

28th Annual Ounce of Prevention Seminar

Welcome

Predicting the Future: Federal Contracting in an Election Year

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2012 NDAA DATA RIGHTS CHANGES

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2012 NDAA Changes

- Applicable to DOD only
- Continues the pendulum switch of increased government rights in technical data and computer software
- Scope of change unclear pending implementing regulations
- Rolls back prior change in treatment of IR&D in determining data rights

New Right to Disclose Limited Rights Data

- New Exception to Non-disclosure of Limited Rights Technical data
 - “such release, disclosure, or use . . . is
 - necessary for the segregation of an item or process from, or
 - the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes”

10 U.S.C. § 2320(a)(2)(D)(i)(II)

- Sounds like the right to disclose form, fit and function at the segregable item or process level

New Right to Compel Delivery of Technical Data

- Notwithstanding any contract delivery requirements, USG can require delivery of technical data
 - If generated or used in the performance of a contract
 - Needed for “reprocurement, sustainment, modification, or upgrade (including through competitive means) of a *major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process,*” **AND**
 - Pertains an item or process developed in whole or in part with Federal funds;
OR
 - is necessary for the segregation of any item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes
 - Compensation = copying costs

10 U.S.C. § 2320(b)(9) (emphasis added).

- Super deferred ordering/deferred delivery provision
- No Time Limitation

New Right to Negotiate Enhanced Government Rights in the Case of Mixed Funding

- Codifies that Government gets Government Purpose Rights in mixed funding tech data unless the SecDef decides negotiation of “different rights in Government’s best interest” based on criteria to be established in regulations
- Factors for criteria
 - Small business objectives
 - Interest in increasing competition and lowering costs
 - Interest in encouraging contracts to develop private expense items for use by the Government
 - Any other reason

10 U.S.C. § 2320(a)(2)(E)

No Revised Treatment of IR&D or B&P

- 2011 NDAA Revised the Treatment of IR&D and B&P Funds
 - IR&D and B&P treated as Government funds if there is no other contractor contribution
- Change never implemented by Regulation
- 2012 NDAA Rolled back this change
 - IR&D and B&P are not treated as Federal funds for the purposes of data rights determination
 - Always considered private funds

10 U.S.C. § 2320(a)(3)

2012 NDAA Changes

- Extends the right for the Government to challenge use or release restriction from three years to six years from the latter of
 - Date of final payment of contract in which data is required to be delivered
 - Date of delivery
- No date restriction in the case of fraudulently asserted use or release restriction

10 USC 2321(a)(2)

Conclusion

- Source of these changes unclear
 - Did not appear to originate from DOD
- Unclear if changes will be implemented or be retracted like the IR&D rule
- Actual impact will depend on implementing regulations