

A man in a dark suit and tie is sitting on a boat. He is looking at a laptop computer on his lap. His right hand is raised, with fingers spread, as if he is explaining something or gesturing. The background is a bright blue sky and water. The text is overlaid on the image in white.

Changes to Data Rights Regulations: Clarification or Sea Change?

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Agenda

- The Government's Current Policy
- New DFARS Regulations
- Proposed DFARS Regulations
- Proposed Statutory Changes

The Government's Current Policy

- USD (AT&L) Policy Letter dated January 4, 2001 provided the following guidance to DoD:
 - Emphasize the use of specifically negotiated license rights
 - Exercise flexibility when negotiating patent rights
 - Use performance-based acquisition strategies that may obviate the need for data and/or rights
 - Acquire only data and/or rights to data truly needed for a given acquisition
- Beware of this Administration's Move to Fixed Price Development Contracts containing "Not Separately Priced" Data items

The Government's Current Policy

- FAR Policy
 - 27.102: General Guidance
 - ❖ “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.”
- DFARS Policy
 - 227.71: Rights in Technical Data and 227.72: Rights in Computer Software and Documentation
 - ❖ Major revisions under consideration in DFARS Case 2007-D003
 - ❖ Discussed in more detail later

The Government's Current Policy

- DFARS Policy
 - Subpart 227.72: Rights in Computer Software and Documentation
 - ❖ 227.7202-1: Commercial computer software or documentation shall be acquired under the licenses customarily provided to the public
 - ❖ 227.7203-1: DoD policy is to acquire only the (non-commercial) computer software and documentation, and the rights in such software and documentation, necessary to satisfy agency needs.
 - Part 212: Acquisition of Commercial Items
 - ❖ 212.212 Computer Software Revision on July 15, 2009
 - Requires departments and agencies to identify and evaluate, at all stages of the acquisition process, opportunities for the use of commercial computer software and other non-developmental software
 - Stages include: concept refinement, concept decision, and technology development
 - ❖ This regulation was released at the same time as the directive requiring use of fixed-price development contracts--connection?

New DFARS Regulations

✓ DPN 20110302 Issued 3/2/11

- Recognizes that covered government support contractors may be required to enter into NDAs with owners of data at any tier
- This acknowledgment of the right of contractors to execute NDAs with support contractors included the Government itself in DFARS No. 2007-D003 wherein it was stated:

“It is well established policy and practice in federal and DoD acquisitions that the treatment of intellectual property rights creates a special, direct, relationship between the Government and subcontractors (at any tier.)”

New DFARS Regulations

✓ Effect on DoD Support Contractors

- Specifically, the regulatory change subjects the support contractor to criminal, civil administrative and contractual actions for penalties, and other damages by both the Government and the owners of the data
- This will greatly increase the number of NDAs in existence, and may have the effect that support contractors refine and limit their requests for access to data not necessary for them to do their work.
- Alternatively, this could embolden support contractors to demand access to data (such as source code) that is not actually needed to do the work requested by the Government
- Overall, this appears to be a favorable development because an NDA at least gives a contractor a right of action against a support contractor

New DFARS Regulations

- ✓ DFARS Case 2007-D003 Issued for comment 5/7/10 – Released in Final Form 9/20/11
 - States it implements the John Warner National Defense Authorization Act (NDAA) for FY 2007 and the NDAA for FY 2008
 - ❖ Statutory provisions reverse the presumption of “development at private expense” for **commercial** items under contracts or subcontract for major systems
 - ❖ Data owners must now substantiate their claim to development at private expense rather than requiring DoD to prove the opposite
 - Proposed regulations go further than the statutes
 - ❖ Amends DFARS 212, 227, and 252

New DFARS Regulations

- ✓ The Regulations impose the non-commercial DFARS data rights clauses and marking requirements on *any* contract for commercial items as long as there is *any* government funding
- ✓ The Regulations apply the entire DFARS data rights scheme to all subcontracts for commercial items.
- ✓ The Regulations apply the presumptions regarding development at private expense to software even though statutes apply to tech data

