



# Weapons Systems Acquisition Reform Act (WSARA) and Technical Data Rights

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## Overview

- **Part I – Current law and policy guidance**
- **Part II – Mechanics of IP Rights in DoD Contracts**

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# Part I – Policy History and Update

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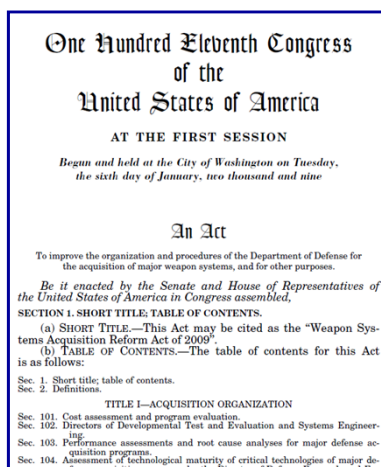


## WSARA – May 2009

### Section 202

(b) MEASURES TO ENSURE COMPETITION.—  
The measures to ensure competition, or the option of competition, for purposes of subsection (a)(1) may include measures to achieve the following, in appropriate cases if such measures are cost-effective:

- (1) Competitive prototyping.
- (2) Dual-sourcing.
- (3) Unbundling of contracts.
- (4) Funding of next-generation prototype systems or subsystems.
- (5) Use of modular, open architectures to enable competition for upgrades.
- (6) Use of build-to-print approaches to enable production through multiple sources.
- (7) Acquisition of complete technical data packages.
- (8) Periodic competitions for subsystem upgrades.
- (9) Licensing of additional suppliers.
- (10) Periodic system or program reviews to address long-term competitive effects of program decisions.





## BBPi Guidance Roadmap

### Target Affordability and Control Cost Growth

- Mandate affordability as a requirement
- Implement "should cost" based management
  - AT&L memo 22 Apr 2011 – Will Cost/Should Cost
  - USA SAAL\_ZR memo 10 June – Army Implementation of USD (AT&L Affordability Initiatives
  - USAF memo 15 June 2011 – Implementation of Will-Cost and Should Cost Management
  - SECNAV ASN-RDA memo 19 July 2011 – Implementation of Should Cost Management
- Eliminate redundancy within warfighter portfolios
- Achieve stable and economical production rates
- Manage program timelines

### Incentivize Productivity & Innovation in Industry

- Reward contractors for successful supply chain and indirect expense management
- Increase Use of FPIF contract type
- Capitalize on progress payment structures
  - DPAP memo 27 April 2011 – Cash Flow Models
- Institute a superior supplier incentive program
- Reinvigorate industry's independent research and development

### Reduce Non-Productive Processes and Bureaucracy

- PD AT&L memo 20 April 2011 – Document Streamlining-Program Strategies and SEP
- PD AT&L memo 23 June 2011 – Improving Milestone Process Effectiveness
- PDUUSD AT&L memo 18 July 2011 – Document Streamlining-Program Protection Plan
- Reduce frequency of OSD level reviews
  - AT&L memo 11 May 2011 – Improving Technology Readiness Assessment Effectiveness
- Work with Congress to eliminate low value added statutory requirements
- Reduce the volume and cost of Congressional Reports
- Reduce non-value added requirements imposed on industry
- Align DCMA and DCAA processes to ensure work is complementary
  - DPAP memo 4 Jan 2010 – Align DCMA and DCAA
- Increase use of Forward Pricing Rate Recommendations (FPRRs) to reduce administrative costs
  - DPAP memo 4 Jan 2010 – Align DCMA and DCAA

### Promote Real Competition

- Emphasize competitive strategy at each program milestone
- Remove obstacles to competition
  - Allow reasonable time to bid
    - DPAP memo 27 April 2011/24 Nov 2010 –Improving Competition
    - Require non-certified cost and pricing data on single offers
    - Enforce open system architectures and set rules for acquisition of technical data rights
- Increase small business role and opportunities
  - DPAP memo 14 Jul y 2011 Use Government –wide Acquisition Contracts Set Aside Exclusively for Small Business

### Improve Tradecraft in Acquisition of Services

- Assign senior managers for acquisition of services
  - Senior Manager's appointed by SAEs (Dec 2010/Jan 2011)
- Adopt uniform services market segmentation (taxonomy)
  - DPAP memo 23 Nov 2010 – Taxonomy for Acquisition of Services
- Address causes of poor tradecraft
  - Define requirements and prevent creep
  - Conduct market research
- Increase small business participation

### Related Memos/DTMs:

PDUUSD AT&L memo 19 July 2011– Roles & Responsibilities of the OSD OIPT Leaders, Teams and Team members

