



Technical Data and Computer Software in Government (DoD) Contracting

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Data Rights and Computer Software in Government (DoD) Contracting

This Presentation will answer the following Questions:

- How are Technical Data and Software are treated in Department of Defense (DoD) Contracts?
- How is it best to protect Technical Data and Software when contracting with the DoD?

Governance

- # Data and Software Rights in DoD Contracts are governed by the DoD supplement to the Federal Acquisition Regulations

Commonly referred to as the

DFAR

Part I – Commercial Contracts

If you are selling commercial products or software to the Government, the following rules will generally apply to Technical Data and Software

Commercial Items

Commercial Items Defined:

- Commercial items are items that have been sold, leased or licensed to the public or offered for sale lease or license to the public or items that, but for minor modifications, would meet the above criteria

DFAR Treatment—Commercial Data

- # DFAR 252.227-7015
- # Government has license rights to certain data related to commercial Contracts—i.e. the right to use modify, reproduce, release, perform, display or disclose, and permit others to do so. This data includes the following:
 - Data delivered without restriction
 - Form, fit and Function Data
 - Data necessary for operation, installation or training
 - Data the Government already has rights in

Form, Fit, and Function Data

Form, Fit, and Function Data

- Technical data that describes the required overall physical, functional and performance characteristics of an item, component or process to the extent necessary to permit identification of physically and functionally interchangeable items

Commercial Software

Definition of Commercial Software similar to definition of Commercial Items

- Software developed or regularly used for non-governmental purposes which—has been sold or licensed to the public, has been offered for sale, lease, or licensed to the public or has not been offered, sold, leased or licensed, but will be available for commercial sale, lease or license in time to satisfy the delivery requirements of this contract (*DFAR 252.227-7014(a)(1)*)

Government Rights in Commercial Software

DFAR 227.7202-3

- Basically, the Government receives the rights specified in the license under which the software was obtained
 - the Government is treated the same as your commercial customers. It either accepts the license offered, or negotiates for further rights

Tips for Protecting Data and Software for Commercial Contracts

- # Do not provide data to the Government beyond what is expressly required without obtaining their agreement to protect it—***if you give it to them without restriction, they are free to use it as they see fit!*
- # Just because the Government asks for it, does not mean you have to provide it!
- # Negotiate Software licenses to the Government as carefully as you would with any other commercial customer

Part II – Noncommercial Contracts

Noncommercial Technical Data and Software is treated far differently than commercial Data and Software

Non-Commercial Data

#DFAR 252.227-7013

- This clause is used in contracts where technical data is to be delivered—typically in R & D contracts where the Data is developed under the contract and is a deliverable

252.227-7013 Continued

Via this clause:

- the Government receives “*unlimited rights*” in all Technical Data developed on the contract
 - Note, the Contractor can attempt to negotiate other rights with the Government (e.g. Government Purpose rights)

Unlimited Rights

The rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so (*DFAR 252.227-7013 (a)(15)*)

■ **EXTREMELY BROAD RIGHTS—THE GOVERNMENT CAN DO PRETTY MUCH WHATEVER IT WANTS WITH THIS DATA.**

Tangential Data Treatment

- # Contractors often bring into a new Contract existing Technical Data—*this data can be protected, if you know how!*
 - If developed at private expense, this existing Data to be used and delivered on a new Contract, qualifies for “Limited Rights” treatment.

Limited Rights

- # Means the Government has the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, or use the technical data for manufacture, or authorize the technical data to be used by another party. . . .

Utilizing Limited Rights Data

During the Representations and Certification process you will be asked to identify this Data.

It is important to identify this Data up front to preserve protections downstream

Marking

- # Two ways Contractor will be able to protect limited rights data used or delivered:
 - Contractor will be able to withhold it from delivery on the Contract
 - Contractor will be able to mark it with the “Limited Rights” legend, which delineates the rights the Government receives in the Data

IF YOU DO NOT MARK DELIVERED DATA, YOU

WILL LOSE THIS PROTECTION

Limited Rights Legend

LIMITED RIGHTS

Contract No.

Contractor Name

Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data--Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

Non-Commercial Software

#DFAR 252.227-7014

- Government gets “unlimited rights” in Software developed on a Government Contract
 - Rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so (*DFAR 252.227-7014(a)(15)*)

Restricted Rights

- # Government gets “restricted rights” to noncommercial software required to be delivered to Government that was developed at private expense
 - *See 252.227-7014 (a)(14) for the definition of Restricted Rights, it is lengthy, but includes right to use one copy at a time, to transfer to another agency, make backup copies, etc.*

Tips for Protecting Data and Software for Non-Commercial Contracts

- # Negotiate rights more restrictive than “unlimited rights”
- # Do not deliver Limited Rights data that you are allowed to withhold
- # Disclose all Limited Rights data and Restricted Software in the Reps & Certs

MARK! MARK! MARK! Deliver all Limited Rights Data and Restricted Software with the appropriate legend

Part III – SBIR Contracts

- # SBIR Contracts are contracts that can be awarded ONLY to small businesses
- # There are 3 phases:
 - Phase I: feasibility study
 - up to six months, up to \$100,000
 - Phase II: development
 - up to two (2) years in amounts up to \$750,000.
 - Phase III: commercialization
 - must use non-SBIR Federal funding (*Note: DO not have to be a small business to do a Phase III*).

Data and Software Rights SBIR

DFAR 252.227-7018

- In SBIR Contracts Technical Data and Software are governed by the same clause
 - Government will receive SBIR Data Rights in all Technical Data and Computer Software developed under an SBIR Contract

SBIR Data Rights Defined

- # A royalty-free license for the Government, including its support service contractors, to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated and delivered under this contract for any United States government purpose (DFAR 252.227-7018 (a)(18))

SBIR Data Rights Continued

- # Per DFAR 252.227-7018(b)(4), *for 5 years from completion of the project*, the Government cannot disclose SBIR Data or Software except
 - as Contractor permits
 - for evaluation purposes
 - as is necessary for emergency overhaul and repairs of items operated by the Government.

Marking SBIR Data and Software

SBIR DATA RIGHTS

Contract No.

Contractor Name

Contractor Address

Expiration of SBIR Data Rights Period

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the Rights in Noncommercial Technical Data and Computer Software--Small Business Innovative Research (SBIR) Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

SBIR Advantages

- # SBIR Contracts present tremendous advantages to small business Contractors, especially in the protections afforded to Data and Software
 - *A Contractor gets 5 years of protection—this means the Government cannot give Contractor's Data or Software to a competitor for procurement purposes!*

Conclusion

Subcontracting

- Most of the Clauses cited in this presentation flow down to Subcontractors
 - This means that even if you are a subcontractor on a Government Contract, the Data and Software treatment will be the same
 - If a Prime Contractor sends you a Contract that treats Data or Software in a way less favorable to you than the rules set forth above—push back and ask for the DFAR Clauses to flow down to you!

Tips for Protection

- # Do not deliver Data or Software you are not required to deliver
- # Mark all Data and Software requiring marking—
OR YOU WILL LOSE YOUR RIGHTS
- # Draft all manuals and instructions with an eye towards these regulations
- # Negotiate with the Government
- # When a Subcontractor—negotiate to have helpful DFAR Clauses flowed down to you

Final Thought

- # Fear of losing rights in intellectual property is a primary reason small businesses shy away from doing Government work. Knowing the rules provides a better understanding and may allay that fear