The Federal Contractor's Guide to Data Rights

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Every federal contractor that develops, sells or otherwise transfers or delivers "technical data" or "computer software" under a federal prime contract or subcontract needs to be aware of the contractual and regulatory "data rights" provisions applicable to federal procurements. Data rights provisions determine the scope of the contractor's and the federal government's rights in the technical data and computer software developed by the contractor.

It is imperative that contractors understand the scope of applicable data rights provisions prior to developing or providing any technical data/computer software of any kind under a federal contract. Contractors that fail to understand the relevant data rights provisions run the risk of losing ownership and user rights in the very technical data/computer software that they created, and worse yet, run the risk of violating federal fraud provisions for misusing the technical data/computer software.

This "Federal Contractor's Guide to Data Rights" provides a brief overview of how data rights are defined, explains the scope of data rights possessed by contractors or the government based on contract parameters, identifies the key data rights provisions incorporated into federal contracts, the keys to avoiding misuse or fraud allegations related to data rights, and data rights "best practices" that should be implemented by all contractors.

"Data Rights" Defined

The government, through various federal agencies, routinely tasks contractors with developing and/or delivering technical data/computer software pursuant to federal contracts. "Technical data" is specifically defined as "recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation)." 48 C.F.R. § 52.227-14. Put another way, technical data equates to any form of scientific or technical information.

Computer software is specifically defined as "(i) computer programs that comprise a series of instructions, rules, routines or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and (ii) recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas and related material that would enable the computer program to be produced, created or compiled." 48 C.F.R. § 52.227-14. In other words, computer software is comprised of instructions or processes developed by a contractor to enable computers to function.

The ownership and user rights of the technical data/computer software that are the subject of a federal contract are covered under the data rights provisions of the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) (or other civilian agency regulation). The FAR data rights provisions apply to government contracts with "civilian" agencies, while the DFARS provisions apply to government contracts with the Department of Defense (DoD). Pursuant to these data rights provisions, the government automatically acquires certain rights to the technical data/computer software developed by a contractor under a federal contract. The extent of the government's rights in the technical data/computer

software varies depending on the contract, the agency and the specific circumstances relating to that particular procurement.

Scope of Data Rights

In general, contractors retain *ownership* of the technical data/computer software that they *develop* pursuant to a government contract, but the government obtains data rights in that technical data/computer software, which essentially amounts to a *license* to possess and use the technical data/computer software under certain conditions and within certain parameters. *See* FAR 52.227-14(d); DFARS 227.7203-4(a) ("license rights"). In other words, "[t]he government may own the delivered physical medium on which the [technical data/computer software] resides, but generally will not own the [technical data/computer software] rights. 'License rights' refers to the government's ability to use, reproduce, modify and release the delivered [technical data/computer software]."[1]

It is critically important to understand the scope of the term "develop/development" in order to determine which category of data rights may apply to technical data/computer software developed by a contractor. In DoD procurements, "development" occurs "when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended." DFARS 252.227-7013(a)(7). The FAR does not specifically define "development" (although the concept of "development" at private expense is mentioned at FAR 52.227-14); therefore, a government contractor under a FAR contract may look to the DFARS' definition of "development" if an issue arises. In other words, as long as there is a "high probability" that the data or software will perform as intended, the core "development" is complete. The government typically has "unlimited rights" to developments that it funds (except for a limited period of time under SBIRs). Once the core development is finished – if done at private expense – additional minor tweaks and minor improvements are not typically or generally considered "development." Therefore, a contractor may, under many types of procurements, assert limited or restricted rights in IP that it paid to develop, even if the government funds further minor modification-type improvements. In other contexts, depending upon the extent of the improvement, the government may have unlimited rights to that improvement.

