Data Rights in Government Contracts

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Definitions

- "Technical data" are recorded forms of information of a scientific or technical nature pertaining to products sold to the government. Examples: Engineering Drawings, O&M Manuals

- "Commercial computer software" is software developed or regularly used for non-governmental purposes. Includes software to which only minor modifications need to be made.

- "Commercial" definition can be found in Far Part 2

- "Noncommercial software" is software that does not qualify as "commercial computer software."

Data Rights in Government Contracts

- DFARS 252.227-7013, Rights in Technical Data – Noncommercial Items.

- DFARS 252.227-7014, Rights in Noncommercial Computer Software

- DFARS 252.227-7017, Identification and Assertion of Use, Release, or Disclosure Restrictions.

Types of Data Rights

- The more government funding, the greater the government's rights in such material.

- "Unlimited Rights" are obtained by the Government where the software or technical data was developed exclusively with Government funds. Unlimited rights permit the Government to use the technical data or software for any purpose whatsoever.

Types of Data Rights

- "Government Purpose Rights (GPR)" are obtained by the Government where there is a mix of contractor and Government funding in the development of the software or technical data. GPR changes to Unlimited Rights after 5 years.

- GPR allow the Government to release or disclose software or technical data for Government purposes excluding commercial uses.

- Non-Disclosure Agreement before giving technical data or software to another contractor. Allowed to use the technical data or software only for the purpose for which it was given by the Government.

Types of Data Rights

- "Restricted or Limited Rights" are asserted by a contractor where the software or technical data was developed exclusively at private expense.
- The Government can provide such software or technical data to other Government agencies but not outside the Government, except:
  - SETA contract employees
  - Emergency repair or overhaul
- "Specifically Negotiated License Rights"

Commercial Items

- Commercial computer software is:
- –Software developed or regularly used for nongovernmental purposes, and
- –Which:
- •Has been sold, leased, or licensed to the public;
- •Has been offered for sale, lease, or license to the public;
- •Has not yet been sold, leased, or licensed to the public but will be available commercially in time to satisfy the delivery requirements of this contract; or
- –Which satisfies one of the first three options and would require only minor modification to meet the requirements of the contract

Data Rights in Commercial Items

- The Government receives ONLY the rights in technical data or computer software that the contractor provides to the general public.

- There is a presumption that commercial items are developed at private .

- Contracting officers are instructed not to challenge this presumption unless the Government can demonstrate that it contributed to development of the item.

Issues

- Government needs at least GPR to comply with CICA.
  - So we ensure that the technical data or software needed for full and open competition is a deliverable.
  - The contract must specify <u>both</u> the deliverable and the data rights in the deliverable.
  - Deliverables can be from a CDRL or contained within the SOW.
  - Deferred Ordering Clause
  - Product containing both GPR and IR&D is problematic.
  - Providing GPR can be an evaluation factor or a subfactor (what is your approach to providing the Government with GPR?).
- Assert, up front, the restrictions on technical data or software.
  - Use the correct markings in the DFARS clauses in your contract.
  - If not properly marked, the Government will allow you 60 days to properly mark the data. If nonconforming marking is not corrected, the Government may ignore, remove or correct it at the contractor's expense. We can consider the technical data or software as being given to us with unlimited rights.
- Use or Disclosure of Government-Furnished Information.
  - Our duty to ensure that contract awardees use the GPR only in performance of its contract.

Issues

- DoD policy is to acquire only the **minimum** data rights necessary.
- §802 of FY 2007 NDAA.
- –(a) Assess data requirements in all Acquisition Strategies
- –(b) Presumption is that Commercial data or software was developed at Government expense for <u>major systems</u>. This changed the earlier presumption. COTS products and data are exempted.
- FY 11 NDAA - Expands definition of "exclusively with federal funds" in 10 U.S.C. 2320 to include amounts spent for IR&D and Bid and Proposal Costs.

QUESTIONS?

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