



Data Rights in US Government Contracts



Agenda

- Setting the Stage
- Definitions
- SBIR Specific Matters
- Proposal Preparation
- Marking Requirements
- Embedded Data/Software
- Prime/Subcontractor Matters
- Protection & Enforcement
- Strategy to Obtain IP from USG



Setting the Stage

- Commercial World
 - Defend Trade Secrets Act
 - Uniform Trade Secrets Act State Laws
 - America Invents Act
- Government World
 - Data Rights
 - Trade Secrets Act, 18 USC §1905
 - All Agencies – FAR Subpart 27.4
 - DoD Unique
 - DFARS Subpart 227.71 – DoD Data Rights
 - DFARS Subpart 227.72 – DoD Computer Software
- Patents, Trademarks and Copyrights are not addressed in this presentation

Same Data May Have Different Licenses and Rights Depending on Customer



Government Rights Defined

- Unlimited Rights
 - Licenses USG to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do
 - Funding Source: Government funds
 - Applies to certain categories of data regardless of funds:
 - Data first produced in the performance of this contract;
 - Form, fit, and function data delivered under this contract;
 - Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract
- DoD Specifics
 - Licenses USG 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
 - Funding source: *Exclusively* Government Funds
 - FAR categories plus:
 - Studies, analyses, test data, or similar data when specified as an element of performance
 - Corrections or changes to technical data when furnished by the Government



Government Rights Defined

- Government Purpose Rights (DoD Only)
 - Licenses USG to
 - Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; AND
 - Release or disclose outside the Government and authorize third parties to use, modify, reproduce, release, perform, display, or disclose for Government Purposes
 - Funding Source: Mixed
 - FAR is silent when funding source is mixed
 - Government Purposes means
 - Any USG activity, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by USG to foreign governments or international organizations
 - Includes competitive procurement
 - *Excludes* commercial purposes
 - 5 Year Period of Protection
 - Converts to Unlimited Rights
 - Starts upon contract execution
 - Strategic Tip:
 - Longer periods can be negotiated
 - Can negotiate for GPR with non-DoD agencies



Government Rights Defined

- Limited Rights (Technical Data)
 - Licenses USG to reproduce and use data with express limitation that not used for manufacturing or disclosed outside USG
 - Other clauses grant authorization to share with support contractor
 - Data must (i) embody trade secrets or (ii) are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes
 - Applies if developed at private expense including minor modifications
 - DoD Specifics
 - Licenses USG to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within USG
 - May not, without the written permission, release or disclose the technical data outside the USG
 - May not use for manufacture
 - May authorize use by third party only if necessary for emergency repair and overhaul *with conditions*
 - May release to covered support contractor in performance of its covered Government support contract
 - May release to foreign government when in the interest of the USG and required for evaluational or informational purposes
 - Third parties are prohibited from further reproduction, release, disclosure, or use of the technical data
 - USG must notify contractor or subcontractor asserting the restriction
 - For DoD applies only if developed *exclusively* at private expense
- [Strategic Tip](#): Use can be negotiated; consider what USG needs to do with the data



Government Rights Defined

- **Restricted Rights (Computer Software/Documentation)**
 - Applies to noncommercial software developed exclusively at private expense and not generated in performance of contract
 - Must be a trade secret, commercial or financial and confidential or privileged, or is copyrighted computer software
 - Includes minor modifications of the computer software
 - Unless available to others without disclosure, USG may use, reproduce, or disclose only as follows
 - Used with the computer(s) or a replacement computer
 - Used with a backup computer or for safekeeping (archives)
 - Used by support service Contractors/Subcontractors
 - Modified, adapted, or combined with other computer software, if the modified, adapted, or combined portions incorporating any of the commercial computer software are subject to same restrictions
 - DoD Specifics
 - First three FAR items
 - May transfer to another USG agency if transferor destroys all copies of software and related documentation and notifies contractor
 - Modify computer software *with conditions*
 - Permit Support Service Contractors/Subcontractors 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 *with conditions*
 - Permit Contractors/Subcontractors performing emergency repairs or overhaul of items or components of items to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul *with conditions*
- **Commercial Software**
 - Generally – accept standard commercial software license. FAR 27.405-3; DFARS 227.7202-3
 - USG may negotiate for additional rights, including restricted rights.
- **Strategic Tip:**
 - Develop standard commercial licenses for all software developed at private expense and include with proposal
 - Do not modify commercial software under USG contract – segregate or develop plug-in modules

