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BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

TAKING THE MYSTERY OUT OF DATA RIGHTS

*By W. Jay DeVecchio**

Rights in technical data and computer software are increasingly a topic of dispute between contractors and the Government, particularly the Department of Defense (DOD). This is because of three forces: (1) congressional and DOD initiatives to acquire rights in data and software sufficient to implement DOD's modular open systems approach (MOSA), which is intended to allow DOD to swap one supplier's subsystems with another's;[1] (2) independent, overreaching actions by DOD contracting activities to acquire operation, maintenance, installation, and training (OMIT) data they claim to need for long-term support;[2] and (3) the escalating practice of agencies seeking priced options from contractors to relinquish data rights in exchange for more favorable best value evaluations, which is an attempt to end run the statutory prohibition of 10 U.S.C.A. § 2320(a)(2)(H) against requiring contractors "as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components, or processes developed at private expense."[3]

All of this means contractors need to understand clearly how the data rights clauses in the Federal Acquisition Regulation (FAR) (applicable to civilian agencies)[4] and the Defense FAR Supplement (DFARS) (applicable to defense agencies)[5] actually work, rather than how they commonly are misunderstood to operate. For civilian agency contracts, there is one principal FAR clause used in most circumstances: FAR 52.227-14, "Rights in Data—General." For DOD contracts, there are two principal clauses: DFARS 252.227-7013, "Rights in Technical Data—Noncommercial Items," and DFARS 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation." Understanding how these clauses work is essential to sorting out whether the rights the Government is seeking are proper or not and should be challenged, as well as assuring that contractor personnel do not relinquish rights mistakenly. But many people in the business—contractor and Government alike—either shy away from understanding the data rights clauses, viewing them as somehow too daunting, or make incorrect assumptions about how

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they think the clauses ought to work. Consequently, there is unnecessary and troublesome confusion expressed every day—by contractors and the Government alike—such as assuming the clauses vest the Government with delivery rights or with ownership in contractors' data or software, when in fact neither one occurs.

These misunderstandings are easily cured. Doing so is the purpose of this BRIEFING PAPER. If one steps back from the length of the data rights clauses and instead views them with some very simple, common-sense concepts in mind, the clauses become surprisingly easy to understand and to apply. This PAPER offers you this common-sense approach, which should forever demystify data and software rights.

Simplicity And Common Sense: Key Questions And Answers

A useful way to frame an understanding about the data rights clauses is to illuminate their principles through a series of questions whose answers are intuitively obvious.

Who Conducted And Paid For Development?

Question: What if you conducted and paid for development yourself?

Answer: Then, it is all yours.

For example, think about a common-sense allocation of data rights based on who has paid to develop hardware or software. If any one of you had developed something at your own private expense in the privacy of your garage, tapping into your 401(k) account and without being paid to do it under a Government prime contract or subcontract, you would have absolutely no doubt about who had rights of use and ownership in the item or process and its technical data, wouldn't you? Without hesitation you would say that you *own* it and have the greatest *rights* in that thing and its associated technical data. Why? Because it was your time, talent, and money that developed it, not the Government's.

So, ask yourself this: Why would the answer be any different if it were a company—say, a Government contractor—that developed the item in its garage without any payment under a Government prime or subcontract? Common sense tells us, correctly, that the answer would be no different.

Therefore, the company also should be able to use whatever it developed to its competitive advantage. That is common sense, too.

And if, like you, a company owns something, wouldn't the company, like you, have the right to sell, lease, or license it—or not—to anyone it pleases (subject to other laws and restrictions, such as export controls) and be paid for it? Certainly it would; that is common sense too.

You now have grasped the fundamental operation of the data rights clauses. That is *exactly* how the data rights clauses in Government contracts work. If a company has paid to develop an item, component, process, or software without any direct Government contract (or subcontract) payment for that development, the company has the ability to limit the Government's rights in technical data;[6] restrict the Government's rights in software;[7] and sell, lease, or license that thing to third parties.[8] Common sense is built into the clauses.