AT&L memo 23 June 2011– DTM 11-009 – Acquisition Policy for Defense Business Systems

AT&L memo 21 March 2011– DTM 11-003 – Reliability Analysis, Planning, Tracking and Reporting

PDUUSD AT&L memo 24 Feb 2011– Expected Business Practice: Post Critical Design Review Reports and Assessments

OMB memo 2 Feb 2011 – "Myth Busting": Addressing Misconceptions to Improve Communications with Industry during the Acquisition Process

*Red = implementing guidance*

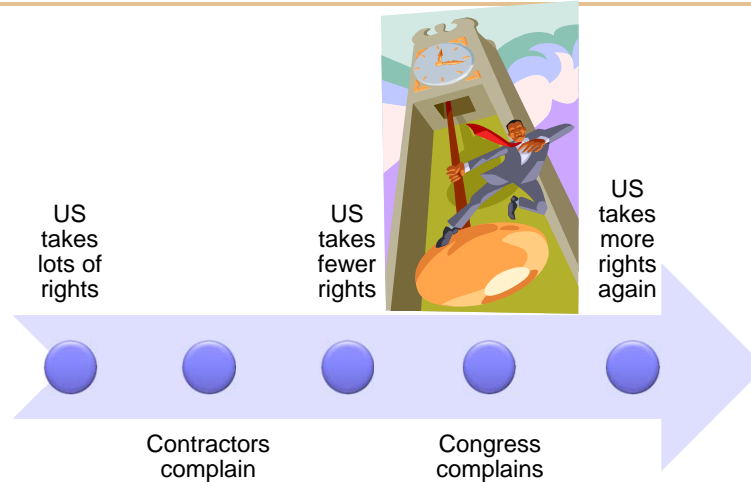


## BBP Initiative- Competition

### • Promote Real Competition

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## Data Rights Pendulum



## The Chickens Come Home to Roost

- **GAO REPORTS 04-715 AND 06-839:**
- **PROBLEMS:**
  - DOD overused Performance Specs. (PS).
  - DOD deemphasized data and data rights.
  - Lack of Technical Data (TD) and the rights to TD limited DOD's sustainment options.
- **Example: M4 carbine (GAO 06-839, See also, FN Mfg. v. U.S., 42 Fed. Cl. 87 (1998))**





*“Those who fail to learn from  
history are doomed to repeat it.”*

**“The Army and the Air Force have encountered limitations in their sustainment plans for some fielded weapon systems because they lacked needed technical data rights. The lack of technical data rights has limited the services’ flexibility to make changes to sustainment plans that are aimed at achieving cost savings and meeting legislative requirements regarding depot maintenance capabilities. ... Although the circumstances surrounding each case were unique, earlier decisions made on technical data rights during system acquisition were cited as a primary reason for the limitations subsequently encountered.” (GAO Report 06-839 at 6)**

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## **Solutions**

### **GAO Reports 04-715 and 06-839:**

- **Limit performance specifications to proper role as done in commercial sector.**
- **Change acquisition policies to reemphasize Technical Data (TD) and rights in Technical Data.**

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## Congressional Response

### Section 802 of 109 P.L. 364 (NDAA 2007)

- **Congressional Response to Lack of DOD action.**
- **Required Acquisition planning to address TD and rights in TD (DFARS 227.7103-1(f)).**
- **802 excluded computer software. However, DFARS 227.7203-1(e) includes it.**
- **Eliminated the presumption that commercial portions of a major system (components) were exclusively contractor funded.**

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## Congressional Response

### Section 815(a) of 110 P.L. 181 (NDAA 2008)

- **Provided a COTs exception to the elimination of the presumption that commercial portions of a major system (components) were exclusively contractor funded.**

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## DOD Follow-up

- **19 Jul 2007 Memo from USD/AT&L:**
  - Requires Data Management Strategy (DMS) assessing long-term technical data needs of CAT I and CAT II systems.
- **DODI 5000.02 (08 Dec 2008)**
  - Requires DMS in CAT I and CAT II systems regardless of acquisition strategy.
  - DMS must be approved in the context of the Acquisition Strategy prior to issuing a contract solicitation.

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## DOD Follow-up DFARS 207.106

### 207.106 Additional requirements for major systems. (abbreviated)

- (S-70)(1) Acquisition plans for major weapon systems and subsystems of major weapon systems shall—
  - (i) Assess the long-term technical data and computer software needs; and
  - (ii) Establish acquisition strategies for technical data rights for life cycle sustainment.
- The strategy may include—
  - (A) The development of maintenance capabilities within DoD; or
  - (B) Competition for contracts for sustainment.

\*227.7103-1(f) requires for tech data, 227.7103-1(e) for software.

