

Intellectual Property Rights: Why You Should Care and How To Manage Them

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Agenda



What are Intellectual Property (IP) Rights?

Why IP Rights are Important

Policies and Federal Acquisition Regulations

Getting IP Rights into Acquisition Documents

Summary





A Warning!

Arguably, the proper acquisition of technical data and computer software rights by the Government - a hybrid of the IP concepts of trade secrets and copyrights - is one of the most complicated subjects in Federal procurement law.

[Acquiring and Enforcing the Government's Rights in Technical Data and Computer Software Under Department of Defense Contracts: A Practical Handbook for Acquisition Professionals, 7th Edition, Aug 2015]





What are IP Rights?

The terms “Intellectual Property (IP) rights” or “data rights” refers to the government’s license rights in data.

IP Rights are sometimes referred to as Rights in Technical Data and/or Computer Software

“In other words, the government’s data rights determine the extent of its ability to use, reproduce, modify, perform, display, release, and disclose data within the government and, under some circumstances, to disclose data outside the government to third

parties.” *“Data Rights Valuation in Software Acquisitions.”* Head and Nelson, DRM-2012-001825-Final, September 2012, CAN Analysis and Solutions - <http://www.cna.org/sites/default/files/research/drm-2012-u-001825-final.pdf>





What Are Technical and Software Data Rights? -1

Can apply to source code, executable code, documentation, test scripts, tools (including the software development and build environment)

Determines who has the right to:

- Use
- Modify
- Disclose
- Distribute



Software licensing is a related topic

- COTS
- Open source
- Commercial (non-COTS)





What Are Technical and Software Data Rights (Government perspective)? -2

DoD does not “own” the technical data and computer software included in deliverables, even if the department paid for 100 percent of the development costs. [OUSD AT&L 2001]

As a general rule under government contracts, the contractor/developer is **allowed to retain ownership** of the technical data and computer software it developed.

The government receives only **a license to use** that technical data and computer software.

The **scope** of the license depends on the **needs of the agency**, **source of funding** for development, and the **negotiations** between the parties.





Getting the Terms Straight -1

Commercial Software - developed or regularly used for non-governmental purposes which has been or will be commercially offered or sold, leased, or licensed to the public; or would require only minor modification to meet the requirements. [Both **COTS and open source software** are types of commercial software.] [DFARS 252.227-7014 (a)(1); see also FAR Part 2]

Computer Program - Set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations. [DFARS 252.227-7014 (a)(3)]

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 does not include computer data bases or computer software documentation.** [DFARS Subpart 252.227-7014 (a)(4), See also FAR Part 2]

Note: Non-Commercial software is anything that does not meet the definition for commercial software.





Getting the Terms Straight -2

Data - Recorded information, regardless of form or the media on which it may be recorded. **The term includes technical data and computer software.** The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information. [FAR Subpart 27.401]

Technical Data – means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term **does not include computer software** or data incidental to contract administration, such as financial and/or management information. [DFARS 252.227-7013]

- Technical data *include but are not limited to* test harnesses, databases, engineering drawings, test plans, design review packages, user manuals, installation manuals, technical orders

Non-Commercial Computer Software - Noncommercial computer software” means software that does not qualify as commercial computer software under paragraph (a)(1) of this clause. [DFARS 252.227-7014]





Getting the Terms Straight -3

Developed exclusively at private expense - development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

- (i) Private expense determinations should be made at the lowest practicable level.
- (ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense. [DFARS 252.227-7013/7014]

Developed exclusively with government funds - development was not accomplished exclusively or partially at private expense. [DFARS 252.227-7013/7014]

Developed with mixed funding - development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract. [DFARS 252.227-7013/7014]





Getting the Terms Straight -4

Main Types of Rights:

- Unlimited Rights – Full rights, no time limits
- Government Purpose Rights - limited release outside the government; Usually, reverts to Unlimited after 5 years
- Restricted Rights – restrictions on use even within the government
- Limited Rights – same as Restricted, but for Technical Data only
- Specifically Negotiated Rights – as per a specific contract clause
- Prior Government Rights – for items developed under a previous contract – retain rights under that contract



