Government and Industry Tensions Around Intellectual Property

Government Contracts

Government agencies continue to require contractors to provide more technical data and computer software to the government, along with greater license rights in that data. That means that contractors should expect to see more IP-related litigation.

"When it comes to IP in government contracting, the rules are quite different than in the commercial space—and there are different rules for civilian agencies and the DoD," says Nicole Owren-Wiest, a partner in Crowell & Moring's Government Contracts Group. When a government contract requires technical data and computer software to be delivered to the government, the government acquires a license in the data that is referred to as "data rights." With Department of Defense contracts, the scope of the government's license generally depends on the source of funding for development (government, private, or mixed), the nature of the item or software (commercial or noncommercial), and any negotiated terms of the contract. If the development is government-funded, the government is entitled to an unlimited rights license, which means that it may disclose (i.e., sublicense) the data outside the government for any purpose. If the development is funded exclusively by the contractor, the government is entitled to a limited or restricted rights license, meaning the data can only be disclosed within the government and not, for example, to other contractors, subject to certain exceptions. If the development funding is mixed, the government may be entitled to government purpose rights, which allows the government to disclose the data outside the government, including to other contractors, for government purposes, such as competing for and performing a government contract.

There are also subsets of technical data, such as "form, fit, and function" data and data that is "necessary for operation, maintenance, installation, and training purposes." With this technical data, the government is entitled to an unlimited rights license regardless of the source of funding. Contractors must assert the applicable data rights in their proposals and mark the data they claim is subject to rights restrictions. The government can challenge contractors' assertions for up to several years after final payment under the contract.

For the past few years, government agencies have increased their focus on both acquiring more contractor technical data and software under its contracts and gaining greater rights in that data, even when the items or software being acquired have been developed exclusively at private expense. This has been particularly true for DoD agencies, which tend to view such data as critical to their ability to enhance competition and sustain systems and subsystems over their life cycle. For example, says Owren-Wiest, "we are seeing more solicitations requesting the contractor deliver detailed manufacturing or process data and computer software, including source code, with at least govern-

Contractor vs. Contractor—and the Government

In a competitive market, some contractors are looking to recoup losses through IP infringement lawsuits that can bring them up against contracting agencies. "We have been seeing more claims against the government for breach of a contractor's software license, and claims for copyright infringement under 28 U.S.C. 1498(b), and patent infringement under 28 U.S.C. 1498(a)," says Crowell & Moring's Nicole Owren-Wiest. Under that law, when a company believes that the government or another company working for the government with the government's authorization and consent has infringed its copyright or patent, its exclusive right of action is against the government, rather than the other company, in the Court of Federal Claims for its "reasonable and entire compensation."

In March 2019, a key development took place on that front, when the court awarded a patent owner nearly $4.4 million for attorney costs and fees—about 20 times higher than its $200,000 damages award. This was the first time such an award has been granted under 1498(a)'s fee-shifting provision, which is limited to certain plaintiffs and when the court finds the government's position not "substantially justified." With a tighter, more competitive market, and the potential opportunities for recovery, Owren-Wiest says, "we are seeing more 1498 cases related to both patents and copyrights at the court and are hearing more from companies that are thinking about affirmatively pursuing such cases."

"We are seeing more formal challenges to contractors' assertions and markings during contract performance, resulting in more formal disputes." **Nicole Owren-Wiest**

ment purpose rights, even when development was accomplished exclusively at private expense, because the government asserts the data are necessary for its sustainment objectives and to avoid vendor lock-in." These requests are directly at odds with the contractor's objective to protect its IP.

This tension is resulting in an increased number of data-rights disputes between contractors and the government. Owren-Wiest notes that in 2018, a contractor filed a pre-award bid protest challenging the terms of an Air Force solicitation that required the delivery of an additional broad category of data, including software, for enabling the installation and maintenance of the system, including installation, de-installation, disassembly, and reassembly activities, with at least government purpose rights. "The company challenged the terms that it believed were overreaching, including the requirement to deliver software developed exclusively at private expense with government purpose rights," she says. That issue was not addressed by the Government Accountability Office because, during the protest, the Air Force clarified that offerors would not be required to sell or otherwise relinquish to the government any rights in software developed exclusively at private expense (except for certain identified exceptions not at issue in the protest), either as a condition of being responsive to the solicitation or as a condition for award. Similar pre-award protests are likely in the near future. "In talking with companies, we find that more are considering filing pre-award bid protests around far-reaching data-rights terms and requirements for delivery of technical data and software," she says.

A Range of Disputes

The government can negotiate with offerors to purchase technical data and software that it has determined are necessary to satisfy its needs, as well as to evaluate the license rights an offeror is willing to grant the government as part of the government's source selection. However, some government solicitations have included fairly aggressive data-rights requirements, Owren-Wiest notes. "The question is, at what point do these requirements cross the line? The statute 10 U.S.C. 2320 says that the government cannot require a contractor to relinquish greater rights in technical data as a condition of being responsive to the solicitation or eligible for award. Also, the government cannot prohibit or 'discourage' contractors from proposing to deliver a solution that was developed exclusively at private expense solely because the government's rights in the data related to that solution may be restricted. Those two restrictions have never been tested. What does it mean to be 'discouraging'? In the next year or so, we will probably see contractors testing those prohibitions."

Government agencies are also being more proactive about questioning contractors' data-rights assertions. "We are seeing more formal challenges to contractors' assertions and markings by the government during contract performance, resulting in more formal disputes," Owren-Wiest says. For example, the contractor may deliver noncommercial technical data or software with limited or restricted rights because they were funded exclusively at private expense. Nevertheless, the government may question the contractor's markings and rights assertions if it believes that some portion of the development was funded by the government. The government is increasingly likely to issue such challenges when the contractor's solution was tested or modified at some point under a government contract. "If these challenges can't be resolved by the parties, they lead to contractor-government litigation at the Civilian or Armed Services Board of Contractor Appeals or the Court of Federal Claims," she says.

Heightened competition in the federal market appears to be another factor prompting disputes—here, in the form of more misappropriation claims by and between contractors. Increasingly, losing contract bidders are claiming the theft of trade secrets or violations of nondisclosure or proprietary information agreements against the winning bidder. This typically happens when an employee leaves one company for another or when a teaming agreement falls apart—and the issue may well end up in court. "Those claims are not necessarily a new thing, but we're seeing more of that litigation because the marketplace is getting so much tighter," says Owren-Wiest.

In light of this evolving approach to data rights, companies doing business with the government—especially companies that do not have much government contracting experience—need to reassess and perhaps rethink some of their approaches to IP. "Companies need to understand the government's very different, complex, and nuanced rules around IP and how they could affect your IP," says Owren-Wiest. "And given the government's interest in wanting more in terms of data and data rights, companies should consider ways to rethink their business model and product and service offerings to adapt. What can you do to protect your core IP? How do you build the flexibility that will let you give the government what it wants without getting into your secret sauce? Because going forward, you may need to do things differently."