Demystifying IP/Data Rights in Government Contracts
Virtual Class Series 2024

Session 2: DFARS Data Rights

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Roadmap

- Analytical Approach to Data Rights Questions

- DFARS Rights in Non-Commercial Technical Data and Computer Software

- DFARS Rights in Commercial Technical Data

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Today's Goals

- Understand how to approach data rights questions generally

- Understand how rights in technical data and computer software are allocated under the DFARS

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APPROACHING DATA RIGHTS QUESTIONS

An Analytical Approach to IP

- Are we talking about deliverables or rights?
- If we are talking about rights, are we talking about data rights or patent rights?
  - "Data rights" are not their own form of IP right, but rather are a hybrid of copyright, trade secret, and other exclusive rights of a property owner
  - The FAR/DFARS distinguish between the USG's rights in a contractor's **data** (*e.g.*, to use and disclose technical data and computer software) and the USG's rights in a contractor's **patents** (*e.g.*, to practice an invention)
- If we are talking about data rights...

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An Analytical Approach to IP (cont'd)

- Who is the customer – DoD or a civilian agency?
  - Only DFARS 227/252.227 applies to DoD
  - Only FAR 27/52.227 applies to civilian agencies
- What type of acquisition – non-commercial or commercial?
- What type of data – technical data or computer software?
- Who provided the development funding – private expense or government expense?

DFARS NON-COMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE
(DFARS 252.227-7013 AND -7014)

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Key Definitions

- *Technical Data*: **Recorded information**, regardless of form or method of recording, of a **scientific or technical nature**
- What is not technical data?
  - Cost and pricing information
  - Data incidental to contract administration (*e.g.*, financial and/or management information)
  - Other information?

Raytheon Co. v. United States (COFC No. 19-883C)

- The court applied the dictionary definitions of "technical" and "nature" and concluded that the vendor lists were not "technical in nature"
  - Technical Data = "[I]nformation that . . . relate to the design of an item or process, how an item was manufactured or assembled, or its physical and functional requirements."
  - Non-Technical Data = "[T]he procurement of finished parts . . . . The information on the lists cannot be used to design, manufacture, operate or reproduce a part[.]"
- The analysis should focus on the *nature* of the data
  - Not its potential users or uses: The court was "not persuaded by the government's arguments that the information on the vendor lists is technical in nature because it is 'used by persons with technical expertise to accomplish technical tasks"
  - Not how it has been classified: The court discounted that DoD classified the applicable DID as a management DID

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Key Definitions (cont'd)

- *Computer Software*: Computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related **material that would enable the software to be reproduced, recreated, or recompiled**

- *Computer Software Documentation*: Owner's manuals, user's manuals, installation instructions, operating instructions, and the like that **explain the capabilities of** or **provide instructions for using** the software

- *Computer Database*: A **collection of recorded data** in a form capable of being processed by a computer

- *What happens if a piece of information doesn't fit one of these definitions?*

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Types of Licenses

- Standard Licenses
  - Unlimited Rights
  - Government Purpose Rights ("GPR")
  - Limited Rights (Technical Data Only)
  - Restricted Rights (Computer Software Only)
- Specially (or Specifically) Negotiated License Rights ("SNLR")

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Unlimited Rights

- Use, modify, reproduce, perform, release, or disclose, in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so
- USG is free to give unlimited rights data to anyone, for any reason – even to competitors to use commercially
  - The contractor retains ownership of the unlimited rights data
  - The license is non-exclusive and belongs to the USG

- *Unlimited rights data is **<u>not</u>** in the public domain, so what can a contractor do to protect its residual interest in unlimited rights data?*
  - We'll discuss this when we talk about data rights markings!

Government Purpose Rights

- Unlimited use and disclosure within the Government
- Release or disclose outside the Government and authorize others to use, modify, etc., for "United States Government purposes"
  - Any activity in which the Government is a party
    - Includes competitive procurement
    - Excludes commercial purposes – the right to commercialize belongs exclusively to the contractor during the GPR period…
  - After five-year GPR period, GPR become unlimited rights
    - The five-year duration is negotiable
    - The clock starts on execution of the contract or exercise of the option that requires the corresponding development

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Limited Rights (Technical Data Only)

- "Unlimited" use and disclosure within the Government
  - Except no use for manufacture
- No release or disclosure outside the Government, except:
  - Emergency repair/overhaul
  - To Covered Government Support Contractors
  - (Soon?) For segregation and reintegration purposes

Restricted Rights (Computer Software Only)

- Use on one computer at one time, unless otherwise permitted, and make a minimal number of archive copies

- Organically modify the software (modified software also subject to restricted rights)

- Permit contractors performing service contracts to use the software to diagnose and correct deficiencies, to modify the software to enable a program to be combined with other programs, to respond to urgent tactical situations

- Other exceptions similar to Limited Rights technical data (*e.g.*, emergency repair/overhaul; Covered Government Support Contractors)

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Specially Negotiated License Rights

- Rather than accepting one of the standard licenses, the parties may negotiate a license that "provide[s] such rights as the parties consider appropriate"
- The negotiated rights are identified in a license agreement made part of the contract
- Limited/Restricted Rights are supposed to be the "floor" for the Government

Standard Allocations of Rights

- The Government's standard license rights are often determined by the source of development funding:
  - Technical Data: Look at the development funding for the *item, component, or process* to which the data pertain; only look at funding for the *data itself* if there is no corresponding item, component, or process
  - Computer Software: Look at the development funding for the *software itself*

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What is Development?