When Does Development Occur?

Question: OK, but when does development occur?

Answer: Common sense tells us it happens sooner rather than later.

Another application of common sense comes to mind

Editor: Valerie L. Gross

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when one encounters the question of development. If you develop something in your garage—such as a prototype computer (think Apple) or software (think Microsoft)—that basically works, but might have a few bugs to sort out or might need to be enclosed in an eye-catching housing, you would say you had "developed" the hardware or software even if it was not the final, handsome product, wouldn't you? Yes, that's common sense.

And that, too, is how the data rights clauses work. Under the DOD clauses, an item is considered to have been developed when reasonable people skilled in the applicable art say there is a *high probability* it will work as intended.[9] For software or a program there is a similar test, whether, according to those skilled people, it can *reasonably be expected* to perform its intended purpose.[10] Although the FAR does not define "development," there is no reason to doubt that the DOD's concepts, long accepted, would be applied to an issue under the FAR. In all events, these definitions necessarily mean a company can develop something for data rights purposes *before* the final version of the item or software, *e.g.*, a prototype or engineering model of an item or beta software.

Therefore, common sense also tells us that improvements (such as developing the housing or engaging in debugging) to something that already has been developed for data rights purposes *may not* convey any greater rights. Yet, routinely, the Government's or a company's engineers make the mistake of assuming that the Government obtains "unlimited rights" in the entire item or process as a result of funding subsequent improvements. This is incorrect and too broad an interpretation, as reflected in the Armed Services Board of Contracts Appeals' seminal *Bell Helicopter Textron* decision:

> All "development" of an item or component need not be 100 percent complete. There will often be further development of an item or component after it has reached the point of being "developed" for data rights purposes.[11]

What Is Private Expense?

Question: OK, then what is private expense?

Answer: It is anything except direct contract payments.

This one is easy too. You do not have to get embroiled in Government contract cost principles or the Cost Accounting Standards. If the Government pays *directly* under a contract (or subcontract) to engage in work, such as development work, that is *not* private expense.[12] If a *company pays* for development work with *any other source* of funds—properly charged to that source of funds—that *is* private expense. This means independent research and development (IR&D or IRAD) or any other "indirect" cost account (overhead) is private expense, even though the Government might reimburse a portion of the costs, because those payments are not *direct* payments under a contract or subcontract. It is that simple.

Putting This Together

Figuring Out Development And Funding At The Lowest Component Level

Putting this together is common sense, too. You figure out development and funding at the lowest component level, because that is how development actually happens.

This is another easy exercise in common sense, requiring only that one think about how things actually are developed and made. A new rocket engine, for example, does not spring fully developed out of the mind of a developer, nor does software. Hardware has subcomponents (gears, shafts, electronics). Software comprises modules and subroutines. Development does not occur all at once, but rather at these discrete segregable levels. Therefore, it makes sense that one should analyze development and the source of funds at these lowest component levels rather than at the level of the final product.

This is why the DOD regulations instruct that determining rights is done "at the lowest practicable level."[13] The procurement laws and court decisions say this, too.[14] This can be depicted easily in the diagram on the following page.

Assume, for instance, that each of these four boxes represents the core components, whether hardware or software, of a drone—in Government parlance, an "unmanned aerial vehicle" (UAV). Like a rocket engine or a software suite, a UAV or its operating software does not spring fully formed out of the mind of its developers. Rather, it is developed at various subcomponent levels. Therefore, let us assume that each of the four boxes is a separate type of software module that ultimately will be integrated into one operational software suite for the UAV. Or, alternatively, one could assume that each of the four boxes represented separate types of hardware (*e.g.*, actuators, engine, weapons, air frame) that ultimately will be integrated to comprise the UAV. For either assumption, the analysis is the same. One looks to see when each of the four discrete, segregable

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components—each of the boxes—achieved a state of development and who paid for it. In other words, one analyzes development at the lowest component level.