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## **DOD Follow-up DFARS 207.106**

### **207.106 Additional requirements for major systems. (abbreviated-continued)**

- **(2) Assessments and corresponding acquisition strategies shall—**
  - **(i) Be developed before issuance of a solicitation;**
  - **(ii) Address the merits of including a priced contract option for the future delivery of technical data and computer software, and associated license rights;**
  - **(iii) Address the potential for changes in sustainment plan over life cycle; and**
  - **(iv) Apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapon systems and subsystems that are to be supported by other sustainment approaches.**

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## **Congressional Response**

### **Section 822 of 110 P.L. 417 (NDAA 2009)**

- **Congressional follow-up to Section 802**
- **Requires data rights negotiation in non-FAR contracts including Cooperative Research and Development Agreements and 10 USC 2371 (Other Transaction Authority)**
  - **Data rights scheme to follow DFARS 227.71 and 227.72?**
  - **Data rights scheme to follow DoD Grants and Agreements Regulations (DoDGARS), DoD 3210.6-R ?**

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## Congressional Response

### Section 822 of 110 P.L. 417 (NDAA 2009)

- **Requires DOD report (w/i 270 days) on § 802 implementation for major weapons including:**
  - **Guidance or policies issued**
  - **PM training on tech data needs**
  - **Examples of use of priced option for tech data or “where all relevant technical data were acquired upon contract award”**

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## Additional software item in 110 P.L. 417 (NDAA 2009)

- **SEC. 803. COMMERCIAL SOFTWARE REUSE PREFERENCE.**
  - **a) In General- The Secretary of Defense shall ensure that contracting officials identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software.**
  - **b) (report on implementation w/i 270 days)**

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## Part II – Mechanics of IP Rights in DOD Contracts

## USG Data Rights Licenses Under DFARS Part 227

- In technical data and computer software delivered under USG contract, a DoD contractor generally retains copyright (or patent) title while the USG gets a license.
- Depending on the particular circumstances, such standard licenses may in substance include aspects of a copyright license, a patent license, and/or a trade secret license (i.e. a non-disclosure agreement).

**The US Government receives a license to technical data, not generally ownership**



## Rights Allocation in General

- In general, rights in noncommercial technical data and noncommercial computer software are apportioned between the contractor and the Government according to who paid for the development of the item, component, or process to which the technical data pertains or who paid for the development of the software.
- However, the Government takes rights in certain categories of noncommercial technical data and noncommercial computer software regardless of funding source.

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## 10 U.S.C. § 2320 Technical Data, Not Software

- (a)(2)(A) “unlimited rights” – exclusive U.S. \$
- (a)(2)(B) contractor “may restrict rights” – exclusive private \$ **except** (a)(2)(C):
  - i) “correction or change” to Government Furnished Information
  - ii) “relates to form, fit, or function”
  - iii) “necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data)”
  - iv) publically available or disclosed

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## 10 U.S.C. § 2320 (continued) Technical Data, Not Software

- (a)(2)(D) – further exceptions to (a)(2)(B):
  - Emergency repair or overhaul
  - Foreign gov't disclosure or use for “evaluational or informational purposes”
    - With nondisclosure agreement
    - With notice to contractor
- (a)(2)(E) – Mixed funding rights up for negotiation



## Software: Important Definitions

- **Commercial versus Noncommercial**
- **Technical Data (TD) versus Computer Software (CS)**
- **Computer Software Documentation (CSD)**



## Commercial Versus Noncommercial

- These definitions apply to items, components, and processes (ICP) to which the technical data pertains.
  - Basically, “commercial” means that the ICP or software has been **sold, is offered for sale, or will soon be sold** to the “public.”
  - For computer software, DFARS 252.227-7014(a)(1) provides a definition of “commercial” which is similar.

General definitions are those used by FAR/DFARS Part 2 to classify the acquisition of goods and services.

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## Commercial/Noncommercial Policy Rationale

- If DoD is buying development of custom noncommercial products/services from a contractor, we must respect legitimate private IP rights, but certain minimal license rights are necessary to effectively utilize the products/services.
  - Generally, for commercial data/software, DoD obtains fewer or no automatic license rights.
  - If the products/services are commercial in nature and thus available in an open competitive market, DoD should be able to purchase those products or services at prices at least as good as the general public.