Categories of Data Rights

There are generally three categories of licenses the government obtains over technical data/computer software developed pursuant to a government contract: (1) limited rights/restricted rights; (2) unlimited rights; and (3) government purpose rights (which apply only to DoD contracts). Additionally, certain agencies and contract types allow for negotiated rights. Further, contracts for the procurement of commercial items normally are transferred under the standard commercial terms with some tweaks. Finally, certain small businesses may develop technical data under SBIR-type procurements, which data may qualify for SBIR data rights treatment. As explained below, these licenses vary widely in scope and effect depending on the contract and the procurement parameters. Contractors must

[1]Office of the Undersec'y of Def. for Acquisition, Tech. & Logistics, Intellectual Property: Navigating Through Commercial Waters 1-3 (2001), available at https://www.acq.osd.mil/dpap/specificpolicy/intelprop.pdf.

understand which licenses apply to their technical data/computer software and how they affect their work product.

"Limited Rights" and "Restricted Rights" – Contractor-Funded Development

The government obtains "limited rights/restricted rights" in circumstances where a contractor develops technical data/computer software pursuant to a government contract "at private expense," or in other words, where the contractor self-funds the development work. Limited rights apply to technical data, and restricted rights apply to computer software.

"Limited rights" allow the government to use technical data internally within the government for limited purposes. DFARS 252.227-7013(a)(14); FAR 52.227-14 Alt. II (g)(3). Under a "limited rights" license, the government may not share the technical data with third parties (other than possibly support services contractors) or make it available for competitive procurements. To be classified as "limited rights," the technical data must have been "developed at private expense" and "embody trade secrets" or constitute "commercial or financial or privileged" information (FAR 27.401, 27-404-2(b)), or pertain "to items, components or processes developed exclusively at private expense and marked with the limited rights legend" (DFARS 252.227-7013(b)(3)(i)(A)). For example, the government would have limited rights in a secret/confidential chemical formula developed by a contractor at the contractor's expense and used for the purposes of an after arising particular government contract.

"Restricted rights" pertaining to computer software permit the government to use the software internally within the government for limited purposes. DFARS 252.227-7014(a)(15); FAR 52-227-14 Alt. III (g)(4). The government may not share the software with any third parties (other than certain support services or similar contractors) or provide it to others for competitive procurements. To be classified as restricted rights software under the FAR, the software must be "developed at private expense" and constitute a trade secret, copyrighted material, or confidential or privileged commercial/financial data. See FAR 27.401. Under the DFARS, restricted rights apply if the software was developed at private expense. DFARS 252.227-7014(b)(3)(i). For example, the government would have restricted rights in confidential computer source code developed by a contractor at the contractor's expense but used for purposes of an after arising government contract.

"Unlimited Rights" – Government-Funded Development

The government obtains "unlimited rights" in circumstances where the government pays for the technical data/computer software development by the contractor. Unlimited rights are the broadest rights the government can obtain pursuant to the data rights provisions and provides the government the "rights to use, modify, reproduce, release, perform, display or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so." DFARS 252.227-7018(a)(21); see also FAR 52.227-14(a). In other words, the government has the ability to use the technical data/computer software in any manner it sees fit. For example, the government would have unlimited rights in a secret/confidential chemical formula developed by a contractor pursuant to a government contract at the government's expense.

It is important to note, however, that as broad as unlimited rights are, it does not mean that the government has "exclusive" rights over the technical data/computer software. Even in circumstances where the government obtains unlimited rights, the contractor still retains ownership of the technical data/computer software and may still use it, license it to others and otherwise profit from its use. DFARS 227.7203-4(a); see also FAR 52.227-14(d).

"Government Purpose Rights" – Joint-Funded Development

In situations where a contractor's technical data/computer software development is jointly funded by both the contractor and the government, the government generally obtains "government purpose rights" or "government purpose license rights" (GPLR) to the technical data/computer software. Government purpose rights are essentially "middle ground" data rights obtained by the government that lie between limited rights/restricted rights and unlimited rights. Government purpose rights apply only to contracts governed by the DFARS—i.e., contracts with the DoD and for other agencies that have followed the lead of the DoD and the concepts set forth in the DFARs, for example certain Homeland Security procurements. The FAR does not include a provision allowing for government purpose rights. Rather, if a project under a FAR contract is partially funded by the civilian agency, that agency will typically acquire unlimited rights, although the specific clauses in the contract and solicitation will need to be reviewed to confirm whether the agency has modified the standard clauses. See FAR 52-227-14(b)(1).