Accordingly, if a contractor started these four development projects at private expense—using IR&D monies, for example—then, the rights that ultimately accrue will be a function of when development was achieved and whether it was achieved at private expense, or whether, instead, the Government stepped in and picked up the development costs under a contract or subcontract before the development occurred. Thus, if the development of Module A were completed under IR&D, the contractor would be entitled to assert limited rights in any technical data pertaining to the item or process it developed[15] and to assert restricted rights in any software it developed.[16] The same result occurs for Module B. This is just like development in your garage.

If, however, the Government awarded a contract to complete Module C (*i.e.*, started making payment directly under a contract or subcontract), which development had begun but not been finished under IR&D (*i.e.*, begun but not finished at private expense), then Module C would have been developed with mixed funding. At the DOD, mixed funding results in "Government purpose rights" (GPR), which are unique to the DOD data rights regulations.[17] Because the DOD regulations do not apply to civilian agencies, but rather the FAR data rights clauses do,[18] and because there are no GPR under the FAR data rights clauses, mixed funding under civilian agency contracts results in "unlimited rights" for the Government.[19] In the example below, Module D is the only one that was paid for entirely at Government expense in the performance of a contract, which results in unlimited rights no matter the agency.[20]

Module A (Flight Control Software or Hardware) Development Entirely at Private Expense Completed on January 1, resulting in **Restricted Rights in Software or Limited Rights in Data**	**Module B (Navigation Software or Hardware)** Development Entirely at Private Expense Completed on February 2, resulting in **Restricted Rights in Software or Limited Rights in Data**
Module C (Weapons Delivery Software or Hardware) Development With Mixed (Private and Government Funding) Completed on March 1, resulting in **GPR at DOD—Unlimited Rights Civilian**	**Module D (Integration Software or Hardware)** Development Entirely at Government Expense Completed on April 1, resulting in **Unlimited Rights**

A common error is for someone to assert that, because all of the development—*i.e.*, all four modules collectively—was accomplished with a mix of Government and private funds, the Government obtains GPR under the DFARS and unlimited rights under the FAR in all the modules. That is incorrect, because it fails to account for development at the lowest segregable level, in this example each of the four separate modules.

Answers to frequent questions are now easier:

Question: Mixed Development: What if I have an item that I have almost finished developing at private expense, but development will be completed under a Government contract (or subcontract) I have just gotten? Who gets rights then?

Answer: You Know the Answer: Look to the lowest level. The Government's rights in a particular item, component, process, or software will be determined by evaluating when each item, component, process, or software was developed and who paid for it at the lowest component level. The answer to your question is that the development would have been completed with mixed funding, resulting in GPR at the DOD and unlimited rights at civilian agencies.

Question: Government Modification: What if I already have something that is completely developed at private expense but now the Government wants to acquire and modify it? Will the Government get GPR or unlimited rights in the whole thing?

Answer: Same Answer: Look to the lowest level. You have to see what elements, components, or subroutines of the item or software are being modified under the Government contract. If some element has not been modified or has been modified only somewhat, then you retain your limited or restricted rights. Stated differently, improvements or enhancements by the Government might not be "development" for data rights purposes.[21] If, on the other hand, the elements at the lowest level have been changed substantially, then the Government might get GPR or unlimited rights.

License Rights, Not Ownership

We've been discussing the Government's *rights of use* under the data rights clauses.

A right to use something is a "license." If a company licenses you to use its name to sell its products—*e.g.*, a right to advertise and to sell Coke®—you do not own the Coca Cola Company or the formula to Coke. In other words, we can all agree that license rights are not ownership.

Therefore, the Government gets license rights *not ownership* under the data rights clauses no matter who paid for the

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development, because there is not one word in any of the standard FAR or DFARS data rights clauses vesting ownership in the Government.