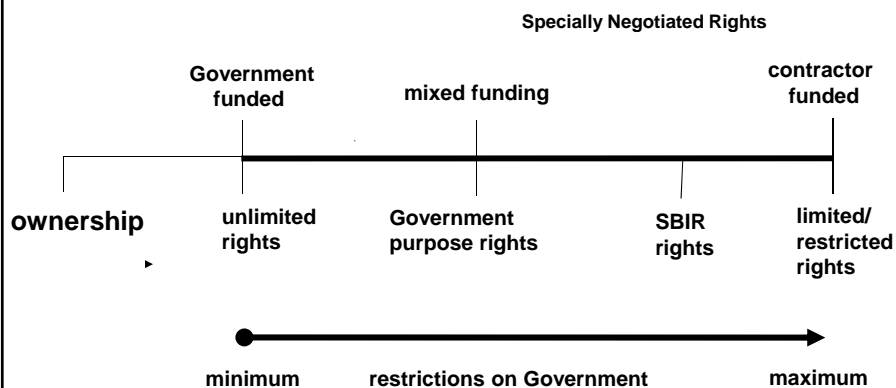
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## Definitions (cont'd)

- Computer software” means 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.
  
- “Computer software documentation” means owner’s manuals, user’s manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.
  
- From DFARS 252.227-7013

## Data Rights Spectrum for Technical Data





## Data Rights Licenses Unique to the USG

The authority to modify, reproduce, perform, display, release, or disclose recorded information.

In DFARS contracts the Government takes certain rights regardless of actual delivery of the data.

- Three basic levels of License Rights:
  - Limited (tech data)/Restricted (software) – No 3<sup>rd</sup> Party Access without permission of data owner.
  - Government Purpose – 3<sup>rd</sup> Party Access w/ Non-Disclosure Agreement (NDA)
  - Unlimited – anyone for any reason

Special License Rights are negotiated.

From DFARS 252.227-7013 and 252.227-7014

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## Special Licenses

- DFARS sets the minimums at Limited/ Restricted. However, there are two statutory limitations in addition to the DFARS restrictions (10 U.S.C. § 2320 & 10 U.S.C. § 2304 (CICA)).
  - Deviations from DFARS Subpart 227.4 (including markings) must be approved by Director of Defense Procurement and Acquisition Policy, Office of Under Secretary of Defense (Acquisition, Technology and Logistics).
  - Only a KO can execute a special license associated with a FAR contract.

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## Special Licenses

- Licenses for USG use of technical data may also arise under other authorities such as Cooperative Research & Development Agreements (15 U.S.C. § 3710a).
- Authority for stand alone licenses to the USG for intellectual property resides with the Service Secretaries. In DA, delegated to CG AMC, *inter alia*, who has delegated the authority to the AMC Command Counsel.
- **Customers should always consult with IP counsel before negotiating any special licenses.**

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## License Rights: Levels Defined

“Unlimited rights” means 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. (DFARS 252.227-7013(a)(15) & 7014 (a)(15))

“Government purpose rights” means the rights to:

- Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and
- Release or disclose technical data (with NDA) 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)(12) & 7014 (a)(11))

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## License Rights: Levels Defined - Cont.

“Limited rights” means 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, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release or disclose such data or authorize the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is—

- Necessary for emergency repair and overhaul; or
- A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluation or informational purposes;
- Subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and
- The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use. (DFARS 252.227-7013(a)(13))

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## License Rights: Levels Defined - Cont.

“Restricted rights” apply only to noncommercial computer software and mean the Government’s rights to—

- (i) **Use a computer program with one computer at one time.** The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;
- (ii) Transfer a computer program to another Government agency without the further permission of the Contractor ...;
- (iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;
- (iv) Modify computer software provided that the Government may—
  - (A) Use the modified software only as provided in paragraphs (a)(14)(i) and (iii) of this clause; and
  - (B) Not release or disclose the modified software except as provided in paragraphs (a)(14)(ii), (v) and (vi) of this clause;
- (v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations....” (DFARS 252.227-7014(a)(14))

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## Data Rights Allocation Paradigm

### THREE SUBSTANTIVE TESTS:

1. Nature of the data
2. Rights arising outside the instant contract
3. Source of funding for the development

### THREE MAJOR PROCEDURAL REQUIREMENTS:

1. Asserting
2. Marking
3. Justifying

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## Allocation Substantive Test # 1 Nature Of The Data

### CERTAIN DATA - ALWAYS UNLIMITED RIGHTS DATA (regardless of funding source):

- Form, fit, and function (FFF) data
- Operation, installation, training, and maintenance data (OITM) (except...Detailed Manufacturing or Process Data (DMPD))
- Noncommercial computer software documentation when required to be delivered
- And more – see (b)(1) of the 252.227-7013 and 252.227-7014 DFARS clauses.