Government Rights Defined

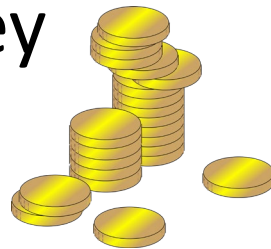
- Specifically Negotiated License (SNL) – DoD Only
 - Negotiate unique rights
 - No less than Limited Rights may be granted
 - Even though SNLs are not explicitly mentioned for other agencies, not prohibited either
 - Strategic Tip:
 - Negotiate for government purpose with long protection period in lieu of unlimited rights
 - Consider USG needs and offer overall license that meets its needs with as much protection as possible to you
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Summary of Definitions of Government Rights

- Depends on Customer



- Follow the Money



- Commercial Software is Unique
- Creativity and flexibility is OK



SBIR Specific Matters

- Purpose - enable small businesses to pursue research and development to maintain and strengthen the industrial base and the national economy
- Small Business Innovative Research (SBIR) Rights Defined
 - Data first produced by a Small Business in performance of a SBIR contract under 15 U.S.C. §638
 - Applicable data rights clause *must be included* in all SBIR contracts and subcontracts
- USG Authorized Use
 - FAR – USG purposes only, not disclosed outside USG (including disclosure for procurement purposes) without permission except USG may disclose for use by support Contractors
 - DoD – USG may use, modify, reproduce, release, perform, display, or disclose. Receives a license for Limited rights in such SBIR technical data and Restricted rights in such SBIR computer software
- Protection Period
 - FAR – 4 years after acceptance of all items to be delivered
 - At the end of the protection period, the USG may use for *Government purposes*
 - DoD – 5 years after completion of the project
 - At the end of the protection period, the USG receives *unlimited rights*

SBIR Specific Matters

- Phase 1 and Phase 2 (Research and Development)
 - Funded with SBIR funds
 - Subject to SBIR statutes and regulations
 - Includes FAR and supplements
 - Managed by SBIR Program Managers
- Phase 3 (Procurement)
 - Funded with procurement or other funds
 - Subject to standard procurement regulations such as FAR or other transaction authorities
 - Managed by Program of Record

SBIR Specific Matters

- Extension of SBIR Data Rights
 - Subsequent contracts must derive from, extend, or complete SBIR efforts
 - FAR/DFARS SBIR clause must be included in Phase III contracts
 - Legend in clause should reference all related SBIR contracts
 - Retain adequate records to substantiate data was developed under each contract
 - Strategic Tip:
 - Engage with contracting officer early
 - Inform that SBIR product available – sole source
 - Request clause be added
 - Update SBIR database with all Phase III awards to further extend protection period
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Proposal Preparation

- Review deliverables to determine if need to provide technical data or computer software with other than *Unlimited Rights*
 - Assert rights to any data and software
 - Request applicable clauses if SBIR or other unique situation
 - Provide commercial computer software license
 - List any data covered by a patent and whether subject to royalties – FAR 27.202-1.
- Determine if subcontractors will assert other than unlimited rights and include in proposal
- Strategic Tip:
 - If data or software is highly sensitive and not intended to be provided to USG or primes, then exclude from additional data rights clauses
 - Monitor contract modifications and any informal changes in scope
 - Be consistent – if provide with different rights on different contracts, USG automatically obtains highest level (least restrictive)



Delivery of Data – USAF Clause

- USAF has been using a full text clause to require delivery of data; e.g., Operations, Maintenance, Installation and Training (OMIT) data
 - Broader than OMIT data in DFARS Data Rights clauses
 - Generally interpreted as requiring Unlimited or GPR even if contractor legally entitled to assert Limited, Restricted or SBIR
 - Also requiring delivery of source code for software developed at private expense
- On May 22, 2018, the GAO issued [Sikorsky Aircraft Corp., B-416027; B-416027.2](#).
 - Sikorsky protested inclusion of clause in USAF contract
 - USAF clarified RFP as not requiring Unlimited or GPR
 - GAO considered *delivery* vs the *right to use* the data and denied protest
- [Strategic Tip:](#)
 - Predict trend to request additional data will continue, so review deliverables and unique clauses carefully. If explicitly or even ambiguously appear to require data be provided with Unlimited or GPR, request clarification in draft proposal or earlier as to level of rights USG requiring in light of [Sikorsky](#) case.