Specifically, government purpose rights provide the government the right to "[u]se, modify, reproduce, release, perform, display or disclose technical data within the government without restriction; and [r]elease or disclose technical data outside the government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display or disclose that data for United States government purposes." DFARS 252.227-7013(a)(13). A "government purpose" is "any activity in which the United States government is a party, including cooperative agreements with international or multinational defense organizations, or sales or transfers by the United States government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display or disclose technical data for commercial purposes or authorize others to do so." DFARS 252.227-7013(a)(12). In other words, government purpose rights allow the government to disclose to third parties a chemical formula developed pursuant to a government contract for a government purpose (such as for national security related purposes), but not for commercial purposes. Note that in most situations, these GPLRs will become unlimited rights after a specified period of time, typically five years, although this period is negotiable.

Specifically Negotiated Rights [Applicable to the DoD]

If the parties to a DoD government contract decide that the standard license rights (unlimited rights, government purpose rights and limited rights) do not serve their purposes, they may modify these standard rights, with certain limits.

DFARS 252.227-7013(b)(4) provides:

> *Specifically negotiated license rights.* The standard license rights granted to the government under paragraphs (b)(1) through (b)(3) of this clause [i.e.,

> unlimited rights, government purpose rights and limited rights], including the period during which the government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the government lesser rights than are enumerated in paragraph (a)(14) of this clause [i.e., limited rights]. Any rights so negotiated shall be identified in a license agreement made part of this contract.

In other words, the parties may modify the standard license rights (unlimited rights, government rights or limited rights) as long as: (1) the parties identify the modified rights in the agreement; and (2) the modified rights are not lesser rights than limited rights in technical data and restricted rights in computer software.

SBIR/STTR Data Rights

Small Business Innovation Research (SBIR) and Small Business Technology Transfer Research (STTR) data rights are valuable and important data protections afforded to SBCs – Small Business Concerns – that enter into contracts with the government. An SBC is a for-profit company of 500 or fewer employees, 50% or more of which is owned and controlled by U.S. citizens or permanent resident aliens, and 49% or less of which is owned by a hedge fund, venture capital operating company or private equity fund.

An important feature of SBIR/STTR protections is that the government may not disclose SBIR data to anyone outside of the government. The government has the right to use SBIR data but is not permitted to disclose it outside the government. For civilian contracts under the FAR, the government's nondisclosure obligation lasts for four years, starting at the end of the SBIR project. See generally FAR 52.227-20. This SBIR project may be extended, and therefore the SBIR data rights time period extended, by additional SBIR contracts for later phase development. For DoD contracts under the DFARS, the nondisclosure period is five years, starting at the end of the project. See generally DFARS 252.227-7018.

Critically, because this nondisclosure obligation prevents the government from revealing the SBC's SBIR data to competitors, it theoretically increases the value of the SBC firm.

In order to qualify as SBIR/STTR data, the data must be: (1) recorded information (i.e., reduced to writing and contained in a written document), (2) of a technical nature (non-technical data, such as cost and pricing information, for example, does not count), (3) that is generated under an SBIR or STTR funding agreement (technical data developed by the SBC with its own private funds, for example, would not qualify as SBIR data because it was not generated under a SBIR/STTR funding agreement with the government).

Finally, it is critically important for the SBC to mark its SBIR/STTR data with the proper SBIR/STTR legend and language set forth in the applicable FAR or DFARS provision. If SBIR/STTR data is not properly marked with the correct language, it could lead to disclosure of the SBIR/STTR data by the government.[2]

Commercial Data Rights

It is critical for contractors to determine whether technical data or computer software is commercial

[2]Source: https://www.sbir.gov/tutorials/data-rights/tutorial-2#

or noncommercial, as this determination affects the scope of the government's licensing rights. Generally, contractors want their products deemed commercial items due to its benefits, particularly the waiver of certain FAR/DFARS requirements and the application of standard commercial licenses.