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## **Allocation Substantive Test # 1: Nature of the Data**

**“Form, fit, and function data” means:**

- **Technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items. DFARS 252.227-7013(a)(10)**
- **In practice, no clear guidance on FFF.**

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## **Allocation Substantive Test # 2: Rights Arising Outside the Instant Contract**

- **The USG takes license rights under most contracts in the name of the USG, which makes those rights available to any USG agency.**
- **Rights conveyed to the general public are available to the USG.**
- **Rights from outside the instant contract are to be disclosed under DFARS 252.227-7028.**

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## Allocation Substantive Test # 3: Funding Source

Under the funding test, the allocation of data rights is based upon the existence of “direct” “Federal” funding for the “development” of the underlying “item, component, or process” (ICP) to which the data pertains. [Each term in quotations has a special definition/meaning.]

The basic allocation rules are:

100% direct Federal funding = Unlimited Rights.

Mixed Funding (partially contractor funding) = Government Purpose Rights.

100% (exclusively) contractor funding = Limited/Restricted Rights.

**IR&D \$ are contractor \$ (currently – pending impact of 2011 NDAA)**

*Critical Point – this funding test cannot be used to limit the Government’s rights under the first two tests.*

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## Procedural Requirements - Asserting

- **Obligation to assert prior to award.**
- **Obligation to assert prior to delivery (for new and for inadvertent omissions not affecting source selection).**
- **Obligation to assert at proper level of detail – Critical Issue.**

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## Procedural Requirements – Asserting At Any Practical Level

- **The contractor has the burden of selecting the level at which an assertion (and the resulting marking of the data) will be made. If the contractor cannot justify the assertion/markings for ALL data at the level chosen, the contractor will lose the claimed restriction on the USG's license rights.**
- **Case law and common sense would suggest that specific assertions & markings at the lowest practical segregable level are the easiest to justify.**
- **IT IS ALL OR NONE AT THE LEVEL ASSERTED & MARKED BY THE CONTRACTOR.**

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## Procedural Requirements - Marking

- **Obligation to use only “conforming” markings:**
  - **Legend authorized by the contract (DFARS 252.227-7013(f) & 252.227-7014(f); and**
  - **Applied only to data covered by a contractually incorporated assertion.**
- **Obligation to apply markings to ONLY the restricted portions of each page.**
- **KO’s do not have authority to authorize marking deviations from the DFARS.**



## Procedural Requirements- Nonconforming

- **NONCONFORMING LEGENDS**
  - Legends such as “PROPRIETARY” or “COMPANY CONFIDENTIAL” are nonconforming legends and should be ordered removed. However, nonconforming legends should be honored until removed.
  - Legends for which a proper assertion has not been made are “nonconforming.”
  - Nonconforming legends can be removed by using a 60 day notice letter from the Contracting Officer (KO).
- **COPYRIGHT NOTICE**
  - A copyright notice on contract deliverable data (by its self) presents no impediment to the Government. However, it must be limited to Owner’s name, year, and term “copyright” or its symbol. Contractors sometimes sneak in “nonconforming” markings in this notice such as “All Rights Reserved”.



## An Aside Non-technical Contractor Data

- **Non-technical data exempt from FOIA\* (5 U.S.C. 552(b)(4)) as trade secrets and commercial or financial information obtained from a person and privileged or confidential**
- **Outside DFARS 252.227-7013 and 252.227-7014**
- **Examples: prices, costs, employee lists, etc.**

\* Freedom of Information Act

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## An Aside - Non-technical Contractor Data Marking

- **USG legend per AR 25-55 Section 4-200:**  
**For Official Use Only**  
**This document contains information**  
**EXEMPT FROM MANDATORY**  
**DISCLOSURE under the FOIA.**  
**Exemption 5 U.S.C. 552(b)(4) applies.**
- **Navy? AF?**
- **No mandatory legend for contractors.**
  - **So “Contractor Proprietary” is permissible though contract may specify other marking.**

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## **An Aside-Non-technical Contractor Data Handling**

- **USG employees should not disclose such non-technical trade secret data to any 3<sup>rd</sup> parties, including support contractors without express agreement of supplying contractor.**



## **Procedural Requirements - Justifying (back to tech data)**

- **Obligation to have internal procedures on the use and application of DOD authorized markings.**
  - **Obligation to have (prior to making assertions) and maintain documentation proving the assertions.**
- DFARS 252.227-7013(g) and -7014(g)**





## Procedural Requirements- Failure To Comply

- A failure to properly & timely assert bars the use of any restrictive markings. The absence of any markings on the data\* results in unlimited rights.
- A failure to substitute an authorized conforming marking (after the 60 day warning letter from the KO) allows the USG to remove all such markings, which leaves the data unmarked. Unmarked data\* equal unlimited rights.

\* You should assume this applies only to noncommercial Technical Data and noncommercial Computer Software.



