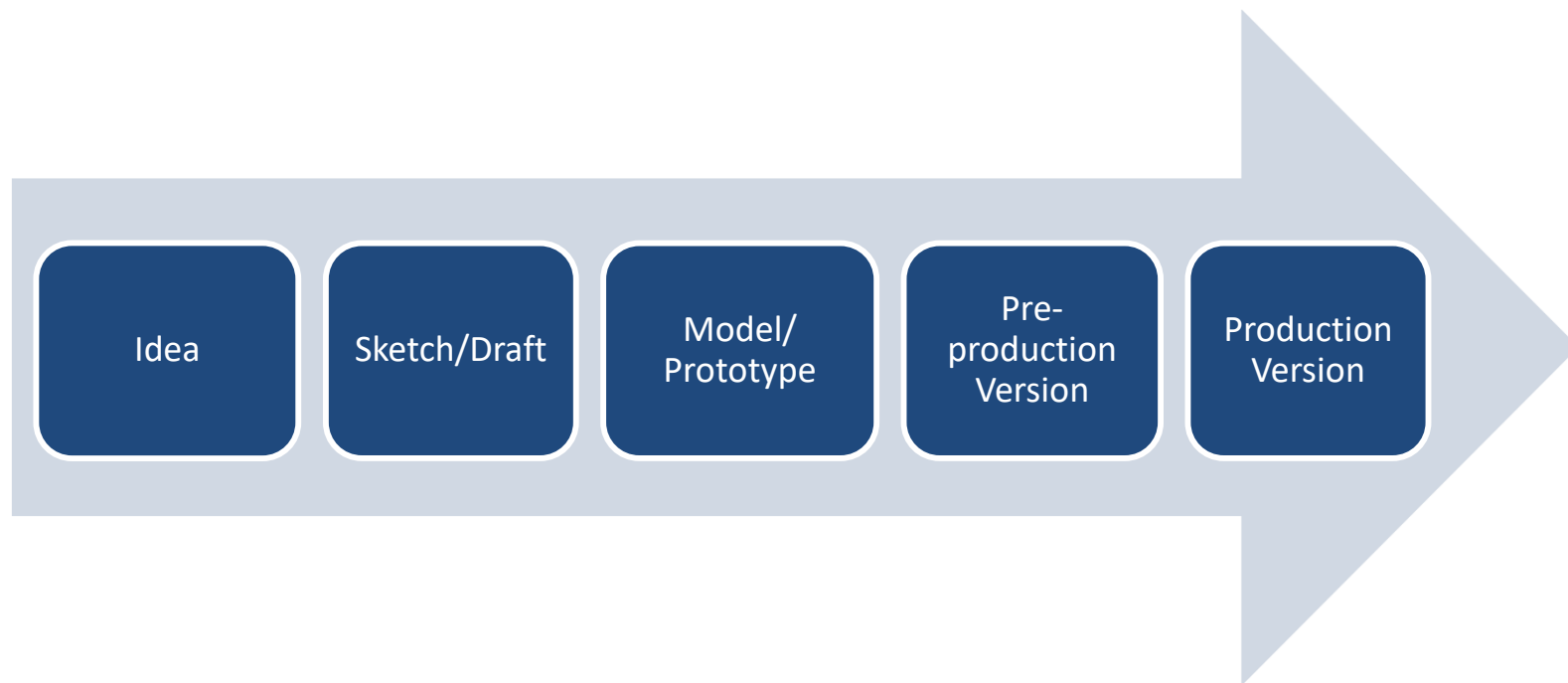
Negotiating IP Rights in OTAs

*“The negotiated IP clauses should consider the project goals, including any likely commercialization of the research or production and follow-on support of the prototype, and **balance the relative investments and risks borne by the parties both in past development of the technology and in future development and maintenance of the technology.**”*

— DoD OT Guide at 17 (v. 1.0, 2018) (emphasis added)

