



32nd Annual

**OUNCE OF
PREVENTION
SEMINAR**

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The Changing Landscape of Government Intellectual Property

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Recent OMB Policies



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Software Licensing

Draft OMB Category Management Policy 16-1: Improving the Acquisition & Management of Common Information Technology: Software Licensing

- Seeks to leverage federal government buying power for s/w
- Agency-level strategies:
 - Appoint software manager to manage all agency commercial software contracts & licenses;
 - Maintain a comprehensive annual inventory of software license & subscription spending; and
 - Aggregate agency software requirements and funding
- Government-wide strategies:
 - Identify & promote existing best-in class software agreements; and
 - Develop new government-wide enterprise software agreements



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Mobile Devices and Services

*Draft OMB Category Management Policy 16-2:
Improving the Acquisition & Management of Common
Information Technology: Software Licensing Mobile
Devices and Services*

- Seeks to leverage federal government buying power for mobile devices and services
- Agency-level strategies:
 - Baseline agency usage;
 - Optimize agency requirements



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Mobile Devices and Services

- Government-wide strategies:
 - Transition to government-wide acquisition strategies and create accountability
 - Consolidate agency requirements
 - Define government-wide requirements
 - Exception for agency-wide mandatory use vehicles
 - Transition plans
 - Improve demand management practices
 - Create broker model to act as single buyer
 - Create accountability



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Legislative/Regulatory Updates



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Exception to the Exception to the Presumption

- Presumption: FASA
 - DoD Commercial Items: Presumption of development at private expense
- Exception: FY 2007 NDAA § 802(b)
 - Reverse presumption of development at private expense for commercial items under contracts or subcontracts for major systems (or subsystems or components thereof)
- Exception to the Exception: FY 2008 NDAA § 815(a)(2)
 - Exempt commercial off-the-shelf (COTS) items from the reverse presumption established under § 802(b) of FY 2007 NDAA



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Exception to the Exception to the Presumption

2016 NDAA § 813(a) & Proposed Rule

- Limits applicability of the exception to major weapons system
- Exception to the exception for commercial components or subsystems of major weapons systems where MWS acquired as commercial items
- Exception to the exception for commercial components of subsystems acquired as commercial items
- Expands COTS exception to the exception to include COTS with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet federal government requirements



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New DoD Prototype OTA Authority

2016 NDAA § 2371b

- Authorizes DoD to conduct “prototype projects” that are “directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the [DoD], or to improvement of platforms, systems, components, or materials in use by the armed forces.”
- Dollar thresholds:
 - \$50M - \$250M, with approval by the agency’s senior procurement executive
 - > \$250M, with Under Secretary of Defense for ATL approval and determination that OTA is “essential to meet critical national security objectives”



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New DoD Prototype OTA Authority

2016 NDAA § 2371b

- Must meet one of the threshold requirements
 - Nontraditional defense contractor participating to a significant extent;
 - All significant participants are small businesses or nontraditional defense contractors;
 - 1/3 of total cost funded by the parties to the transaction;
or
 - Exceptional circumstances:
 - Project involves innovative business arrangements or structures not suitable for a contract;
 - Project provides opportunity to expand supply base
- OTAs, generally, provide greater flexibility in negotiating IP terms



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Government Industry Advisory Panel

2016 NDAA Section 813(b)

- Purpose of Panel
 - Review data rights statutes and regs to ensure that they are “best structured to serve the interests of the taxpayers and the national defense.”
- Scope of review – factors
 - Ensuring that the DoD does not pay more than once for the same work.
 - Ensuring that DoD contractors are appropriately rewarded for their innovation and invention.
 - Cost-effective reprocurement, sustainment, modification, and upgrades to DoD systems.
 - Encouraging private sector investment in new products, technologies, and processes relevant to DoD
 - Ensuring that the DoD has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.
- Report due Sept. 30, 2016



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2017 NDAA - Modular Open Systems Architecture

- Require use of Modular Open Systems Architecture (MOSA) to the maximum extent practicable
 - MOSA = integrated business and technical strategy that employs a modular design with major system interfaces between a major system platform (such as a ground vehicle, ship, or aircraft) and its major system components (such as sensors or communication equipment) or between major system components
 - Interfaces would be consistent with widely-supported and consensus-based standards, unless such standards are unavailable or unsuitable



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2017 NDAA – Changes to Rights in Tech Data

- Rights to Technical Interface Data
 - Government Purpose Rights in TD related to a major system interface developed either at private expense or with a mix of Federal and private funds and used in a modular system approach
 - Government Purpose Rights in the technical data of a general interface developed with a mix of Federal and private funds, unless the Secretary of Defense determines that the negotiation of different rights would be in the best interest of the United States.
 - Unlimited Rights to technical data pertaining to an interface between an item or process and other items or processes.
- Limited Rights to the detailed manufacturing and process data of major system components used in MOSA and developed exclusively at private expense.