## Part III – Lessons Learned & Pitfalls



## The Winborne\* Deduced Contractor Game Plan

- 1) Determine DOD technology goals.
- 2) Develop it all before it is a specific contract requirement.
- 3) Get reimbursed for development by IRAD money.
- 4) Sell the technology to DOD on a sole source basis.



\*George Winborne is a Government IP Lawyer in Huntsville, AL

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## Contractors Actually Have A Specific Published Game Plan

- The Ten Practical Rules for Protecting Rights in Technical Data and Computer Software  
Matthew Simchak, Wiley Rein LLP Newsletter, Summer 2001 (URL in notes)
- Protecting Rights in Technical Data and Computer Software: Applying the Ten Practical Rules and their Corollaries
- Matthew Simchak, 33 *Pub. Cont. L.J.* 139 (2003)

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## Simchak's 10 Rules (presented for critical review)

- **1. Exploit the Opportunity to Claim Commercial Item Treatment for Technical Data and Software**
  - *Burden One: Undertake the steps necessary to ensure that the company's products and services qualify as "commercial items" in Federal procurements.*
- **2. Develop at Private Expense: Heeding The Cost-Based Definitions**
  - *Burden Two: Elect to structure and apply one's cost-accounting systems so that promising technologies can be shown to have been developed at private, rather than Government, expense.*
- **3. Avoid Developing Items Directly in the Performance of a Government Contract: Heeding The Non-Cost-Based Definitions**
  - *Burden Three: Be careful not to enter thoughtlessly into a Government contract or subcontract that requires that the company develop an item or software.*
- **4. Keep Evidence**
  - *Burden Four: Make—and keep—clear and convincing evidence that would prove that an item or software product was developed at private expense.*
- **5. Refine the Scope of "Government Purposes"**
  - *Burden Five: Whenever one contemplates a sale of a Government Purpose Rights license, negotiate with the Government to redefine the term "Government Purposes," being sure to reserve the exclusive commercial rights in secondary markets such as foreign programs, state and local programs, other Federal markets and even commercial markets.*

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## Simchak's 10 Rules (presented for critical review)

- **6. Provide Written Notice Prior to Contract Award**
  - *Burden Six: Before the company enters into a contract, give written notice of any data and software to be delivered to the Government with less-than-unlimited rights, and be prepared to explain why the company is entitled to do so.*
- **7. Give Notice During Contract Performance**
  - *Burden Seven: Give an additional notice during performance, before committing to the use of any item whose data or software code the contractor intends to deliver with less-than-unlimited rights.*
- **8. Reach Agreements with the Government**
  - *Burden Eight: Reach an agreement with a DOD contracting officer, sometime during performance, to list the data or software that will go to the Government with something less than unlimited rights.*
- **9. Mark Data and Software**
  - *Burden Nine: Mark every piece of proprietary data and software with the appropriate protective legend before delivering that material to the Government.*
- **10. Protect Proprietary Information**
  - *Burden Ten: In all aspects of one's business, Government and commercial, protect all data and software believed to be other than unlimited-rights material as though that material contains trade secrets.*

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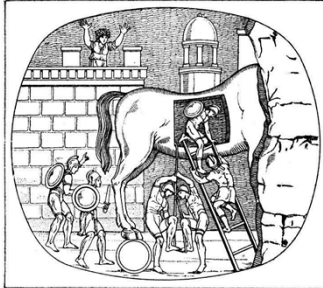
- Beware of contractor cherry picking of data.
- Contractors are motivated to use Independent Research and Development (IRAD) and Bid & Proposal (B&P) or other private funding to develop critical technologies and prevent competition.
- When effort is near or related to scope, raises Cost Accounting Standards issues.
- **The law has much gray.**
- Programs should be vigilant to prevent this when possible.

## **“Whatever it is, I fear the Grecians, even bearing gifts.”**

- Contractors may want to “give” us proprietary, often IRAD, data in CRADAs or other contexts. This is rarely done without some ulterior motive, either to try to interest the USG in certain technologies for later procurement, get USG feedback, or learn of USG wishlists. While such exchanges may be useful, there are risks.



## “Whatever it is, I fear the Grecians, even bearing gifts.”



- Pollution of source selection
- Mishandling of data
- See *Spectrum Sciences v. U.S.*, 84 Fed. Cl. 716 (2008)

**May also raise issues with unauthorized agreements since individual employees in informal meetings lack authority to bind the USG to a NDA or IP license agreement.**

## Commercial Games

- Contractors have motivation to seek classification of technologies as commercial even those only sold to USG.
- Be skeptical of “commercial” technologies for which USG is likely to be (have been) the only customer, especially weapons related technology.



