

Recommendation 4: Revise DFARS sections related to rights in technical data policy for commercial products.

Problem

DFARS clauses 252.227-7015 and 252.227-7037 establish rights in intellectual property for DoD that are not aligned with commercial practice. Both clauses deter companies that rely on their intellectual property (IP) to differentiate themselves in the marketplace from doing business with the federal government.

Background

FASA made substantial changes in policy regarding technical data for commercial products procured by the federal government. FASA set forth the following statutory changes intended to reduce barriers to the acquisition of commercial items:

- Establishment of the commercial item definition.
- A statutory preference for the acquisition of commercial items.
- Establishment of a presumption of development at private expense for commercial items.

The FASA conferees intended to exempt commercial items from requirements to provide technical data (other than data on form, fit, and function), unless the government could prove that an item was *developed* at government expense. Although Congress has amended 10 U.S.C. §§ 2320 and 2321 in the years since FASA enactment, nothing in the congressional record indicates that Congress has intended the statutes apply to commercial items that have not been proven to be *developed* at government expense. The current DFARS approach of mandating the flow down of data rights clauses to commercial items that have not been proven to be developed at government expense exceeds the express legislative intent of Congress (as originally established in FASA).

Many commercial items must be adapted in some way to meet unique DoD requirements. *Minor modifications* made to commercial items to meet unique DoD requirements do not rise to the level of new technology development. This practice is consistent with the intellectual property white paper titled, *DoD, Innovation, and Intellectual Property in Commercial and Proprietary Technologies*, which supports efforts to cultivate relationships with commercial companies and nontraditional contractors, such as those in Silicon Valley.¹ The white paper states that, “only those modifications that rise to the level of a new technology ‘development’ should affect the standard license rights granted to DoD in the newly developed modification.”

Consistent with the express legislative intent of Congress, the technical data statutes may be applied to commercial items that will undergo of a type modifications only if the parties determine that the modifications rise to the level of new technology development. Taking into consideration the cost and

¹ OUSD(AT&L), “DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies,” accessed January 25, 2017, <https://www.dau.mil/cop/stm/ layouts/15/WopiFrame.aspx?sourcedoc=/cop/stm/DAU%20Sponsored%20Documents/IP%20White%20paper%20from%20osd%20Jan%202016.pdf&action=default>.

business effects of mandating flow down of the data-rights clauses to all commercial contractors and suppliers—and to incentivize commercial and other nontraditional suppliers to do business with the DoD—it is not in the best interest of the government to apply the technical data statutes to commercial items or commercial items with *minor modifications*.

Findings

Although the FAR itself emphasizes relying on customary commercial practice, the DFARS treats IP rights acquisition as an act of the sovereign, which can grant or deny as it pleases by claiming *government purpose*. In the commercial world, assignment of IP rights is subject to negotiation, and transfer of rights typically involves fair compensation in the form of a purchase or payment of license fees. The FAR is more closely aligned to commercial practice, stating, for example, in FAR 27.102(d) that “The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the government will acquire only those rights essential to its needs.” Other sections of the FAR are similarly circumspect when it comes to commercial practice.²

The basic policy at DFARS 227.7102-1 establishes what appears to be a requirement for contractors to provide three classes of technical data beyond what may be customary in commercial markets:

227.7102-1 Policy.

(a) DoD shall acquire only the technical data customarily provided to the public with a commercial item or process, except technical data that—

- (1) Are form, fit, or function data;*
- (2) Are required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand alone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or*
- (3) Describe the modifications made at Government expense to a commercial item or process in order to meet the requirements of a Government solicitation.*

DFARS 227.7102-1 appears to acknowledge the role IP has in encouraging or discouraging commercial firms to offer solutions to DoD requirements, stating,

(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required, except for the technical data described in paragraph (a) of this subsection, to—

- (1) Furnish technical information related to commercial items or processes that is not customarily provided to the public; or*
- (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data pertaining to commercial items or processes except for a transfer of rights mutually agreed upon.*

² See, for example, FAR 12.211, FAR 12.212, and FAR 27.405-3.

And in 227.7102-2, the DFARS states,

- a) *The clause at 252.227-7015, Technical Data–Commercial Items, provides the Government specific license rights in technical data pertaining to commercial items or processes. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul and for covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor’s written permission. Those restrictions do not apply to the technical data described in 227.7102-1(a).*

It is the exceptions in 227.7102-1(a), and the implication that these exceptions are not negotiable, and the contractor may not propose to meet these requirements in another manner other than conveying these minimum rights (and others addressed below) that constitute overreach. In the commercial world, to the extent that the exceptions exceed normal practice, they would be subject to negotiation between the parties.

DFARS 252.227-7015, Technical Data – Commercial Items, further expands the government’s assertion of rights without negotiations, stating in subsection (b):

License.

(1) The Government shall have the unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so, that—

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party; (emphasis added.)

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the Contractor by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. The Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or

(ii) Release, perform, display, disclose, or authorize use of the technical data outside the Government without the Contractor’s written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this contract, or for performance of work by covered Government support contractors.

DFARS 227.7102-3 and 227.7102-4 compound the problem by extending policies intended to guide contracting officers in resolving issues where technical data may have been developed using government funds or a combination of government and contractor funds to commercial data items. For example, DFARS 227.7102-3 directs use of the procedures at DFARS 227.7103-13, Government Right to Review, Verify, Challenge, and Validate Asserted Restrictions. DFARS subpart 227.7103 applies to noncommercial items, not commercial products and services. Mixed funding issues arise in commercial contracts too, and they are usually resolved by negotiation between the parties. All of these assertions of rights go beyond the original intent of FASA.

Conclusions

The policies in FAR 27.102 and DFARS 227.7102-1 are generally adequate to protect DoD and balance the interests of the government and the contractor (except as noted above); however, subsequent paragraphs of DFARS 227.7102 deviate from commercial practice by requiring rights that are customarily addressed in negotiated commercial licenses. Adopting policies aligned with commercial practice will remove barriers to greater access to innovations in the commercial market. The recommendations below will enable that alignment.

Implementation

Legislative Branch

- No statutory changes are required.

Executive Branch

The DAR Council should do the following:

- Rescind DFARS 252.227-7015 and remove DFARS 252.227-7037 from DFARS 212.301. They go beyond the intent of FASA and are not representative of commercial practice, and therefore represent a disincentive for commercial firms to do business with the department.
- Rescind DFARS 227.7102-1 and move the policy contained therein to an appropriate place in DFARS 212. This change will make the processes for commercial buying easier for commercial firms to understand by collocating commercial technical data policy with other policies for commercial products and services.
- Rescind DFARS 227.7102-2 through 227.7102-4. Generally, these subsections adapt DoD policies and practices to recognize challenges contracting officers may face when transacting technical data issues in commercial environments. They do, however, attempt to shape commercial practices to fit DoD models and methods, rather than guiding contracting officers on how to operate in commercial markets. They go beyond the intent of FASA and are not representative of commercial practice; therefore, they represent a disincentive for commercial firms to do business with DoD.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.