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2017 NDAA – Changes to Rights in Tech Data

- Requires the U.S. Government and DoD contractors to negotiate for data rights when items or processes are developed with a mix of Federal and private funds.
- Limits deferred ordering of technical data to 6 years after delivery of the last item on a contract and to technical data generated, not utilized, in the performance of the contract.
- The committee expects DoD to develop its sustainment strategies and plans for technical data earlier in the acquisition process so it depends upon deferred ordering less frequently.



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2017 NDAA – Section 813 Panel

- Government Industry Advisory Panel established by 2016 NDAA
- Extend duration of panel to March 1, 2017
- Develop recommended changes to DoD technical statute and regulation, to include consideration of data rights required to support MOSA
- Bottom line: Fundamental changes to data rights rules are on the horizon



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SBIR/STTR

- April 2016 SBA issued a notice of proposed amendments
- Significant changes to the current data rights provided under SBIR/STTR awards
- Changes to preference for program participants for Phase III awards



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SBIR/STTR

- Currently program participants can receive multiple Phase I and II awards, data protected for at least 4 years from last deliverable
- Proposal to allow USG to use and allow others to use after a non-extendable 12-year period



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SBIR/STTR

- Changes create more certainty in Phase III awards:
 - If pursuing the Phase III work with the Awardee is found to be practicable, the agency must award a non-competitive contract to the firm
 - If a sole-source award is not practicable, an agency must consider a different preference, such as requiring contractors to acquire the prior awardee's deliverables through a brand-name designation or establishing evaluation factors that promote subcontracting with the prior awardee



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Recent Case Developments



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Objecting to Solicitation Terms

Deloitte Consulting, LLP; Booz Allen Hamilton, Inc.; CALIBRE Systems, Inc., B-411884, et al., Nov. 16, 2015, 2016 CPD ¶ 2

- RFQ included non-standard data rights clause:

The Government has unlimited rights to all documents/material produced under this contract. All documents and materials, to include the source codes of any software, produced under this contract shall be government owned and are the property of the Government with all rights and privileges of ownership/copyright belonging exclusively to the Government. These documents and materials may not be used or sold by the contractor without written permission from the Contracting Officer. All materials supplied to the Government shall be the sole property of the Government and may not be used for any other purpose.



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Objecting to Solicitation Terms

- Deloitte protested, arguing that the awardee PwC's quotation took exception to RFQ's data rights clause
- The awardee PwC's quotation stated:

“[N]either the contract deliverables nor their content may be distributed to, discussed with, or otherwise disclosed to any Third Party without PwC's prior written consent.”

- **GAO sustained, finding that the data rights clause was a material term of the RFQ.**
- **Query how contractors are supposed to negotiate specifically negotiated rights with the USG, as authorized by DFARS 252.227-7013. During Q&A?**



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Marking Requirements

DynCorp International, LLC v. United States, 125 Fed. Cl. 446 (2016)

- DynCorp, the incumbent, voluntarily gave the agency a life cycle management report which incorporated indirect rate and award fee data
- Agency published report on FedBizOps as part of follow-on RFP – resided there for 5 months
- DynCorp argued RFP should be cancelled & it should be awarded a sole-source contract



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Marking Requirements

DynCorp International, LLC v. United States, 125 Fed. Cl. 446 (2016)

- Incumbent contract granted USG unlimited rights in all deliverables, but allowed DynCorp to mark proprietary data
- DynCorp's contract also included FAR 52.227-14, Rights in Data—General, and DFARS 52.252.227-7013, Rights in technical data—Noncommercial items clauses
- DynCorp did not mark life cycle management reports for years
- DynCorp did not object when agency informed a report would included with the solicitation
- DynCorp silent while its proprietary data resided on FedBizOps for 5 months

Holding: DynCorp waived ability to protect the rate and fee data as proprietary. Protest dismissed.



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Patents, the Federal Government, and Infringement

Zoltek Corp. v. US (Fed. Cir. 2016)

- Zoltek's saga to obtain compensation for the alleged infringement began in 1996
- Zoltek sued the U.S. for infringing carbon fiber sheet patents used on the B-2 Bomber and F-22 Fighter
- Following *Zoltek V*, the CFC found Zoltek's claims were invalid as obvious and/or lacking written description



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Zoltek Corp. v. US

- Zoltek appealed, and received another shot at recovery from the Federal Circuit in 2016
- The Court found that:
 - The written description need not include information that is already known and available to the experienced public
 - At time of patent application no other company could supply the relevant material
 - An expert could not accurately duplicate patentee's discovery without information that was not available to persons of skill at time of invention



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Coming Events



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2012 NDAA Changes

- Regulation implementing the requirement for the delivery, and permitting Government disclosure, of “segregation . . . or . . . reintegration” data



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FCA

- Increased emphasis on data rights in FCA context?



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IP Strategy



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IP Strategy

- Plan ahead
- Software licensing
- Negotiating with US Government
- Negotiating with suppliers



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