New DFARS Regulations

- ✓ The Regulation deletes 10 USC §§2320 and 2321 from the list of laws *inapplicable* to commercial contracts – significant change
- ✓ Burden of proving *development “exclusively” at private expense* shifts to the contractor with potentially enormous ramifications
 - At least commercial contractors will not have kept the records necessary to prove “exclusively private funding” for all work currently in existence – unless able to prove no previous work for the government
 - Government contractors may have some records to the extent that they document their IR&D funding justifications

New DFARS Regulations

- ✓ The regulation appears to abrogate the exceptions to Government ownership of data developed with government funding for modifications of commercial items
 - “of a type customarily available in the commercial marketplace”
 - “minor modifications of a type not customarily available in the commercial marketplace”
- ✓ This eliminates an important portion of the definition of commercial items in FAR §2.101
- ✓ Will make it exceedingly difficult to maintain a commercial product line that is sold to the government and modified to meet the government’s application as a commercial item for subsequent purchases

New DFARS Regulations

- ✓ This could mark the end of the Government's policy to encourage commercial item purchasing
- ✓ For both commercial and non-commercial contractors, a completely new method of accounting for development costs may become necessary
- ✓ Possibly adds fuel to an allegation that a contractor's accounting system is flawed and subject to disapproval under the new "Business Systems" rules

New DFARS Regulations

- ✓ This Regulation starts to blur the line between software and computer data and technical data
- ✓ This erosion is completed in the pending DFARS Case No. 2010-D001
- ✓ Even without the added damage inflicted by the still-pending DFARS rewrite, this is a major erosion of the benefits to commercial companies under FAR Part 12.

Proposed DFARS Regulations

- ✓ DFARS Case No. 2010-D001 Issued 9/27/10
 - Virtually rewrites DFARS Part 227
 - Covers 56 pages in the Federal Register
 - Includes the Provisions of DFARS Case No. 2007-D003 plus many more changes
 - Has gone through several comment phases, and is still under consideration after heavy industry criticism
 - Will probably be revised to take out provisions that overlap with DFARS 2007-D001

Proposed DFARS Regulations

- ✓ This proposed regulation completely combines the provisions that govern computer and software data and technical data
- ✓ Makes commercial item data abide by virtually the same rules as non-commercial item data
- ✓ Essentially eliminates the treatment of commercial item data consistent with the commercial marketplace
- ✓ Fundamentally alters the Government's data rights policy

Proposed DFARS Regulations

- ✓ Comment period is over with many critical comments received
- ✓ Unknown when the final rule will be issued, and in what form

Proposed Legislation

- ✓ FY11 NDAA and S.1253 (FY12 NDAA) seek to change rights to data developed with IR&D funding
 - Currently, Contractor retains data rights and government gets Limited Rights
 - New legislation changes the law to grant the Government Unlimited Rights in such data
 - Impossible to predict how these confusing legislative provisions might get incorporated into the DFARS
 - Would cause massive changes in both the data rights section of the FAR, as well as in the cost principles governing IR&D funding

Proposed Legislation

- ✓ Major Impact on FAR §31.205-18
 - This detailed cost principle sets out extensive accounting requirements for the tracking of IR&D costs (also covered in the Cost Accounting Standards)
 - If IR&D funded research and development gives the government unlimited rights, contractors may not choose to use IR&D funds to develop new technologies
 - This would defeat the purpose of IR&D funding and jeopardize new development

Proposed Legislation

- ✓ This could be a reaction to the *ATK Thiokal v. U.S.* case decided by the Federal Circuit last year
 - The Federal Circuit held that R&D costs are independent unless specifically required by a contract. This decision makes it clear that the Government's "implicit" requirement test adopted in *Newport News* is incorrect, firmly protecting the indirect nature of all R&D costs when the effort is not specifically required by a contract, even when the R&D effort is "concurrent" or "parallel" to contract performance.
 - The proposed new legislation would make Thiokal irrelevant because the data rights resulting from such IR&D would result in unlimited rights regardless of whether the R&D effort was "concurrent" or "parallel" to contract performance.