## Abstract Art Vague or Absent Assertions

- Many contractors seem to think that vague data rights assertions are advantageous as they may be used to support later restrictions on anything without giving meaningful prior notice.
- Similarly, evolving assertions.
- The USG should object to vague assertions and warn of the consequences for the funding test.
- Enforce rules for post award assertions in DFARS 252.227-7013(e) and -7014(e).



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## Utilize Assertions

- Assertions let contractors make a record.
- Acceptance for contract inclusion is not substantive agreement.
- Assertions provide short and long term info:
  - Immediate impacts on use of software & support contractors in program execution which may call for special license negotiation or software quantity revisions
  - Life cycle sustainment costs which can be part of proposal evaluation for major systems

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## Software: Restricted Rights Pothole



- Programs often do not specify a required quantity for developmental software.
- Restricted Rights (RRs) means use of one copy on one machine.
- While DOD may not require data rights generally, we may always set our delivered quantity requirement.
- So if quantities are not specified in RFP, proposals should be examined for RRs and followed by proposal quantity modification or special license negotiation (unless restriction will be fought).

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## Don't Go to Jail\* The Support Contractor Trap



- Limited and Restricted Rights data may not be supplied to third parties without permission except in certain specified circumstances.
- No general exception for the support contractors that staff many USG projects.
- Assertions should be examined for impact on support contractor utilization.
  - Try to negotiate licenses to cover; or
  - Change plans for using support contractors.

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## Don't Go to Jail The Support Contractor Trap

- Nondisclosure agreements are required when the USG distributes GPR data.
- Should have in support contracts “DFARS 252.227-7025 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends” or
- Should sign “Use and Non-Disclosure Agreement” at DFARS 227-7103-7(c).

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## Giveaways Limits on Special Licenses

- Contractors may request that the USG agree to give up rights that it “does not need.”
- Why should the USG ever do this?
- If USG is the only customer, the USG is restricting its own flexibility for later, perhaps unforeseen, requirements.
- CICA prohibits any surrender of rights that reduces USG contract competition when rights are not in dispute. See *FN Mfg.*

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## Giveaways Limits on Special Licenses

- 10 U.S.C. §2320(a)(2)(G)(ii) permits restriction of rights “otherwise accorded” if the U.S. retains “a royalty-free license to use, release, or disclose the data for purposes of the United States (including purposes of competitive procurement)” similar to GPR (no right to modify).
- Rights “otherwise accorded” are URs in U.S. funded data ((a)(2)(A)) and URs in contractor funded FFF, OMIT, changed GFI and public data ((a)(2)(C)).
- Overrides Limited/Restricted Limit floor of DFARS when applicable.

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## Make a List & Check It Twice Data and Rights

- **Programs should keep track of the data and data rights that they have and MUST keep track of special licenses.**
- DFARS 252.227-7013(b)(4) (and -7014(b)(4)(ii)) require that special negotiated licenses be made a part of the contract.
- Army loss of rights to M4 carbines began with failure to advise Navy of special license on data provided to Navy in *FN Mfg.*



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## Make Another List & Check It Twice: GFI

- Beware of contractors returning Government Furnished Information (GFI) with claimed restrictions on USG rights.



- USG has Unlimited Rights in modifications to technical data or software provided to contractor as GFI (DFARS 252.227-7013(b)(1)(vi) (and - 7014(b)(1)(iii)) and retains original rights in GFI.
- Programs should track what is provided as GFI and head off this not infrequent practice.

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## Marking Games: Data



- Non-DFARS conforming legends
- “Proprietary” and many variations.
- Modified DFARS legends
  - Legends simply referring to clauses without indicating what rights are substantively.
  - Legends that are substantively correct but nonstandard in form and often confusing.
- Deliverables should be checked upon receipt and correction required promptly.

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## Marking Games: Data



- **Restrictive legends not supported by prior assertions**

- Assertions of data rights restrictions are to be made prior to award per DFARS 252.227-7017 or prior to delivery per DFARS 252.227-7013(e) and -7014(e).
- Try to reject data with restrictive markings not supported by prior assertions as nonconforming.

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## Marking Games: Hardware

- Dicta in *Night Vision Corp. v. U.S.*, 68 Fed. Cl. 368 (2005) implies that contractors may protect proprietary data embodied in hardware by marking the hardware with restrictive legends.
- This is wrong for DOD contractors.
- The trade secret protections inherent in DFARS 252.227 and associated marking rules apply to copies of data and software, not hardware.
- DOD retains the right to reverse engineer i/a/w policy in DFARS PGI 217.7504.
- Other than authorized patent markings, reject contractor proprietary markings on hardware deliverables.