Thus, even if the *Government gets "unlimited" license rights* because it paid for the development, the *company still owns* the rights to the data or software. Common sense (and the regulations) tells us that if the contractor owns the rights, then the contractor can use, sell, lease, or license the data or software as it pleases, subject to national security rules and export controls or, less commonly, a unique contract clause limiting the contractor's use. This is exactly how the clauses operate. FAR 52.227-14(d) provides that the "Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract," except "as prohibited by Federal law or regulation (*e.g.*, export control or national security laws or regulations)," or as "expressly set forth in this contract."[22]

Not Exclusive Rights Or Delivery Rights

The clauses' license rights are not exclusive rights or delivery rights. Common and legal sense tells us that if license rights are defined by a contract, and if a particular right is not expressed in the contract, then generally, there is no such contractual right. The data rights clauses are no exception.

There is *not one word* in any of the three main data rights clauses, one for civilian agencies (FAR 52.227-14) and two for the DOD (DFARS 252.227-7013 and DFARS 252.227-7014), stating or suggesting the Government has title to, *ownership* of, exclusive rights to, or sole rights to data or software. Invite a skeptic to read the clauses.

There *also is not one word* in any of the clauses *giving the Government the right to delivery* of the data or software in which it gets license rights. As FAR 27.403 states: "The Data Rights clauses do not specify the type, quantity, or quality of data that is to be delivered. . .."[23] If the Government wants delivery of the data or software in which it has rights, it knows how to (and must) specify delivery somewhere else in the contract, typically in the Contract Data Requirements List (CDRL) or the Statement of Work (SOW). Or, the Government can get these delivery rights later by using a "Deferred Ordering"[24] or "Deferred Delivery" clause.[25]

Also recognize that a Data Accession List (DAL) usually will give the Government access to your data or software. Similarly, Integrated Product Teams (IPTs) may inadvertently establish access (electronically or otherwise) to in-process technical data or software, which may not be deliverables under the contract. This means that technologists and engineers at all levels, whether working for the Government or for a contractor, must understand that if data or software will be delivered indirectly these ways, the data or software must be correctly marked with the exact limited rights or restricted rights legends specified in the clauses.[26] Failing to mark can result in losing rights, as we will discuss shortly.[27]

Once again, answers to frequent questions are now easier:

Question: Can I use it? The Government tells me that, because it paid entirely for my development under a contract, I cannot use the data or the software for my own purposes. Is that correct?

Answer: No, invite the Government to read the clause. If the Government paid entirely for the development, it gets unlimited rights.[28] But unlimited rights are not "exclusive" rights, and nothing in the clauses divests the contractor of ownership or use rights. The contractor retains the ability to use or to license others to use unlimited rights data or software, subject to other laws, such as export control, or to unique contract limitations.[29]

Question: Do I have to deliver it? The Contracting Officer says I must deliver items covered by the data rights clauses. Does the Government have the right to make me deliver data or software in which it gets rights even if that data or software was not specified in the contract as a deliverable?

Answer: No, not under the basic data rights clauses. Remember there is not one word in the data rights clauses about delivery. But if the Government has a "Deferred Ordering" or a "Deferred Delivery" clause, then those clauses permit the Government to obtain delivery.[30]

Question: Whoops! The customer forgot to identify it as a deliverable: What if my data or software isn't a deliverable, does that mean the Government doesn't get data rights?

Answer: No. Do not make the mistake of thinking the Government only gets rights in what is delivered. The Government gets license rights in everything covered under the clauses;[31] it just does not have the data or software in which it has those rights if the data or software is not a deliverable.

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Marking Requirements For Data And Software

Marking your data and software is essential, but it is (mostly) easy, too.

Magic Words

Question: Do I need to use any "magic words" when marking my data and software?

Answer: Yes. If you are entitled to assert limited or restricted rights, you must mark your data and software with the *exact words* in the legends that are specified in the clauses in your contract.[32] Common sense, once again: Why would you do anything else?

But recognize that the legends are different for data and for software, and they are different between the FAR and DFARS clauses. At the DOD, the markings also must be in the electronic versions.[33] If you fail to mark correctly, and do not fix it quickly, you can lose the company's rights.

Words On Silicon Chips—Marking Firmware

Question: The Contracting Officer tells me I must put the restricted rights legend on my silicon chips—my firmware—that incorporate my software. Is that correct?