Negotiating IP Rights in OTAs

Development of the technology should be a touchstone



CONSIDERATIONS WHEN WORKING AS OR WITH A SUBCONTRACTOR

Overview: *Subcontracting Considerations*

- What gets flowed down
- What do these flowdowns mean
- How are the flowdowns different under the FAR and the DFARS

Multi-tier Data Rights Considerations

- Ensure that subcontracts include the proper flowdowns
- Ensure that higher tier contracts have the ability to grant the Gov't the rights the Gov't seeks for the contract

Multi-tier Data Rights Considerations: *Prime/Sub Issues in the Regs*

- FAR 52.227-14(h) Rights in Data-General
 - Requires prime contractor to obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract
 - Directs prime contractor to notify the Contracting Officer of the refusal of a subcontractor to accept terms affording the Government the rights necessary to fulfill the Contract's obligations
 - Prohibits the prime contractor from proceeding with award of the subcontract without authorization from the contracting officer

Multi-tier Data Rights Considerations: *Prime/Sub Issues in the Regs*

- DFARS 227.7103-15(d) and 227.7203-15(d)
 - Precludes the Government from requiring contractors to have subcontractors relinquish rights in data or software (other than rights provided under applicable clauses) to the contractor (or higher-tier subcontractor), or to the Government, as a condition for award of a subcontract

Multi-tier Data Rights Considerations: *Prime/Sub Issues in the Regs*

- DFARS 252.227-7013(k)(1) and 7014(k)(3)
 - Impose an obligation on prime contractors to ensure that subcontractor rights are adequately protected in the identification, assertion and delivery processes
- DFARS 227.7103-15 and 227.7203-15
 - Permits the Government to communicate directly with the subcontractors with respect to validation of or challenges to restrictive markings on subcontractor technical data or computer software, without creating privity of contract

Multi-tier Data Rights Considerations: *Subcontractor Protections in the Regs*

- DFARS 252.227-7013(k) and 7014(k)
 - Precludes prime contractors from using the award of a subcontract as leverage to obtain rights in subcontractor data, or to modify the clauses to enlarge their rights in subcontractor data
 - However, prime contractors may need to obtain license agreements in cases where the prime needs to satisfy its contractual obligation to the Government
- DFARS 252.227-7013(k)(3)
 - Subcontractors can submit technical data with other than unlimited rights directly to the Government, rather than through the prime contractor

RECOMMENDED PRACTICES TO PROTECT YOUR IP

Overview: *Recommended Practices*

- Planning
- Negotiating
- Documenting

Key Actions – *Overview*

- Plan IR&D and IP Development with Gov't contracts in mind
- Document every step of development for each component
- Identify and list asserted restrictions before entering into a contract
- Ensure that all parties understand the IP aspects of the proposal
- Focus on both data deliverables and data rights

