



29TH ANNUAL OUNCE OF PREVENTION SEMINAR

Weathering the
Rough Seas of
Regulation



**The Pendulum Continues to Swing the
Wrong Way for Contractors:
*The Government's Continued Assault on
Contractor Intellectual Property***

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FY 2012 NDAA Data Rights Changes

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2012 NDAA Data Rights Changes

- Enacted
- Applicable to DoD only
- Scope of change unclear pending implementing regulations

2012 NDAA Data Rights Changes

- “segregation” “reintegration” data
 - “necessary for the segregation of an item or process from, or”
 - “the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes”

10 U.S.C. § 2320(a)(2)(D)(i)(II)

2012 NDAA Data Rights Changes

- New exception to non-disclosure of limited rights technical data
 - “such release, disclosure, or use . . . is”
 - “necessary for the segregation of an item or process from, or”
 - “the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes”

10 U.S.C. § 2320(a)(2)(D)(i)(II)

2012 NDAA Data Rights Changes

- Super deferred ordering provision
 - Notwithstanding any contract delivery requirements, USG can require delivery of technical data
 - If generated or used in the performance of a contract
 - Needed for “reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process,” AND
 - Pertains to an item or process developed in whole or in part with Federal funds; OR
 - “segregation” “reintegration” data
 - Compensation = copying costs
- 10 U.S.C. § 2320(b)(9) (emphasis added).
- No Time Limitation

2012 NDAA Data Rights Changes

- Extends the right for the Government to challenge use or release restriction from three years to six years from the latter of
 - Date of final payment of contract in which data is required to be delivered
 - Date of delivery
- No date restriction in the case of fraudulently asserted use or release restriction

10 USC 2321(a)(2)

Policy Changes Impacting Contractor Intellectual Property

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DoD's Better Buying Power 2.0

- Preliminary version issued November 13, 2012
- “Do more without more”
- 7 Focus Areas
 - Achieve Affordable Programs
 - Cost Controls Throughout the Product Lifecycle
 - Incentivize Productivity & Innovation in Industry & Government
 - Eliminate Unproductive Processes & Bureaucracy
 - *Promote Effective Competition*
 - Improve Tradecraft in Acquisition of Services
 - Improve the Professionalism of the Total Acquisition Workforce

BBP 2.0: Implementation Directive

- Implementation Directive issued April 24, 2013
- Effective immediately
- BBP 2.0 is subject to professional judgment; it is not “rigid dogma”

BBP 2.0: Promote Effective Competition

- Emphasizing Competition Strategies
 - Competition from cradle-to-grave
 - Strategies:
 - Leader-follower arrangements
 - Open systems architecture (OSA)
 - Acquisition of technical data packages
 - Competition at subsystem level

BBP 2.0: Promote Effective Competition

- Enforce OSAs & effectively manage technical data rights
 - Emphasis on OSAs supportable through multiple competitive alternatives
 - Focus on IP strategy that is implemented over product's lifecycle
 - DoD components must describe how OSA is considered during milestone reviews
 - Sole-source J&A waivers must discuss OSA

BBP 2.0: Promote Effective Competition

- Specific Actions
 - Re-publish OSA Contract Guidebook for Program Managers (PMs), version 1.1 by June 1, 2013
 - Re-publish DoD Data Rights Brochure to update changes to DFARS by Oct. 1, 2013
 - Publish replacement procedure for acquisition & management of technical data by Jan. 1, 2014

OSA Contract Guidebook for PMs

- Draft issued in December, 2011
- USG cannot condition award or responsiveness on relinquishing rights, but can evaluate data rights
- Includes model solicitation language for SOW, sections H, L, M

Update on Recent Case Law

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Coastal Seal Services, LLC

- B-406219, March 12, 2012, 2012 CPD ¶ 111
- GAO protest of Navy's proposed sole-source contract for stern tube seal repair kits for ships
- Sole-source J&A largely based upon Navy's lack of rights in, and access to, relevant technical data relating to the seals construction and manufacture

Coastal Seal Services, LLC (cont'd)

- Navy argued lack of technical data made it impossible to determine whether protester's proffered design was an adequate substitute
- GAO concluded that this was a proper basis for a sole-source award

Appeal Of Alenia N. Am., Inc.