Answer: Almost. The regulations require that software be marked, and there is no distinction between software on a DVD or etched into a chip.[34] Accordingly, you have got to do something either to mark the chip or otherwise identify the chip in your proposal and assert restricted rights in it. At the DOD this is accomplished in the assertions table contemplated by DFARS 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions."[35]

Commercial Software

Answers to your questions about commercial software are there for the reading, too.

Commercial Software Licenses

Question: My software is commercial. Doesn't the Government have to use my standard commercial license agreement?

Answer: No. Under the *DOD* regulations, if you have commercial computer software, then there is no prescribed clause.[36] Rather, the Government is supposed to use a version of the contractor's standard license; but this license cannot impose terms that are contrary to the laws applicable to the Government:

> (a) Commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.[37]

Question: What if I have commercial computer software under a civilian agency contract? Does the Government have to use my standard commercial license in those procurements?

Answer: No. Under the FAR, civilian agencies are encouraged to use your standard commercial license, subject to the same admonition that certain clauses are invalid.[38] But, unlike the DOD, under a FAR contract, a civilian agency can use another clause at FAR 52.227-19, "Commercial Computer Software License," which is peculiar because it gives the Government the same rights in commercial software that the Government receives with restricted rights in noncommercial software. You can be sure there is no software sold commercially with FAR restricted rights licenses.

Question: How do I know which of my commercial clauses is potentially inconsistent with federal law?

Answer: It is not easy. Neither the FAR nor the DFARS contains a list of problematic clauses. The General Services Administration, however, has published a list of clauses it perceives as troublesome,[39] and a few contracting activities publish their own. Commercial clauses most often are an issue when they are inconsistent with a federal statute. For example:

- *Indemnification*: These clauses conflict with the Anti-Deficiency Act (ADA)[40] prohibition on the executive branch incurring an obligation (to indemnify) in advance of an appropriation (no appropriation for future indemnities).
- *Disputes/choice of law and forum*: Under the Contract Disputes Act (CDA)[41] only the U.S. Court of Federal Claims or a board of contract appeals has jurisdiction over contract disputes.
- *Automatic renewals of term-limited agreements*: These clauses violate the ADA and might violate the CDA.
- *Advance payment for services*: These clauses can violate the ADA.

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- *Future fees, penalties, or interest*: These clauses violate the Prompt Payment Act.[42]

- *Assignment*: One must comply with Assignment of Claims Act[43] and FAR Subpart 42.12 (Anti-Assignment Act).

- *Unilateral termination for contractor's convenience or Government breach*: Termination clauses are prescribed by regulation.[44]

Question: This is easy to say, but how do I supply commercial software licenses to the Government when the clauses are silent on the subject?

Answer: There is no method or procedure for suppliers at any tier to provide commercial licenses to Contracting Officers. As a best practice, contractors should use the form at DFARS 252.227-7017 to inform the DOD of all commercial software that is being supplied.[45] Doing this, and coupling it with including the license agreement within the software code and the shrink wrap, or including the licenses with the proposal, will maximize the contractor's protection.

Note, however, the FAR does not have a form that can be used. Accordingly, contractors should clearly identify in their proposals the commercial computer software that is being provided and include the terms of the license where practicable.

Pricing Commercial Software

Common sense can also be applied to one last issue—pricing commercial software—but not where you might expect.

There is a misconception that if software is developed under a Government contract, it cannot later be sold back to the Government as a commercial item. *But there is nothing in any definition* of commercial software *that addresses who paid for its development*. In other words, if software meets the definitions in FAR 2.101 of a "commercial item" or, for the DOD, the definition in DFARS 252.227-7014(a)(1), then the software is "commercial," regardless of who paid to develop it. Stated differently, development at private expense is not a prerequisite to commerciality.

And both the FAR and the DFARS contemplate circumstances in which software is developed for the Government but then becomes commercial. For example, DFARS 252.227-7014(a)(1) defines commercial software to include "software developed or regularly used for nongovernmental purposes." Therefore, the software could have been developed for the Government but later used for nongovernmental purposes and thus still be commercial.