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Why Data Rights Are Important

Determines how the government can use the technical data and software produced in an acquisition

Influences the ability of the government to economically sustain systems

- Can provide the ability to compete / re-compete maintenance for systems when advantageous to the government

Can influence the ability to interface to other systems

Some commercial licenses are not in compliance with the Federal Acquisition Regulations (FAR)

**“Even the hardest IP problem is made infinitely easier ...
by simply starting EARLY!! ” [Gray 2011]**





Why IP Rights are important to the DoD -1

It's the law....

- Section 824 of the Ike Skelton National Defense Authorization Act for FY 2011 required the Secretary of Defense to review existing guidance concerning the acquisition of data rights “to ensure that the United States—
 - preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with federal funds as defined in accordance with the amendments made by this section;”

For ACAT I and II programs, an Intellectual Property (IP) Strategy must be maintained throughout the program and summarized in the Acquisition Strategy as per DoDI 5000.2



Why IP Rights are important to the DoD -2

DFARS 207.106(S-70) Additional Requirements For Major Systems

- (S-70)(1) In accordance with Section 802(a) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) and DoD policy requirements, **acquisition plans** for major weapon systems and subsystems of major weapon systems shall—
 - i. Assess the **long-term technical data and computer software needs** of those systems and subsystems; and
 - ii. Establish acquisition strategies that provide for the technical data and computer software deliverables and associated license rights needed to sustain those systems and subsystems over their life cycle. The strategy may include—
 - A. The development of **maintenance capabilities** within DoD; or
 - B. Competition for **contracts for sustainment** of the systems or subsystems



Data Rights Concerns – Early In Lifecycle

Rights to any trade study data

Rights to use any software tools used to help formulate Analysis of Alternative results if any scenarios need to be re-run later

Rights to data used to compile early cost estimations

Rights to any prototype software

Right to any prototype architectures/designs

Rights to data presented during any early design reviews



Data Rights Concerns – Later in the Lifecycle

Development, Deployment & Sustainment

- Architecture, design and test documentation
- Software used/developed during development
- Software development and test tools used during development
- Limitations on Open Source or Commercial Off The Shelf (COTS) licenses
- Ability to run software on other platforms
- Software tests, test data, environments, and tools used during production and/or acceptance testing
- Databases with software information – defects, metrics, etc.
- Software modifications
- Updates to software documentation





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FAR/DFARS Structure

DFARS - For data/IP rights we are mainly concerned with two specific parts:

- Part 27 (227) – Patents, Data and Copyrights
 - Subpart 27.1 – General
 - Subpart 27.2 – Patents and Copyrights
 - Subpart 27.3 – Patent Rights under Government Contracts
 - Subpart 27.4 – Rights in Data and Copyrights
- Part 52 (252.227) – Solicitation Provisions and Contract Clauses

Other parts commonly used in DoD acquisition

- Part 12 (212) – Acquisition of Commercial Items
- Part 15 (215) – Contracting by Negotiation





DFARS Regulations and Contract Clauses

DFARS SUBPART 227.71 - Rights In Technical Data

- Prescribes policies and procedures; acquisition of technical data and the rights to use, modify, reproduce, release, perform, display, or disclose technical data. Rights are unlimited, Government Purpose Rights, and Limited.

DFARS SUBPART 227.72 - Rights In Computer Software and Computer Software Documentation

- Prescribes policies and procedures; acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose. Rights are unlimited, Government Purpose Rights, and Restricted.
- DFARS SUBPART 252.227 – Solicitation and Contract Clauses for Technical Data and Noncommercial Software Licenses

Contract clauses regarding technical data and noncommercial software licenses for inclusion in RFPs and contracts.



