

Protecting Your Intellectual Property from the Government's Assault

John McCarthy
Jon Baker
Joelle Sires



Overview

- Recent Developments
- Be Sure to Read the Fine Print – Government IP Provisions that Will Keep You Up at Night
- What to Do When the Government Comes Knocking – Preventing & Responding to Data Rights Challenges

Recent Developments



Better Buying Power 3.0

Achieving Dominant Capabilities through Technical Excellence and Innovation

Achieve Affordable Programs

- Continue to set and enforce affordability caps

Achieve Dominant Capabilities While Controlling Lifecycle Costs

- Strengthen and expand "should cost" based cost management
- Anticipate and plan for responsive and emerging threats by building stronger partnerships of acquisition, requirements and intelligence communities
- Institutionalize stronger DoD level Long Range R&D Program Plans
- Strengthen cybersecurity throughout the product lifecycle

Incentivize Productivity in Industry and Government

- Align profitability more tightly with Department goals
- Employ appropriate contract types, but increase the use of incentive type contracts
- Expand the superior supplier incentive program
- Ensure effective use of Performance-Based Logistics
- Remove barriers to commercial technology utilization
- Improve the return on investment in DoD laboratories
- Increase the productivity of corporate IRAD

Incentivize Innovation in Industry and Government

- Increase the use of prototyping and experimentation
- Emphasize technology insertion and refresh in program planning
- Use Modular Open Systems Architecture to stimulate innovation
- Increase the return on and access to small business research and development
- Provide draft technical requirements to industry early and involve industry in funded concept definition
- Provide clear and objective "best value" definitions to industry

Eliminate Unproductive Processes and Bureaucracy

- Emphasize acquisition chain of command responsibility, authority and accountability
- Reduce cycle times while ensuring sound investments
- Streamline documentation requirements and staff reviews
- Remove unproductive requirements imposed on industry

Promote Effective Competition

- Create and maintain competitive environments
- Improve DoD outreach for technology and products from global markets
- Increase small business participation, including more effective use of market research

Improve Tradecraft in Acquisition of Services

- Strengthen contract management outside the normal acquisition chain – installations, etc.
- Improve requirements definition for services
- Improve the effectiveness and productivity of contracted engineering and technical services

Improve the Professionalism of the Total Acquisition Workforce

- Establish higher standards for key leadership positions
- Establish stronger professional qualification requirements for all acquisition specialties
- Strengthen organic engineering capabilities
- Ensure development program leadership is technically qualified to manage R&D activities
- Improve our leaders' ability to understand and mitigate technical risk
- Increase DoD support for STEM education

**Continue Strengthening Our Culture of:
Cost Consciousness, Professionalism, and Technical Excellence**

Recent Developments

- Builds on previous versions
- Consistent themes: increased use of commercial technology and innovation
 - Seeks to eliminate unproductive processes and bureaucracy
 - DoD will “scan the commercial sector to identify and capture emerging disruptive technology”
 - BUT, proposes greater oversight for IRAD, including prior DoD approval of each IRAD project

Recent Developments

- Better Buying Power 3.0 - Highlights
 - Remove barriers to commercial technology utilization
 - Handbook of methods and best practices by July 2015
 - Improve return on investment from DoD laboratories
 - Increase productivity of corporate IR&D
 - Reduce IR&D spending on near term competitive opps
 - Increase use of prototyping and experimentation

Recent Developments

- Better Buying Power 3.0 - Highlights (continued)
 - Emphasize technology insertion and refresh in program planning
 - Use modular open systems architecture to stimulate innovation
 - Modularity and Openness metrics to be published in Oct. 2015
 - Increase access to and return on Small Business R&D
 - Transition SBIR technology to fielded systems
 - Engage with non-traditional suppliers, entrepreneurs and inventors
 - Improve DoD outreach for technology and products from global markets

Recent Developments

- DoD Looks to Silicon Valley for Innovation
- Talking points come straight out of BBP 3.0
 - Silicon Valley presence will help DoD access and use commercial technologies. “Our potential adversaries are already doing so”
 - Will offer commercial firms a route to use technology for both commercial and military purposes
 - DoD will reduce bureaucracy and trim onerous IP impediments to attract high tech
- Can DoD have it both ways?

Recent Developments

- GSA Aims to Override Certain Commercial Supplier Agreement Terms
 - RFI on proposed class deviation, 80 Fed. Reg. 15011, March 20, 2015
 - Renders unenforceable 15 types of Commercial Supplier Agreement terms & conditions
 - Implements certain standard terms & conditions to reduce need to negotiate commercial terms on a contract-by-contract basis
 - FAR 52.212-4 takes precedence over conflicting terms in Commercial Supplier Agreements

Recent Developments

- GSA Class Deviation Terms
 - Definition of contracting parties
 - Contract formation
 - Patent indemnity (contractor assumes control of proceedings)
 - Automatic renewals of term-limited agreements.
 - Future fees or penalties
 - Taxes
 - Payment terms or invoicing (late payment)
 - Automatic incorporation/deemed acceptance of third party terms
 - State/foreign law governed contracts
 - Equitable remedies, injunctions, binding arbitration
 - Unilateral termination of Commercial Supplier Agreement by supplier
 - Unilateral modification of Commercial Supplier Agreement by supplier
 - Assignment of Commercial Supplier Agreement or Government contract by supplier
 - Confidentiality of Commercial Supplier Agreement terms and conditions
 - Audits (automatic liability for payment)