If software is commercial, then common sense tells us it can be priced commercially at a fair and reasonable price, independent of whatever the costs were to develop the software. This indeed is reflected in FAR Part 15, which exempts commercial items from the requirement to provide certified cost or pricing data under the Truth in Negotiations Act.[46] Being exempted from having to provide cost or pricing data means the Government does not require any detailed cost information about the commercial item. Indeed, FAR Part 15 provides that the Government must use "price analysis" for commercial items.[47] Price analysis is defined as "the process of examining and evaluating a proposed price *without evaluating its separate cost elements* and proposed profit."[48]

If you get a question on this issue, engage in a common-sense discussion: point out what the Government did and did not acquire through its prior development payments to the contractor. Specifically, if the Government previously acquired license rights under the data rights clauses in the software by virtue of paying for development of the software—in whole or in part at "the lowest practicable, segregable portion of the software. . ., e.g., a software subroutine that performs a specific function"[49]—then the Government retains whatever rights it acquired as a result of paying for that development.

If the Government subsequently acquired the software as commercial software, that acquisition would not extinguish any existing Government rights. Common sense tells us those license rights would already have been paid for and vested under the Government's earlier development contract. But this does not mean the contractor cannot later charge the Government a fair and reasonable price for the commercial software. The contractor is not charging the Government again for the prior development; it is charging a price for the commercial item. Common sense, once again.

Guidelines

These *Guidelines* are intended to assist you in understanding the common-sense principles underlying the data rights clauses in Government contracts. They are not, however, a substitute for professional representation in any specific situation.

1. Remember that there are three principal data rights

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contract clauses. For civilian agency contracts, FAR 52.227-14, "Rights in Data—General," is used in most circumstances. For DOD contracts, there are two principal clauses: DFARS 252.227-7013, "Rights in Technical Data—Noncommercial Items," and DFARS 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation."

2. Recognize that the Government's rights in a particular item, component, process, or software will be determined by evaluating when each item, component, process, or software was developed and who paid for it at the lowest component level.

3. When evaluating development, keep in mind that development for data rights purposes typically occurs before the final, manufacturable product. This is because development occurs essentially when people who are skilled in the technology reasonably would conclude that the item, component, process, or software has a high probability of working, which is an event that almost always takes place before the final product or process.

4. When considering what private expense is, keep it simple by remembering that private expense is usually any funding other than direct government payment under a contract or subcontract.

5.Therefore, if development at the lowest practicable level of your item, component, process, or software is achieved prior to receiving any direct Government funding under a prime contract or subcontract, then you are entitled to assert limited rights in technical data or restricted rights in software with respect to that development. The Government may, in turn, have unlimited rights in other segregable component portions of the item or software that were developed exclusively with Government funds. At the DOD, if the development of those lowest segregable items occurred with mixed funding—i.e., partially at private expense and partially at Government expense—then the Government would obtain Government purpose rights; at civilian agencies under the FAR, the Government generally would get unlimited rights.

6. Do not make the mistake of assuming that the Government obtains "unlimited rights" in the entire item or process as a result of funding subsequent improvements. Remember, improvements or enhancements may not be developments, because development for data rights purposes already would have occurred before the improvement or enhancement.

7. Bear in mind that the Government gets license rights not ownership under the data rights clauses no matter who paid for the development. Nothing in the clauses vests the Government with ownership or title.

8. Similarly, even if the Government gets "unlimited" license rights because it paid for the development under your contract, those right are not exclusive. You still own the rights to the data or software and you can use, sell, lease, or license the data or software as you please, subject to national security rules and export controls or to a unique contract clause.

9. Remember that the FAR and DFARS data rights clauses specify license rights the Government receives; they do not specify any contract deliverables. Any item, component, process, or software that you are obligated to deliver to the Government must be specified elsewhere in the contract, typically in the CDRL or SOW, or the Government may obtain delivery later by using a "Deferred Ordering" or "Deferred Delivery" clause.

