2014 Technical Data Rights Forum

Technical Data Rights Challenges from the Small

Business Perspective

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Overview

* Putting small business on notice – data rights assertion tables
* SBIR Data rights – tutorial
* SBIR Data rights – DoD IG report
* Evaluation criteria
* Prime contract flow-downs
* Protection of core technology

Putting Small Business on Notice

* Many, if not most, small businesses do not have data rights, or even government contracts expertise
* Mere incorporation of FAR/DFARS clauses in prime/subcontracts often mean nothing to small businesses
* To avoid misunderstandings later, put data rights assertion tables into RFPs, prime contracts, and subcontracts in full text
* When there are blanks to fill in, questions will be asked!

But I Have A FAR Contract!

* Get FAR 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, in the prime contract
* DFARS data rights assertion table is appropriate to insert into 52.227-15(b)
  * (b) By completing the remainder of this paragraph, the offeror represents that it has reviewed the requirements for the delivery of technical data or computer software and states [*offeror check appropriate block*]—
  * ( ) None of the data proposed for fulfilling the data delivery requirements qualifies as limited rights data or restricted computer software; or
  * ( ) Data proposed for fulfilling the data delivery requirements qualify as limited rights data or restricted computer software and are identified as follows:
  * _____
  * _____
  * _____

Sample Table

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)*****	(LIST)	(LIST)	(LIST)
Technical reports addressing Z technology	Developed in SBIR Phase I and II contracts	SBIR rights	Subcontractor A
Level II drawings, subcomponent X	Developed with mixed funding	Government Purpose Rights	Prime Contractor
Subsystem Y computer database	Developed exclusively at private expense – commercial item	Commercial rights – see license	Subcontractor B

*For technical data (other than computer software documentation) pertaining to items, components, or processes developed at private expense, identify both the deliverable technical data and each such item, component, or process. For computer software or computer software documentation identify the software or documentation.
**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data pertain. The Government's rights in computer software documentation generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.
***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited, restricted, or government purpose rights under this or a prior contract, or specially negotiated licenses).
****Corporation, individual, or other person, as appropriate.
*****Enter "none" when all data or software will be submitted without restrictions.

Use of Sample Table

* Place link to sample table in RFP/prime contract/subcontract
* Or
* Include sample table as an attachment or exhibit

Putting small businesses on Notice

* Informing small businesses through completion of data rights assertion tables of the impact government funding may have on their rights up front reduces risk of confusion and disputes later on

SBIR Data Rights

* Alison Brown
* Heidi Jacobus

SBIR Data Rights – DoD IG Report

* DoD Considered Small Business Innovation Research Intellectual Property Protections in Phase III Contracts, but Program Improvements Are Needed
* http://www.dodig.mil/pubs/documents/DODIG-2014-049.pdf
* "DoD contracting and U.S. Army Medical Research and Materiel Command personnel inconsistently followed policies that governed SBIR intellectual property protections because of unclear and inconsistent DoD and SBA requirements"
* "DoD does not have reliable data to report the success of the DoD SBIR Program"

DoD IG Recommendations

* DoD officials should:
  * develop training and issue guidance that will allow for a uniform interpretation of intellectual property protections across DoD;
  * issue guidance to improve the accuracy of SBIR information being entered into existing databases; and
  * address inconsistencies in DoD regulations regarding intellectual property protections.

Data Rights As Evaluation Criteria

* Use of evaluation factor – legal?
* Is it a condition of award?
* Government Purpose Rights requirement – conflict with SBIR Data Rights?
* What's an agency to do?

Prime Contract Flow-downs

* 10 U.S.C. 2320 provides subcontractors at all tiers the **same protection** for their rights in data as is provided to prime contractors

* 10 U.S.C. 2321 permits a subcontractor **to transact directly with the Government** in matters related to subcontractor's asserted restrictions on the Government's rights to use or disclose technical data

  * *Does not establish subcontractor privity w/ the Govt*

* DFARS 227.7103-15(d) also cautions prime contractors against forcing subcontractors to **"relinquish their rights"** as a condition for award of a contract, subcontract etc. except for those rights obtained *by the Government*

Prime Contract Flow-downs – Technical Data

* DFARS 227.7103-15(c), Subcontractor Rights in Technical Data, instructs prime contractors to flow-down the following clauses, *w/out modification*, to their subs if the clauses are included in the prime contract:

    * 252.227-7013, Rights in Technical Data – Noncommercial Items
    * 252.227-7025, Limitation on the Use or Disclosure of Government Furnished Information Marked w/Restrictive Legends
    * 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government
    * 252.227-7037, Validation of Restrictive Markings on Technical Data

Prime Contract Flow-downs – Computer Software/Documentation

* DFARS 227.7203-15(c), Subcontractor Rights in Computer Software or Computer Software Documentation, instructs prime contractors to flow-down the following clauses, *w/out modification except for identification of the parties*, to their subs if the clauses are included in the prime contract:

  * 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation
  * 252.227-7019, Validation of Asserted Restrictions-Computer Software
  * 252.227-7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends
  * 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government

Mechanics of Flow-Downs

* The following Federal Acquisition Regulation ("FAR") and Defense supplement ("DFARS") clauses, including applicable alternates, as in effect on an Order's, Contract's or Agreement's date, are hereby incorporated by reference to the extent required by the clause, with the same force and effect as if they were incorporated in full text. In reading these clauses "Contractor" or "Offeror" shall mean "Seller" as the context requires and references to "the Government", "the Contracting Officer" or any Federal department or agency shall include "Prime Contractor" except to the extent the clause addresses audit or real, personal, or intellectual property (including data rights), in which case the references shall remain as in the original.

Data Rights Flow-Down Considerations - General

* Different treatment for Commercial Computer Software and Computer Software Documentation
* Identification of data delivered with less than unlimited rights
* Conflicting clauses; order of precedence
* Identifying deliverables
  * Data rights regulations identify type of license rights Government receives, not the type of data the Government receives
* Development, use and production of data during performance of services contracts
* Deferred delivery or ordering clauses

Data Rights Flow-Down Considerations - Primes

* Does prime contractor need rights in subcontractor data?
    * See 252.227-7013(k)(5) (prime contractor cannot use "subcontractor's rights" as an excuse for failing to satisfy its contractual obligations to the Government)
    * Prime may have to negotiate separate license rights
* Determining whether subcontractor data was previously provided to Government
* Subcontracts for Commercial Items
    * Prime has obligation to "ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion and delivery processes" required by clauses in prime contract – only w/ respect to commercial computer software and documentation
    * Flow down of 252.227-7015

Data Rights Flow-Down Considerations - Subcontractors

* Identification of data subject to protection
  * Need to identify data delivered at teaming agreement stage
* Tracking IR&D expenses
* Delivery of data
* Legending data delivered
* Validation / removal of proprietary markings/disputes
* Data created or produced by employees vs consultants (1099s)
* Deferred delivery or ordering requirements

Questions?