Marking Requirements

- Comply with marking requirements in clauses
- Be consistent in labeling each piece of data
- Review documents before delivery
 - Identify all types of data to be delivered:
 - Unlimited Rights – Do NOT mark except - “export controlled” or similar
 - Comply with Marking Requirements in Clauses
 - Less than Unlimited Rights, Third Party Data, Export-Controlled
 - Mark each page
 - May need to portion mark if pages contain mix of data rights
 - Creative Marking Ideas: Clip wraps, Acceptance document, Indicate specific pages or types of data in Cover page, Use Adobe Portfolio

Marking Requirements

- “Proprietary” or “Confidential”
 - Appropriate for Commercial World and business/financial data in Government World
 - Not appropriate for Technical Data in Government World
 - “Confidential” is prohibited for cleared contractors
- Strategic Tip:
 - Enable use of USG markings for commercial effort in contracts and non-disclosure agreements; e.g. “Proprietary or similar markings”
 - Have written process with specific examples
 - Ensure subcontractors know to properly mark documents. Question assertion of data rights or use of “proprietary”



Marking Samples

- FAR 52.227-14 - Limited Rights Notice (Dec 2007)

(a) These data are submitted with limited rights under Government Contract No. _____ (and subcontract _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any; provided that the Government makes such disclosure subject to prohibition against further use and disclosure: [Agencies may list additional purposes as set forth in 27.404-2(c)(1) or if none, so state.]

(b) This notice shall be marked on any reproduction of these data, in whole or in part.

- DFARS 252.227-7013 - LIMITED RIGHTS

Contract No. _____

Contractor Name _____

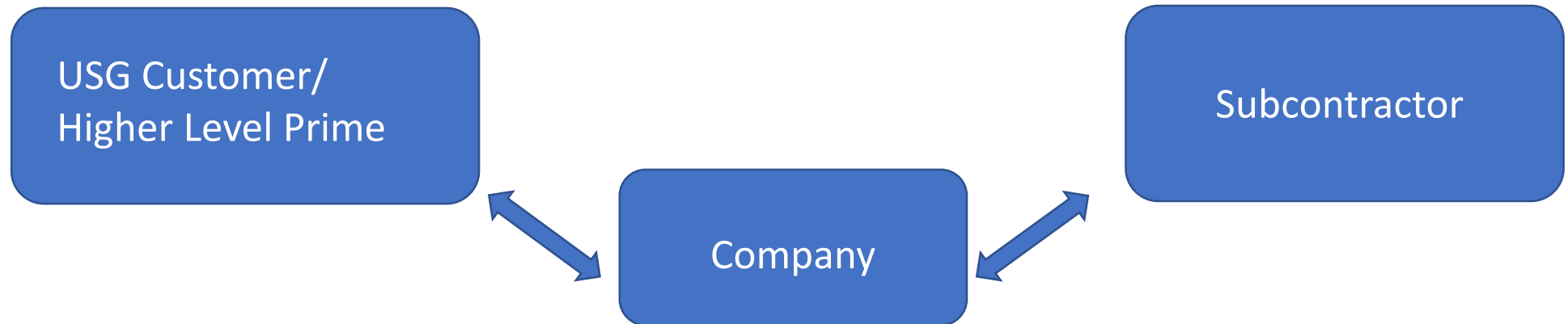
Contractor Address _____

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.

Embedded Data/Software

- Refers to situations wherein hardware includes data or software
 - Embedded IP subject to same rules as if delivered separately
 - Assert and Mark in accordance with same requirements
- Government property
 - No specific guidelines in Property clauses
 - Be clear in proposal and contract if software provided with other than Unlimited Rights
- Strategic Tip:
 - Determine if USG requiring delivery of software code or technical data with hardware
 - If other than Unlimited Rights,
 - Determine associated level of rights; and
 - Assess USG needs for data and software
 - Use, modification, test/evaluation, acceptance criteria
 - Explicitly exclude from delivery in proposal and contract

Prime/Subcontractor Matters



- Licensing Rights in Data and Software
 - FAR/DFARS clauses license direct to USG even for subcontractors
 - Flowdown clauses as appropriate for customer and type of data
 - May not substitute parties
 - Primes must obtain licenses through separate clauses
 - Fully Negotiable
 - Prohibited from obtaining ownership or more rights than necessary to perform contract
 - Strategic Tip:
 - Subcontractors have privity with USG and may negotiate data rights directly
 - Primes can obtain Unlimited or GPR rights from USG
 - Use small business liaisons if needed
 - If want to own or have unlimited rights in data, do not have subcontractor perform work