The FAR's definition of a "commercial item" is any item (other than real property) that is: (1) of a type customarily used by the general public for nongovernmental purposes and has been sold, leased or licensed to the general public or been offered for sale, lease or license to the general public; (2) any item evolved from (1) through "advances in technology or performance" but not yet commercial available; (3) any item that could satisfy (1) or (2) but for "modifications of a type customarily available in the commercial marketplace; or minor modification or a type not customarily available in the commercial marketplace made to meet federal government requirements"; or (4) any combination of items meeting the above requirements. See FAR 2.101 (definition of "commercial item").

The broad phrase "of a type" in the definition of "commercial item" has the effect of placing less stringent requirements on a contractor of what it has to prove for technical data or computer software to qualify as a "commercial item." For example, an item can qualify as a "commercial item" without being identical to an item that is already available in the commercial marketplace.

FAR Part 12 implements Title VIII of the Federal Acquisition Streamlining Act of 1994 (FASA) and prescribes policies and procedures unique to the acquisition of commercial items. Under the FAR's policy requirements, government agencies are required to "conduct market research to determine whether commercial items or nondevelopmenetal items are available that could meet the agency's requirements." See FAR 12.101(a). Further, government agencies must buy commercial items when they are available to meet the agency's needs and "require prime and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency." See FAR 12.101(b), and (c).

With respect to the acquisition of technical data, the FAR requires the government to acquire "only the technical data and the rights in that data customarily provided to the public with a commercial item or process" unless agency-specific statues apply. See FAR 12.211. Further, the contracting officer must presume that data delivered under a contract for commercial items was created exclusively at private expense. *Id.*

With respect to the acquisition of commercial computer software and documentation, such data "shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with federal law and otherwise satisfy the government's needs." See FAR 12.212. FAR Subpart 12.5 lists various laws that are not applicable to prime and subcontracts (at any tier) for the acquisition of commercial items and laws that have been amended to eliminate or modify their applicability to either prime or subcontracts for the acquisition of commercial items. See FAR 12.5(a) and (b).
When it comes to "commercial items," contractors should be aware of a few key issues to preserve their IP rights when conducting business with the

government. Primarily, contractors should determine whether the product they are supplying qualifies as a "commercial item." As such, contractors (ideally with the government's approval) should identify potential "commercial items" in the proposal. Contractors should also have ready a standard commercial license applicable to technical data and computer software. Having a strong understanding of the rules and regulations pertaining to "commercial items" will allow contractors to better understand their IP rights and negotiate the scope of those rights with the government.

Funding of Data Rights

Of course, determining what kind of data rights the government or a contractor has or obtains under a federal contract is significantly dependent on the source of funding used to develop the technical data/computer software—i.e., whether the funding is provided by the contractor ("at private expense"), the government (via "government funds") or jointly by both parties (through "mixed funding"). It is imperative that contractors understand how the source of funding affects the data rights determination, which dictates the rights maintained by the contractor or obtained by the government.

Determining what constitutes funding technical data/computer software "at private expense" is not as straightforward as it sounds. Contractors often believe that if the government pays for some of the technical data/computer software development that it was not developed "at private expense," and, consequently, that the contractor cannot claim limited rights/restricted rights over the technical data/computer software. However, this is generally not the case. If development work is appropriately charged by the contractor to its indirect cost accounts, such as independent R&D or overhead, it constitutes development "at private expense," even if the government reimburses the contractor for such indirect costs.

