

Protecting Intellectual Property in Government Contracts: the Perspective from Industry

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Which Way is the Pendulum Swinging?

- Recent changes in statutes, regulations and practice indicate that:
 - Due to budget and other pressures, the Government is paying more attention to intellectual property, and is more concerned with ensuring that it obtains the rights it perceives are necessary for downstream competitive procurement;
 - There is less flexibility with respect intellectual property relating to commercial items;
 - The Government believes it should have broader rights in data pertaining to items that have been developed using funds charged to indirect cost pools that are partially or fully reimbursed by the Government;
 - The Government is more focused on understanding/questioning commercial software terms and encouraging the use of open architectures and open source software;
 - The Government is **strictly** enforcing the regulatory “assertion” and marking requirements for technical data and computer software; and
 - The Government is making routine requests for “justification” of all assertions at the proposal phase vs. individual requests based on a reasonable basis for questioning the assertion.

What are Industry's Key Concerns?

- **§824 of FY 2011 NDAA reclassifying IR&D/B&P expenditures for purposes of determining Government rights, and strengthening the Government's authority to challenge a contractor's rights assertions; may be repealed by current pending legislation (Section 841 of S. 1253) and replaced with alternate language**
 - **Reversal of Government Policy on IR&D and B&P costs with little industry input, and in a manner that is difficult to understand, unworkable, and/or that places significant administrative burdens on the contractor**
- New and proposed regulations affecting commercial items will undermine the flexibility accorded to commercial items with respect to intellectual property

Treatment of IR&D and B&P Costs

- **§824(B) – Significant policy change, masquerading as a change in a definition, and included into the NDAA at the last minute & with no debate; plain language very difficult to understand**
 - One of the two cases which were not addressed by the statute is very common – i.e., development of an item funded entirely with IR&D – no guidance on how such data is to be treated.
 - Congressional recognition of ambiguities resulted in §841 of pending Senate NDAA language.
- **§824(C) repeals 3-year limitation on the Government’s right to challenge the rights asserted by a contractor if reasonable grounds exist to believe that the assertion was erroneous**
 - BUT – *all* restrictions on the Government’s rights are essentially based on erroneous assertions because you cannot mark/assert rights unless included in the assertions tables.
 - Eliminating the 3-year challenge limitation imposes a costly administrative burden to maintain cost records indefinitely;
 - If applied retroactively, the Government could reap a windfall in rights if it challenges assertions for which a contractor had not retained adequate records, relying on the 3-year rule to establish its document retention policies.

Pending Language to Replace §824: §841 of S. 1253

- Introduces concept of “Government Purpose Rights” (“GPR”) into the statute (previously only in the regulations), and grants such rights in technical data pertaining to items developed with IR&D and/or B&P funds *if*:
 - the contractor contributed less than 10% of the total development costs with costs not actually allocated to U.S. Government contracts (e.g., IR&D allocated only to commercial contract bases or costs paid with contractor funds); *OR*
 - That item or process is a part of a major system and either:
 - Cannot be segregated from the system as a whole for purposes of competition; *or*
 - The contractor contributed less than 50% of the total development costs with costs not actually allocated to U.S. Government contracts.
- In all other cases, IR&D and B&P costs would be deemed to be a private expense for rights determinations.

Treatment of IR&D and B&P Costs

- **§841 also problematic because:**
 - Establishes a new allocability test that would make it difficult or impossible for a contractor to make data rights determinations concurrently with technology development;
 - Would likely require the implementation of new accounting systems to track the allocation of development costs over time;
 - Chameleon-like nature of “colors of money” would be difficult to implement and monitor, and could lead to situations where specific IR&D funds could be considered to be both private and federal funds simultaneously;
 - “Developed” not clearly defined – thus, not clear *when* total cost of development has been established – in other words, what amount should be used for the denominator in the calculation;
 - Individual contractors may not have all necessary information if item “developed” over time by more than one company.
- **What to do?**
 - Repeal and use existing statutes/regulations to meet Government needs – Currently, Congress is not inclined to take this approach.
 - Acquisition Reform Working Group Proposal: Require contractor to license technical data for competitive procurement under certain circumstances.

Focus on Commercial Data and Software

- DFARS Case No. 2010-D001, dated September 27, 2010 – Proposed Regulation with *rewrite* of DFARS Part 227
 - Proposed DFARS 252.227-7015: Data assertions required for commercial items
 - this could help both parties understand what commercial items will be delivered and the associated rights – already occurring through RFP terms.
 - Could be burdensome if requirements for technical data not clearly established in the RFP.
 - Proposed DFARS 252.227-7015: New marking requirements for commercial items – but little guidance on what markings are appropriate.
 - Automatic deletion of certain software license terms – could be difficult to work with commercial software companies;
 - Proposed DFARS 252.227-7017/7018: Will require submission of commercial and non-standard licenses with assertions.

Focus on Commercial Data and Software

- **Applying the Non-Commercial Technical Data Rights Clause to Commercial Items: Final DFARS Rule Implementing 10 U.S.C. 2321 (f); Proposed DFARS Section 227.7104-8(a)(2):**
 - Currently and under recent DFARS rule, commercial items will be subject to both the -7013 and -7015 clauses if the Government paid for any part of the “*development*.” This could be read consistently with the FAR definition of commercial item because “development” ≠ a “minor modification” or “modification customarily available in the commercial marketplace.”
 - Proposed DFARS regulations modify this language, and would provide that the -7013 clause applies if the Government pays any portion of the costs of development ***or modification***. Now, even though an item would otherwise qualify as commercial, if the Government pays for only minor modifications, data pertaining to that minor modification would be subject to the rules governing treatment of non-commercial data.
 - Will make marking exceedingly complex when rules for commercial items were intended to simplify the sale of commercial items to the Government.
 - It is not clear what benefit this would provide to the Government if remainder of the item is still subject to commercial license rights.
- If a commercial item is a major system or a component of a major system, the presumption of development exclusively at private expense does not apply for validation purposes, unless the item qualifies as a COTS item – easier to challenge rights assertions.

Conclusion

- Numerous enacted and pending changes are making or could make significant changes, with the result that the Government will be exerting greater pressure for greater rights, even in data that was once viewed as being developed at private expense:
 - More administrative burdens despite efforts to reduce such costs; could ultimately lead to higher rates;
 - Could potentially undermine incentives for “private” investment in technology development;
 - The Government could meet most, if not all, of its needs under the current regulations if the regulations were understood and applied appropriately by both industry and Government.