- ASBCA No. 57935, 2013 WL 1871512 (Mar. 26, 2013)
- Contract did not contain any FAR or DFARS data rights clauses
- Contractor delivered publications with restrictive markings

Appeal Of Alenia N. Am., Inc. (cont'd)

- Air Force sent Alenia letter 18 months after delivery of first publication challenging Alenia's assertions
- Alenia disagreed
- CO issued a final decision stating it had unlimited rights to the publications, arguing
 - DFARS 252.227-7037, Validation of Restrictive Marking, was incorporated by operation of law pursuant to the Christian Doctrine
 - Alenia never identified any restrictive data in its proposal
 - Inconsistent with Distribution Statement C, required by the contract

Appeal Of Alenia N. Am., Inc. (cont'd)

- Contractor appealed final decision to ASBCA
- Contractor then argued ASBCA lacked jurisdiction, because there was no claim
- ASBCA found that there was a government claim

Colt Defense, LLC

- B-406696.2, Nov. 16, 2012, 2012 CPD ¶ 319
- GAO protest alleging terms of the solicitation are inconsistent with the terms of Colt's license agreement with the Army
 - Protester relied on FAR 27.202-2(b)(1) “[w]hen the Government is obligated to pay ... a royalty,” agencies must “[e]valuate an offeror's price by adding an amount equal to the royalty.”

Colt Defense, LLC (cont'd)

- GAO dismissed protest:
 - GAO will not resolve a dispute involving interpretation of a license agreement
 - FAR 27.202–2
 - Not applicable to royalties on the use of technical data
 - Does not preclude the evaluation of a royalty where the amount of the royalty has yet to be determined

D'Andrea Bros. LLC v. U.S.

- 109 Fed. Cl. 243 (2013) (Judge Firestone) recon. denied, 08-286C, 2013 WL 1316534 (Fed. Cl. Mar. 28, 2013)
- Licensee claimed \$1.95 million in reliance damages for alleged breach of implied covenant of good faith and fair dealing in connection with a CRADA
- Government counterclaimed for \$60,000 in unpaid royalties

D'Andrea Bros. LLC v. U.S. (cont'd)

- Exclusive five-year license to trademarks for HooAH! nutritional energy bars in exchange for payment of royalties to Army
- Army agreed to help licensee test and improve HooAH! bars for commercial market
- Alleged Army breached the CRADA by:
 - Unreasonably failing to communicate with Claimant for 9 months
 - Changing name of its military energy bar from “HooAH!” to “First Strike”
 - “Bad mouthing” and electing to compete with plaintiff by developing its own bar within the military community

D'Andrea Bros. LLC v. U.S. (cont'd)

- Holdings:
 - Government breached implied covenant of good faith and fair dealing
 - Government's breach was a prior material breach excusing licensee's failure to pay royalties
 - Licensee was not entitled to reliance damages

ITT Electronic Services

- B-406405 *et al.*, May 21, 2012, 2012 CPD ¶ 174
- GAO protest alleging unequal treatment in evaluating the data rights that each offered to the government
- One of the five technical evaluation subfactors provide for, among other things, the evaluation of data rights granted to the government

ITT Electronic Services (cont'd)

- All 3 offerors offered a mix of limited and unlimited data rights
- Agency assessed a marginal rating due, in part, to ITT's proposed data rights
- GAO found that ITT's offer included different restrictions not found in the other offers
- Evaluation reflected “reasonable distinction” between proposals

IHS Global, Inc. v. U.S.

- 106 Fed. Cl. 734 (2012) (Judge Wheeler)
- Procurement for, *inter alia*, access to a database of information regarding obsolete parts
- Protest challenged a sole-source award to BAE
- Air Force justified sole-source contract on basis that the BAE parts database was needed to perform the contract
- Protester alleged:
 - BAE's specifically negotiated license agreements relating to the parts data either did not cover the relevant data or were invalid
 - Two years earlier, BAE failed to include a particularly relevant data field on a list of data to which it asserted ownership rights

IHS Global, Inc. v. U.S. (cont'd)

- COFC found that IHS lacked standing, because the database proposed by IHS admittedly could not meet the contract requirements, and therefore did not reach the merits of the issues
- In *dicta*, COFC:
 - Expressed skepticism of any claims of entitlement to data developed in performance of contracts paid for by the government
 - Agreed with Air Force approach to avoid the data rights issue

Questions?

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