- An item, component, or process is developed when it **exists** and is **workable**
- "Workability" requires analysis or testing sufficient to demonstrate to a person of ordinary skill in the art that there is a high probability the item will function as intended
  - Does not require the item to be ready for sale
  - Lower standard than actual reduction to practice under the patent laws

What is Development? (cont'd)

- A computer program is developed when it has been **successfully operated in a computer** and **tested** to the extent sufficient to demonstrate to a person of ordinary skill in the art that it can reasonably be expected to perform its intended purpose

- Other computer software is developed when it has been **tested or analyzed** to the same standard

- Computer software documentation is developed when written in sufficient detail to comply with contractual requirements

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Caselaw on "Developed"

- *Dowty Decoto, Inc. v. Department of Navy*, 883 F.2d 774 (9th Cir. 1989)

- *In re Bell Helicopter Textron*, 85-3 B.C.A. 18,415 (ASBCA 1985)

- *Applied Devices Corp.*, B-187902 (1977)

Characterizing Development Funding

- Every development dollar falls into one of two "buckets":
  - Private expense
    - Costs charged to indirect cost pools (classically, IR&D, though DoD has made efforts to do away with this)
    - Costs not directly allocated to a Government contract
  - Government expense: Everything else
- Development funding determinations can be made at the lowest practicable segregable level (*e.g.*, a component, software procedure, or subroutine)
- Some interesting questions:
  - *Which bucket do we use for Government money received under a cooperative agreement, grant, OTA, or some other instrument?*
  - *Can a contractor choose to do some work under IR&D, rather than a contract, in order to call it private expense?*

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Funding-Based Rights Allocations

- Development Exclusively at Government Expense = Unlimited Rights
- Development Exclusively at Private Expense = Contractor may assert Limited/Restricted Rights
- Development with Mixed Funding = Contractor may assert GPR
  - This will (soon?) be SNLR in most instances

Non-Funding-Based Rights Allocations

- The Government automatically receives unlimited rights in certain data regardless of the source of development funding:
  - Corrections/changes to GFI
  - Form, fit, and function data
  - Data necessary for operation, maintenance, installation, and training ("OMIT")
    - Excludes detailed manufacturing and process data ("DMPD")
  - Data originally furnished with restrictions that have since expired (*e.g.,* sunsetted GPR data)
  - Computer software documentation required for delivery

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DFARS COMMERCIAL TECHNICAL DATA (DFARS 252.227-7015)

Commercial Technical Data Deliverables

- When the Government contracts for a commercial item, it is supposed to be treated like any other commercial purchaser
- Thus, the Government generally receives "only the technical data customarily provided to the public" in a commercial item (*see* DFARS 227.7102-1)
  - Except DoD is also entitled to form, fit, and function data; data required for repair or maintenance of a commercial item; data required for the proper installation, operating, or handling of a commercial item; and data that describe modifications made at Government expense
  - The Government can, and often does, bargain for more

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Rights in Commercial Technical Data

- The Government's rights in commercial item technical data can be compared to the non-commercial rules
  - Rights analogous to limited rights in most commercial item technical data
  - Unlimited rights where the Government gets unlimited rights regardless of development funding
  - SNLR always an option
- *Why?* Because commercial items are generally presumed to have been developed exclusively at private expense
  - We'll see the importance of this presumption – recently reinforced through some changes to DFARS 252.227-7037 – when we talk about validation and challenges!
- *A wrinkle*: DFARS 252.227-7013 will apply to technical data pertaining to any portion of the commercial item developed at Government expense/with mixed funding
  - Example: Contract-funded modifications to a COTS item
    - "Core" COTS item subject to commercial item rights
    - Government expense modifications subject to unlimited rights (if exclusively Government expense) or GPR (if mixed funding)

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Presenters

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Scott helps clients identify, protect, manage, and enforce their intellectual property rights. His practice focuses on the complex intellectual property issues confronted by government contractors, including patent rights and rights in technical data and computer software, with emphasis on the aerospace, defense, and intelligence sectors.

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Professor Ralph C. Nash, Jr. founded the academic discipline of government contacts law with the late John Cibinic. He was Professor Emeritus of Law of The George Washington University, Washington, D.C., and founded the Government Contracts Program. Professor Nash is currently a consultant for government agencies, private corporations, and law firms on government contract matters. He is active in the Public Contracts Section of the American Bar Association, is a member of the Procurement Round Table, and is a Fellow and serves on the Board of Advisors of the National Contract Management Association.

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