Key Actions – *Overview*

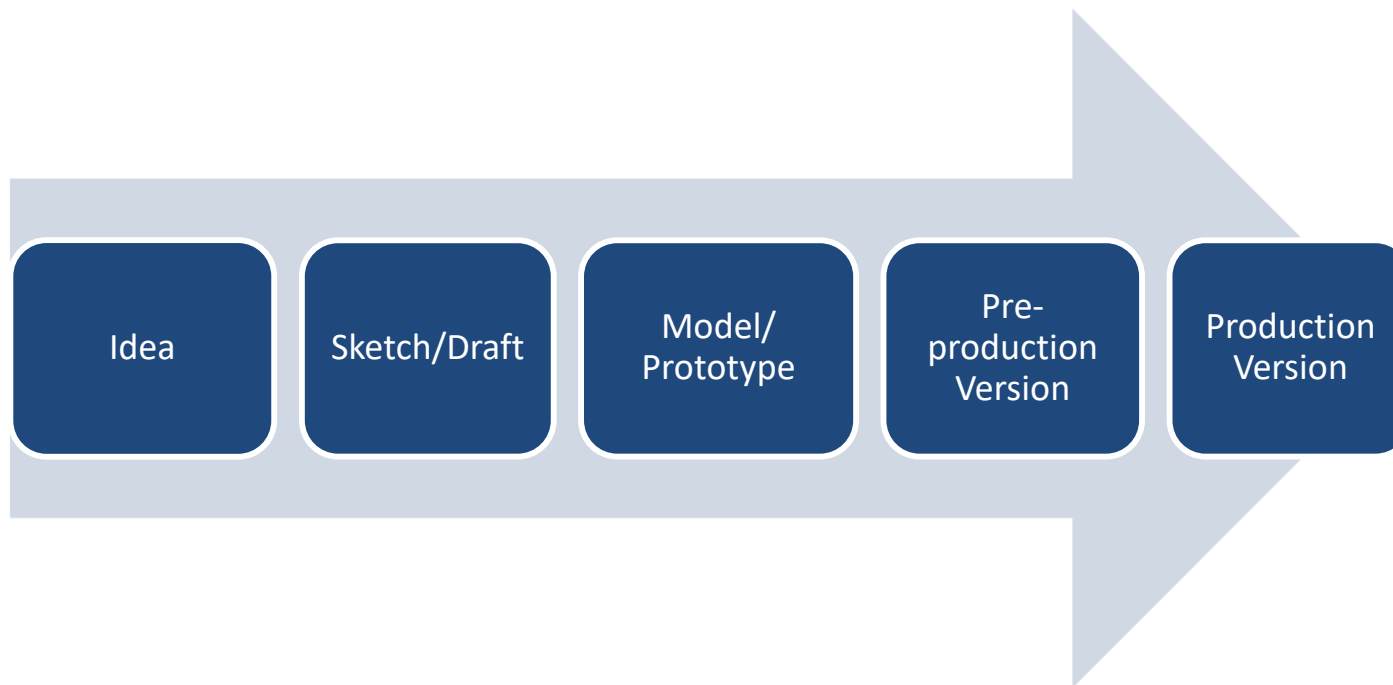
- Negotiate for the best deal (SNLR)
- Apply the correct marking before delivery to maintain the proprietary status
- Maintain records for validation proceedings to maintain the proprietary status

Key Actions – *Planning*

- Have the Government acknowledge in advance (specific recitals in contract) that inventions have already been reduced to practice and are therefore Background Inventions
- Have a system in place to capture conception and reduction to practice (*e.g. routines and workflows*)

Key Actions – *Negotiating*

- Development of the technology should be a touchstone
- Figure out what each party wants to accomplish
- Interest-based approach
- Remind Gov't of policies to not take more than needed



Key Actions – *Documenting*

- Document, document, document
 - Absent an explicit agreement, determining actual reduction to practice is extremely fact specific
 - When you conceive something, submit an invention disclosure form
 - Include these documentation and workflow practices into your training for inventive and engineering personnel

Key Actions – *Documenting*

- Document Using a Lab Notebook:
 - Use a permanently bound, page numbered laboratory notebook
 - Describe your work so that it can be repeated in your absence
 - Write in ink
 - Write legibly
 - Permanently attach any printouts or drawings
 - Have notebook witnessed and signed regularly
 - Include unambiguous descriptions

Key Actions – *Documenting*

- Cross-reference others needed
- Contemporaneous entries
- Dates for each entry
- Each page signed and dated
- Witnessed frequently
- No blanks, erasures, or scratch-outs
- Computer records are still not regarded as a good substitute for lab notebooks

Key Actions – *Documenting*

- The Witness Should:
 - Be able to understand subject
 - Not be a co-inventor or contributor
 - Sign as “read and understood by . . .”
 - If events were also witnessed, consider other notations, such as
 - “test done in my presence . . .”
 - “samples observed by me . . .”
 - “equipment demonstrated to me . . .”

QUESTIONS?

Presenters



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