Protection & Enforcement

- Best Practices to Protect
 - Good processes to identify, segregate, mark and protect intellectual property
 - Monitor use of IP by government – check FedBizOpps, news articles, competitor announcements
 - Report violations and potential violations to contracting officer *in writing*
 - Engage with lawyer immediately. May need to litigate to protect
 - Protect Your Data Even If GPR or Unlimited
 - Not required to stop protecting
 - Don't make it easy for competitors
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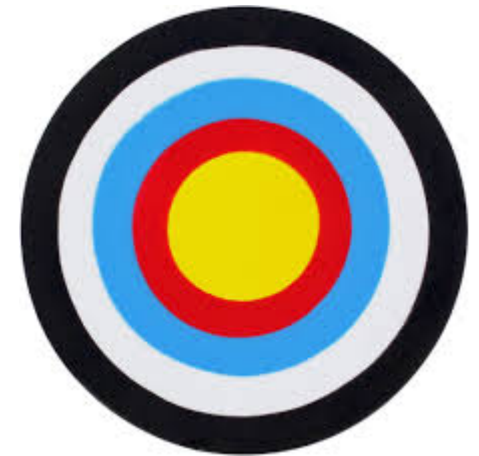
Protection & Enforcement

- If want to prevent USG from obtaining GPR or Unlimited rights in data and software, then develop with private funds
 - If highly sensitive, then limit access to minimum employees and third parties
 - Mandate NDA at a minimum
 - Consider requiring approval on an individual basis
 - Exclude from delivery to USG
 - Creative solutions for review or evaluation
 - May negatively impact competitiveness
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Obtaining Data/Software

- Technical Data and Software with GPR or Unlimited Rights May Be Available
 - Unlimited Rights – available for government purpose or commercialization
 - GPR – available for government purposes
- How Obtain
 - Request license from contracting officer
 - During RFI or Draft RFP phase
 - During contract administration
 - Provide details so contracting officer can “find”
- Some Are Posted Online
 - NASA Software - <https://software.nasa.gov>

- Resources are main consideration
 - How much time and effort do you want to expend to protect?
- Set Priorities for each data and software
 - Does it provide a competitive edge?
 - Distinctive capability
 - Increased efficiencies/productivity
 - Reduced costs
 - Are you willing to expend resources to litigate to protect?



Strategy Tips

- New Ideas Need to be Assessed Before Charging Effort to a Contract (Subject Inventions too)
 - Government Funding is good but it means more rights are provided to the USG May be strategically better to fund at private expense
 - If using IRAD funds, follow process for approvals and maintain records
 - Modifications and Improvements to Existing Data and Software
 - If can't segregate, entire solution could become GPR or Unlimited
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Questions?





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Reference Slides



Applicable Clauses - FAR

52.227-14 Rights in Data—General

52.227-15 Representation of Limited Rights Data and Restricted
Computer Software

52.227-16 Additional Data Requirements

52.227-17 Rights in Data—Special Works

52.227-18 Rights in Data—Existing Works

52.227-19 Commercial Computer Software License

52.227-20 Rights in Data—SBIR Program

52.227-21 Technical Data Declaration, Revision, and Withholding of
Payment—Major Systems

52.227-22 Major System—Minimum Rights

52.227-23 Rights to Proposal Data (Technical)



Applicable Clauses - DFARS

252.227-7013 Rights in Technical Data--Noncommercial Items

252.227-7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation

252.227-7015 Technical Data--Commercial Items

252.227-7016 Rights in Bid or Proposal Information

252.227-7017 Identification and Assertion of Use, Release, or Disclosure Restrictions

252.227-7018 Rights in Noncommercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program

252.227-7019 Validation of Asserted Restrictions--Computer Software

252.227-7020 Rights in Special Works



Applicable Clauses - DFARS

- 252.227-7021 Rights in Data--Existing Works
- 252.227-7022 Government Rights (Unlimited)
- 252.227-7023 Drawings and Other Data to Become Property of Government
- 252.227-7024 Notice and Approval of Restricted Designs
- 252.227-7025 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends
- 252.227-7026 Deferred Delivery of Technical Data or Computer Software
- 252.227-7027 Deferred Ordering of Technical Data or Computer Software
- 252.227-7028 Technical Data or Computer Software Previously Delivered to the Government
- 252.227-7030 Technical Data--Withholding of Payment
- 252.227-7032 Rights in Technical Data and Computer Software (Foreign)
- 252.227-7033 Rights in Shop Drawings