Government IP Provisions that Will Keep You Up at Night

- Government's assault on contractor intellectual property continues
- Proliferation of solicitation and contract provisions that disproportionately favor the Government
- Consideration of IP rights grants often included as an evaluation criteria
- Proliferation of agency unique clauses

Government IP Provisions that Will Keep You Up at Night

- Intellectual Property considerations in the evaluation criteria:

Factor: Data Rights, Computer Software Rights and Patent Rights

- “In evaluating the Data Rights and Patent Rights, the Government will use information in the proposal to assess the extent to which **the rights** in technical data (TD), computer software (CS), computer software documentation (CSD), and inventions/patents offered **to the Government ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [SYSTEM NAME] throughout its life cycle; allow for open and competitive procurement of [SYSTEM NAME] enhancements; and permit the transfer of the [SYSTEM NAME] non-proprietary object code and source code to other contractors** for use on other systems or platforms.”

Subfactor 2. Interface Design and Management

- “The Government will evaluate the extent to which the Offeror's open system architecture approach, as documented in the Offeror's Open Systems Management Plan (OSMP), clearly defines and describes all component and system interfaces; defines and documents all subsystem and configuration item (CI) level interfaces to provide full functional, logical, and physical specifications; identify processes for specifying the lowest level (i.e., subsystem or component) at and below which it intends to control and define interfaces by proprietary or vendor-unique standards; and identifies the interface and data exchange standards between the component, module or system and the interconnectivity or underlying information exchange medium.”

DoD's Open Systems Architecture Contract Guidebook, v.1.1.

https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf.

Government IP Provisions that Will Keep You Up at Night

- Intellectual Property considerations in the evaluation criteria:

Subfactor 3. Treatment of Proprietary or Vendor-Unique Elements

- “The Government will evaluate the extent to which the Offeror's Life Cycle Management and Open Systems Strategy, as documented in the Offeror's Open Systems Management Plan (OSMP), explains the use of proprietary, vendor-unique or closed components or interfaces; defines its **process for identifying and justifying use of proprietary, vendor-unique or closed interfaces, code modules, hardware, firmware, or software**; and **demonstrates to the Government that proprietary elements do not preclude or hinder other component or module developers from interfacing with or otherwise developing, replacing, or upgrading open parts of the system.**”

Subfactor 4. Life Cycle Management and Open Systems

- “The Government will evaluate the extent to which **the Offeror's Life Cycle Management and Open Systems Strategy**, both of which should be documented in the Offeror's Open Systems Management Plan (OSMP), **demonstrates a thorough, adequate, and feasible, strategy for the insertion of COTS technologies and other reusable NDI into the SYSTEM NAME and demonstrates that COTS, other reusable NDI, and other components can be logistically supported throughout the system's life cycle.**”

DoD's Open Systems Architecture Contract Guidebook, v.1.1.

https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf

Government IP Provisions that Will Keep You Up at Night

Intellectual Property considerations in the evaluation criteria:

Factor: Data, Software and Patent Rights

- “The Government will evaluate Data, Software and Patent Rights using information in the proposal to assess the extent to which **the rights** in Technical Data (TD), Computer Software (CS), Computer Software Documentation (CSD), and inventions/patents **offered to the Government ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [SYSTEM NAME] throughout its life cycle; allow for open and competitive procurement of [SYSTEM NAME] enhancements; and permit the transfer of [SYSTEM NAME] TD, CSD and CS to other systems or platforms.”**
- “Proposals **will not be rated as less than ACCEPTABLE on this factor solely because an Offeror does not offer a price for the Government Purpose Rights Option CLIN. However, ratings on this factor for proposals to deliver TD, CSD, or SW with less than the minimum rights specified for the Government by applicable statute (10 U.S.C. 2320) and regulation (DFARS 252.227-7013, 252.227-7014, and 252.227-7015) may be negatively impacted.** For noncommercial acquisitions, these rights include: Unlimited Rights in TD (as specified in DFARS 252.227-7013(b)(1)) and CS and CSD (as specified in DFARS 252.227-7014(b)(1)); Limited Rights in TD (as specified in DFARS 252.227-7013(b)(3)); and Restricted Rights in CS (as specified in DFARS 252.227-7014(b)(3)). **The minimum rights considered for TD associated with commercial item acquisitions are specified in DFARS 252.227-7015(b)(1). For commercial SW acquisitions, evaluation of the offered rights will assess their consistency with Federal procurement law and satisfaction of Government user needs in accordance with the policy in DFARS 227.7202-1(a). Ratings on this factor for proposals to deliver TD, CSD, or SW with more than the minimum rights specified for the Government by applicable statute and regulation may be positively impacted.”**

DoD’s Open Systems Architecture Contract Guidebook, v.1.1.