10. Do not make the mistake of thinking the Government only gets rights in what is delivered. The Government gets various license rights in everything covered under the clauses,[50] regardless of whether the data or software is a deliverable under the contract. But if the data or software is not a deliverable, the Government gets rights in data or software it does not have.

11. Remember to educate your engineers and technologists about the consequences of sharing data or software with their Government counterparts as part of an Integrated Product Team or otherwise, because sharing it may constitute inadvertent delivery coupled with a failure to mark the data or software correctly.

12. Take care to mark your technical data or computer software using the exact works in the legends specified in the data rights clause that is in your contract. At the DOD, you must also place the markings in the electronic versions.

13. Be aware that because the regulations require that software be marked and make no distinction between software on a DVD or etched into a chip, you must do something either to mark the chip or otherwise assert restrict rights in the chip. At the DOD, you can do this in the assertions table contemplated by DFARS 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions."

14. If you have commercial computer software, be aware

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that under the DOD regulations, there is no prescribed data rights clause, and the Government is supposed to use a version of your standard commercial license, subject to the admonition that certain clauses will be invalid because they are inconsistent with federal procurement law. A civilian agency has the option of using the FAR 52.227-19 "Commercial Computer Software License" clause, which essentially gives the Government the same rights in commercial computer software that it gets in noncommercial computer software provided with restricted rights.

15. Be sure to identify your and your subcontractors' commercial computer software in your proposal's data rights assertions.

16. Recognize that development at private expense is not a prerequisite to commerciality. If software meets the definitions in FAR 2.101 of a "commercial item" or, for the DOD, the definition in DFARS 252.227-7014(a)(1), then the software is "commercial," regardless of who paid to develop it and can later be sold back to the Government as a commercial item, priced commercially at a fair and reasonable price.

ENDNOTES:

[1]See, e.g., 10 U.S.C.A. § 2446a (defining MOSA as "a system architecture that allows severable major system components at the appropriate level to be incrementally added, removed, or replaced throughout the life cycle").

[2]DeVecchio, "Feature Comment: Data Rights Assault: What in the H (clause) Is Going On Here? Air Force Overreaching on OMIT Data," 60 GC ¶ 8 (Jan. 17, 2018).

[3]See DFARS 227.7103-1(c); DFARS 227.7203-1(c).

[4]See FAR subpt. 27.4; FAR 52.227-14.

[5]See DFARS 227.400; DFARS subpts. 227.71, 227.72; DFARS 252.227-7013; DFARS 252.227-7014.

[6]DFARS 252.227-7013(b)(3).

[7]DFARS 252.227-7014(b)(3).

[8]See, e.g., FAR 52.227-14(d); DFARS 227.7103-4(a).

[9]DFARS 252.227-7013(a)(7).

[10]DFARS 252.227-7014(a)(7).

[11]Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18,415, at 92,434.

[12]DFARS 252.227-7013(a)(8)–(9); DFARS 252.227-7014(a)(8)–(9); see DeVecchio, "The False Claims Act and Data Rights; What Plaintiffs' Lawyers Need to Know but Do Not Want To Hear," 43 Pub. Cont. L.J. 467, 476–77 (Spring 2014).

[13]DFARS 252.227-7013(a)(8)(i); DFARS 252.227-7014(a)(8)(i).

[14]See 41 U.S.C.A. § 108; 10 U.S.C.A. § 2302(3)(F); Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA ¶ 18,415, at 92,417.

[15]See DFARS 252.227-7013(b)(3).

[16]See DFARS 252.227-7014(b)(3).

[17]See DFARS 252.227-7013(b)(2); DFARS 252.227-7014(b)(2).

[18]See FAR 27.400; DeVecchio, "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions & Answers (Including § 815) / Edition II," 12-6 Briefing Papers 1, at 2 (May 2012); DeVecchio, "Rights in Technical Data & Computer Software Under Government Contracts: Key Questions and Answers," 10-10 Briefing Papers 1, at 2 (Sept. 2010).