At private expense "determinations should be made at the lowest practicable level," which means that different determinations can be made regarding different technical data/computer software components developed by a contractor. DFARS 227.7013-(8)(i). This concept of segregability also applies to civilian agencies operating under the FAR. See 41 U.S.C. § 108 (defining "item" as "an individual part, component, subassembly, assembly or subsystem integral to a major system"). Thus, contractors must determine the source of funding for the development of *each* component of a contract or a project in order to correctly determine whether limited rights/restricted rights apply to the specific components.

By contrast, the question of whether technical data/computer software developed under a DoD contract was developed through "government funds" tends to be more straightforward, and it occurs where "development was not accomplished exclusively or partially at private expense." DFARS 252.227-7013(a)(9)-(10), 252.227-7014(a)(9)-(10). Further, development through "mixed funding" under a DoD contract occurs when that "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." *Id.*[3]

[3]As discussed earlier, if a project under a FAR contract is partially funded by the civilian agency, that agency will typically acquire unlimited rights. See FAR 52.227-14(b)(1).

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Key Data Rights Provisions Incorporated into Federal Contracts

The following FAR contract clauses relate to data rights and are incorporated in federal contracts under specific circumstances:

- **FAR 52.227-14 – Rights in Data**
  Main contract clause that outlines the respective rights of the contractor and government in data and software that precedes the performance of the contract work. This clause also outlines the rights in data and software created during the performance of the contract. Pursuant to FAR 27.409(b)(1), this clause is inserted in solicitations and contracts "if it is contemplated that data will be produced, furnished, or acquired under the contract" unless one of the listed exceptions apply. See FAR 27.409.
- **FAR 52.227-15 – Representation of Limited Rights Data and Restricted Computer Software**
  Outlines the government's known delivery requirements for data. Under FAR 27.409(c), this clause is inserted "if the contracting officer desires to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation." See FAR 27.409(c).
- **FAR 52.227-16 – Additional Data Requirements**
  Allows the contractor, under certain circumstances, to order any data first produced or specifically used in performance of this contract. Under FAR 27.409(d), this clause is inserted in "solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract." See FAR 27.409(d). The clause may also be inserted in other contracts, as described in FAR 27.409(d).

FAR 52.227-17 through FAR 52.227 include additional clauses for particular circumstances outlining data and software rights among the contracting parties.

Avoiding Misuse or Fraud Allegations

As all federal contractors are aware, many procurement regulations require a "certification" stating that the contractor has complied with all applicable laws and regulations. For example, when a contractor is asserting that limited rights apply, it must state in its proposal its basis for seeking to limit the government's rights. Contractors need to be aware that providing a certification containing inaccurate descriptions of the government's data rights under a contract can potentially expose them to liability under the False Claims Act (FCA). The complexity of the data rights provisions makes it particularly easy for an FCA plaintiff to allege that a contractor has "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment approval" or has "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement material to a false or fraudulent claim."[4]

To reduce the risk of FCA liability, it is imperative for every contractor to ensure the accuracy of its

[4] 31 U.S.C. § 3729(a)(1)(A).

representations. This means keeping detailed logs about when each component of the data or software was developed and how it was funded. It also requires familiarity with the quagmire of data rights provisions and how they are applied.

Data Rights "Best Practices"

Read and understand your contract. It is essential to understand which specific activities you will be performing under the contract and who will be funding each aspect of each activity.

Know the rules. It is critically important to become familiar with the FAR or DFARS provisions applicable to your contract.

Document any uncertainty. It is also important to keep a log of all work performed and where funding for each aspect came from, in case it ever becomes necessary to resolve an ambiguity.

Use a legend. Recall that:

- To be classified as "limited rights" under the DFARS, technical data must pertain "to items, components or processes developed exclusively at private expense and *marked with the limited rights legend*." (DFARS 252.227-7013(b)(3)(i)(A)) (emphasis added).
- SBIR/STTR data must be marked with the proper SBIR/STTR legend and language set forth in the applicable FAR or DFARS provision.

Get help when necessary. Navigating the complex quagmire of data rights provisions alone is no easy task.

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