https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf

Government IP Provisions that Will Keep You Up at Night

- Well known problem clauses:
 - FAR 52.227-17, Rights in Data Special Works
 - Includes broad rights grant in all data delivered under the contract
 - Imposes use restriction on data produced in the performance of the contract
 - Requires Contractor to indemnify the USG
 - Reach back clauses
 - DFARS 252.227-7026, Deferred delivery clause (2 years; only predesignated tech data and computer software))
 - DFARS 252.227-7027, Deferred ordering clause (3 years; any tech data or computer software generated in the performance)
 - FAR 52.227-16, Additional Data Requirements (3 years; “any data first produced or specifically used in the performance of th[e] contract”)

Government IP Provisions that Will Keep You Up at Night

- Sleeper clauses:
 - DFARS 252.227-7015, Technical Data – Commercial Items
 - Grants unlimited rights in certain categories of data (FFF, OMIT)
 - Permits release to Government support contractors
 - No liability for release if “not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.”
 - FAR 52.227-19, Commercial Computer Software License
 - Purports to take precedence over commercial software licenses
 - Grants non-commercial restricted rights in software
 - Requires contractors to label their commercial software with a specific FAR legend:
 - Notice—Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction and disclosure are as set forth in Government Contract No. _____.

Government IP Provisions that Will Keep You Up at Night

- Original clauses:

17. Proprietary Information

All data received, processed, evaluated, loaded, and/or created as a result of this delivery order shall remain the sole property of the Government unless specific exception is granted by the contracting officer.

Government IP Provisions that Will Keep You Up at Night

- The Granddaddy of them all – VA “Governing Law”
 - No commercial license effective unless attached
 - No clickwrap
 - No incorporation by reference (3rd P, OSS)
 - Restrictions re Government’s use, duplication and disclosure of data “are included and made a part of this contract, and only to the extent that those provisions are not duplicative or inconsistent with Federal law, Federal regulation, the incorporated FAR clauses and the provisions of this contract”
 - Other license provision – other than Government’s use, duplication and disclosure of data – not part of the contract

Government IP Provisions that Will Keep You Up at Night

- The Granddaddy of them all – VA “Governing Law”
 - Federal law and regulation, including without limitation, the Contract Disputes Act (41 U.S.C. §601-613), the Anti-Deficiency Act (31 U.S.C. §1341 et seq.), the Competition in Contracting Act (41 U.S.C. §253), the Prompt Payment Act (31 U.S.C. §3901, et seq.) and FAR clauses 52.212-4, 52.227-14, 52.227-19 shall supersede, control and render ineffective any inconsistent, conflicting or duplicative provision in any commercial license agreement.
 - Super order of precedence clause
 - Bottomline: Commercial license agreements eviscerated

Government IP Provisions that Will Keep You Up at Night

- What to do
 - Bilateral negotiations – just say no
 - Competitive procurement
 - Ask questions
 - Interpret provisions as a part of the proposal
 - Pre-award protest
 - Subcontractor – reject flowdown

Government IP Provisions that Will Keep You Up at Night

- What to do
 - Order of precedence
 - Custom order of precedence
 - FAR 52.212-4(s)
 - (1) “the schedule of supplies/services;”
 - (2) “the Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause;”
 - (3) “the clause at FAR 52.212-5;”
 - (4) “addenda to this solicitation or contract, *including any license agreements for computer software*;”
 - (5) “solicitation provisions if this is a solicitation;”
 - (6) “other paragraphs of this clause;”
 - (7) “the Standard Form 1449 ;
 - (8) “other documents, exhibits, and attachments; :and
 - (9) “the specification”

Preventing & Responding to Data Rights Challenges

- Increasing numbers of data rights disputes

Prechallenge RFIs	Data Rights Challenge
DFARS 252.227-7037(d)	DFARS 252.227-7037(e)
Request for written explanation for data rights assertions	Formal challenge to contractor's data right assertions
CO establishes timeline for response, but can be extended by mutual agreement	60 days to respond, but must be extended upon written request showing need for additional time
Response is not certified	Response is certified
If unsatisfied with response, CO can ask for more information or issue formal challenge	CO may request more information or issue final decision

Preventing & Responding to Data Rights Challenges

- How to respond?
 - Take it seriously!
 - Provide complete and accurate response to create fulsome record
 - Request more time if necessary

Preventing & Responding to Data Rights Challenges

- What to include in response:
 - Summary of technology
 - Timeline of development history
 - Legal support for data assertions

Preventing & Responding to Data Rights Challenges

- What to include in response, cont'd:
 - Documents justifying the data right assertion
 - E.g.:
 - Documents demonstrating development at private expense, e.g.,
 - » Timekeeping records
 - » Records showing development occurred prior to USG investment, such as test reports, specifications, dated drawings
 - Documents demonstrating segregability of technology, e.g.,
 - » Drawings
 - » Software diagrams
 - » Software code analysis

Questions?

John McCarthy

(202) 624-2579

jmccarthy@crowell.com

Jon Baker

(202) 624-2641

jbaker@crowell.com

Joelle Sires

(213) 443-5579

jsires@crowell.com