[19]Under the FAR, unlimited rights accrue in any data first produced in the performance of a contract. FAR 52.227-14(b)(1). "Data" under this FAR clause encompasses technical data and computer software. FAR 52.227-14(a).

[20]FAR 52.227-14(b); DFARS 252.227-7013(b)(1); DFARS 252.227-7014(b)(1).

[21]See Dowty Decoto, Inc. v. Dep't of the Navy, 883 F.2d 774,780 (9th Cir. 1989); Applied Devices Corp., Comp. Gen. Dec. B-187902, 77-1 CPD ¶ 362, at 9–12.

[22]Accord DFARS 252.227-7013(c); DFARS 252.227-7014(b); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1044 (9th Cir. 1983); Regents of the Univ. of Colo. v. K.D.I. Precision Prods., Inc., 488 F.2d 261, 264 (10th Cir. 1973).

[23]See Office of the Under Sec'y of Defense for Acquisition, Technology & Logistics, Intellectual Property: Navigating Through Commercial Waters 2-7 (Version 1.1, Oct. 15, 2001), https://www.acq.osd.mil/dpap/docs/intelprop.pdf.

[24]See, e.g., DFARS 252.227-7027.

[25]See, e.g., DFARS 252.227-7026.

[26]See FAR 52.227-14(e); DFARS 252.227-7013(f); DFARS 252.227-7014(f).

[27]See FAR 27.404-5(b)(1), 52.227-14(f)(1); DFARS 227.7103-10(c)(1) ("Unmarked technical data"); DFARS 227.7203-10(c)(1) ("Unmarked computer software or computer software documentation").

[28]FAR 52.227-14(b)(1); DFARS 252.227-7013(b)(1); DFARS 252.227-7014(b)(1).

[29]See FAR 52.227-14(d); DFARS 252.227-7013(c); DFARS 252.227-7014(b).

[30]See DFARS 252.227-7026, "Deferred Delivery of Technical Data or Computer Software"; DFARS 252.227–7027, "Deferred Ordering of Technical Data or Computer Software"; FAR 52.227-16, "Additional Data Requirements."

[31]See FAR 27.403 ("Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of

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the such data."); DFARS 227.7103-4, "License rights" (technical data), 227.7203-4, "License rights" (computer software and computer software documentation).

[32]See FAR 52.227-14(e); DFARS 252.227-7013(f); DFARS 252.227-7014(f).

[33]DFARS 252.227-7013(f)(1); DFARS 252.227-7014(f)(1).

[34]See General Atronics Corp., ASBCA No. 49196, 02-1 BCA ¶ 31,798, 44 GC ¶ 147.

[35]DFARS 252.227-7017(d).

[36]DFARS 227.7202-4.

[37]DFARS 227.7202-1(a).

[38]FAR 12.212, 27.405-3.

[39]48 C.F.R. § 552.232-78, "Commercial Supplier Agreements—Unenforceable Clauses."

[40]31 U.S.C.A. § 1341.

[41]41 U.S.C.A. §§ 7101–7109.

[42]31 U.S.C.A. §§ 3901–3907.

[43]32 U.S.C.A. § 3727.

[44]See FAR 12.403; FAR 52.212-4, "Contract Terms and Conditions—Commercial Items," Contract Terms and Conditions—Commercial Items (l) ("Termination for the Government's convenience"), (m) ("Termination for cause").

[45]DFARS 252.227-7017(d).

[46]FAR 15.403-1, (b)(3), (c)(3); 10 U.S.C.A. § 2306a(b)(1)(B); 41 U.S.C.A. § 3503(a)(2) "(Truthful Cost or Pricing Data" statute).

[47]FAR 15.403-3(c)(1).

[48]FAR 15.404-1(b)(1) (emphasis added).

[49]DFARS 227.7203-4(b) ("Source of funds determination").

[50]See FAR 27.403 ("Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the such data."); DFARS 227.7103-4, "License rights" (technical data), 227.7203-4, "License rights" (computer software and computer software documentation).

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