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Thinking About Data Rights in the RFP

Data rights (or lack of data rights) can have long term impacts

- Use of the data the program office receives on the current program
- Data that is provided to interfacing programs (especially in complex “system of systems” type efforts)
- Long term maintenance/sustainment of the current system

It is always more expensive to try to negotiate data rights after the contract is let

- It is vitally important to think about what data rights are needed well before the RFP is being prepared
- If data rights are important, ensure they are part of the evaluation criteria in a source selection





Data Rights Questions -1

When writing an RFP:

- What software data rights might you need?
- What software/ software data might require additional data rights?
- Who will need the software related data? And what data will they need?
- What is the risk involved in not getting the rights to software data you need?
- Will software data rights be used as an evaluation criteria?
- How will user licenses be handled?





Data Rights Questions -2

When writing an RFP (continued):

- For commercial software
 - Are data rights provided to the public under the commercial license acceptable?
 - Are the commercial licenses in accordance with federal law?
 - Does the vendor have long term stability?
 - Is escrow a possibility? (Note – this does not totally solve most software rights issues)
- For non-commercial software
 - Do we have a way to clearly identify what was developed with private or mixed funds?
 - Are the standard rights acceptable (unlimited, government purpose, restricted) or do I need specially negotiated rights?
 - Will we have rights to subcontractor provided software?





Data Rights in the RFP/Contract -1

Contract Line Item Numbers (CLINs) (Section B)

- Include one or more CLINS for specific delivery of software to include the data rights and any COTS licenses

Contract Clauses (Section H and I)

- Include specific clauses to ensure all data rights are specifically listed
- Include in the contract specific definitions for items such as “test infrastructure” as needed
- These should be based on the [FAR/DFARS](#) data rights clauses – collaborate with your Primary Contracting Officer (PCO)
- Ensure these flow down to the subcontractors
- For DoD you can make use of “specifically negotiated” data rights permitted by the DFARS 227-7103.5





Data Rights in the RFP/Contract -2

Deliverables (for DoD) Contract Data Requirements List (CDRL)

- Ensure you ask for the offeror's asserted data rights for the deliverables

Section L – Instructions to Offerors

- Request a description of all software that is planned to be used
 - Include who owns the intellectual property rights and what rights the government will have
- Be sure to include items like test infrastructure if important
- Be sure to include subcontractors
- You should determine your evaluation criteria (Section M) first and then ensure Section L asks for the material you will need to perform that evaluation.





Data Rights in the RFP/Contract -2

Section M – Evaluation Criteria

- If needed, include criteria for evaluating the data rights so they can be used as part of the source selection decision
 - Something like “Provides data rights and licensing that will meet the Government’s needs for assessing technical progress during development, certification and accreditation, mission assurance, interfacing to future systems, and performing long-term maintenance.” BUT – check with your Contracting Officer and IP attorney
 - Include any other specifics that would increase risk to an unacceptable level



Contract Clauses from DFARS 252.227.7014 -5



(e) ... Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software. The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be restricted:

Computer Software to be Furnished with Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****

*Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

**Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR software generated under another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

(End of identification and assertion)





Other Things to Consider

Ensure any license terms for COTS products do not conflict with any FAR provisions

- Many of them do – so you need to check

If applicable, ensure firmware is included in the software data rights purposes

Provide adequate training on data rights for those who will be evaluating them during the source selection

Consider both technical data rights and software data rights as needed

Continue to think about data rights throughout the program execution!

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Summary

Consider data rights early and often during government acquisition of software systems

Data rights can influence a system long after the system has been delivered

Data rights is a complex area – be sure to involve an IP Attorney and Contractor Officer as soon as possible if you anticipate complex data right needs





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PART 227 - Patents, Data, And Copyrights. SUBPART 227.71 and SUBPART 227.72

PART 252.227- 7000-7039 - Solicitation Provisions And Contract Clauses

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<https://acc.dau.mil/adl/en-US/431675/file/80625/Technical%20Data%20and%20Computer%20Software%20Rights%20Handbook%207th%20Edition.pdf>

GENERAL *Copyright Law of the United States* - <http://copyright.gov/title17/>

"What Are Patents, Trademarks, Servicemarks, and Copyrights?"

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