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## Delivery Issues

- Delivery usually means that the customer takes possession of the information.
- Access allows the customer to gain access to data that are stored electronically at a contractor's or subcontractor's facility.
- Contractually required "access" (i.e., "formal delivery") must be via the Contract Data Requirements List (CDRL) (Form DD1423) and a Data Item Description (DID). Make this clear in the CDRL Block 16.
- Informal access via technical liaison does not equal "delivery."
- **DO NOT SUBSTITUTE ACCESS FOR DELIVERY!**

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## Why Delivery, Not Access

- By law, any enforceable right to see/access/have a copy of data requires an OMB approved DID or FAR/DFARS Clause. [See Paperwork Reduction Act at 44 U.S.C. 3512 and DoD 5010.12M Procedures for the Acquisition and Management of Technical Data C3.3]
- By contract terms, only "deliverable" data is subject to the DFARS Part 227 clauses requiring assertions/markings/justifications.
- Therefore, DOD has no useable rights (as a practical outcome) in data which is informally provided unless explicitly granted by the contractor and reviewed by legal counsel. Copyrights and typical proprietary markings bar any DOD use of that data.

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## When It Counts, Delivery, Not Access

- If execution of the program requires that DOD see, use, or provide the data to others, that data **MUST** be a formal deliverable under the contract.
- Relying upon methods (Deferred Ordering Clause, Changes Clause, and bilateral agreements) of later adding the data as a deliverable is risky.
- Risks include: unanticipated assertions/restrictions; delays in identifying disagreements with the contractor and their resolution; contractor electing to change without notice the method of performance and to utilize additional restricted data; and the inability to factor data rights issues into acquisition planning.

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## Delivery & Time/Material Contract Hazard

- **Requirements only for labor/services but without proper deliverable requirements are dangerous.**
- **Be wary of noncompliance with requirements for CDRLS and DIDs, e.g., requirements only in SOW, task order, technical instruction but without a CDRL and DID.**

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## Some Thoughts on Negotiations For Data Rights

- Starting Positions – not equally balanced.
- Rules of engagement are different.
- Statutory protections against coercion.
  - 10 U.S.C. § 2320(a)(2)(F)
- Sole source voluntary negotiations–OK.
- Competitive negotiations very limited.
- Should decide first what the USG has before deciding what the USG needs.

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## Seeking the Priced Option



- Congress and OSD are pushing programs to try to get data rights for full and open competition.
- All emphasize use of priced contract options for future license rights. (See DFARS 207.106)
- Naval Open Architecture Contract Guidebook (PEO Integrated Warfare Systems) provides some excellent data and data rights related language for solicitations and evaluation criteria.
- Voluntary NTE Priced Options for GPR
  - Covered by Sections L & M of the solicitation

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## The Priced Option Chimera



- No rational profit seeking enterprise would sell such an option for any reasonable price.
- Anyone seen one?

So what do you do when one offeror offers a price with no or few data rights restrictions and another offers a perhaps lower price but with far greater data rights restrictions?



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## Winborne's View on the Key to Data Rights Acquisition

- Since 10 U.S.C. § 2320(a)(2)(F) prohibits evaluating proposals directly on the basis of data rights being offered, our **only option and only leverage is to evaluate life cycle cost impact of less than competitive acquisition rights** (major systems only).
- To effectuate this, the USG must attempt to estimate the cost impact of lack of rights if a contractor does not give us an option price.
- The estimated cost impact must be used in evaluation criteria to put proposals on equal footing and provide legally permissible incentive for contractors to propose a reasonable price.

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## Any Better Ideas?

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## Negotiations for Data Rights Leverage

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The USG's objective is a "fair" outcome.

- Procedural violations
- Lack of due diligence
- Desire to avoid litigation
- Statutory minimums & competition rules
- Separate the negotiations into default & additional rights





## Data Rights Conclusions

- **Data Rights can be crucial in total life cycle management of weapons systems.**
- **Appreciation of this sometimes only comes long after initial contracting.**
- **Data Rights laws are complicated.**
- **Careful attention to Data Rights issues during Data and Requirements Development is critical.**
- **Cautionary Tale of the UAHMMWV (GAO 06-839)**

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## Resource References on Data Rights

- **A Practical Guide for the Understanding, Acquiring, Using, Transferring, and Disposition of Intellectual Property by Dayn Beam AMCOM Legal**
- **A Legal Analysis of the Statutory and Contractual Allocation of Data Rights in Federal Contracts by Dayn Beam AMCOM Legal**

URL for both is:

<http://www.redstone.army.mil/legal/intellect.html>

- **WEAPONS ACQUISITION: DOD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems, GAO Report GAO-06-839 (July 2006)**

URL is:

<http://www.gao.gov/cgi-bin/getrpt?GAO-06-839>

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