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DATA RIGHTS FOR GOVERNMENT CONTRACTORS

A PilieroMazza Webinar

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ANALYSIS

- Is it a civilian or defense contract?
  - FAR or DFAR
- What type of data?
  - Technical Data or Computer Software
- What type of rights?
  - Limited Rights, Restricted Rights, Unlimited Rights, Government Purpose Rights, Inchoate Rights

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ANALYSIS CONT'D

- When was software "developed"?
  - "Developed" means that an item, component, or process is workable.
  - Development for purposes of asserting data rights generally occurs when reasonable people skilled in the applicable act conclude there is a "high probability" the item or process will work as intended.

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ANALYSIS CONT'D

- Who paid for it? What is the source of funding?
  - Private Expense – means development accomplished entirely with costs charged to indirect cost pools; private expense determination should be made at the lowest practicable level
  - Government Funded – means development was not accomplished exclusively or partially at private expense
  - Mixed funding

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FAR AND DFAR

- FAR Clause – Civilian Agency Contracts
  - FAR 27.4, Rights in Data – General (52.227-14)
- DFARS Clauses – Defense Contracts
  - DFAR 227.71, Rights in Technical Data – Noncommercial Items (252.227-7013)
  - DFAR 227.72, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation (252.227-7014)

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FAR AND DFAR CONT'D

- FAR data rights provisions do not apply to DoD contracts and DFAR data rights clauses do not apply to civilian contracts. They are separate and distinct.
- Example of differences:
  - If development occurred with mixed funding, under the DFAR, government would obtain government purpose rights but under the FAR, government would have unlimited rights.

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TYPES OF DATA

- Technical Data
- Computer Software
  - Commercial Software
  - Non-Commercial Software
- Data Bases
- Computer Software Documentation

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TECHNICAL DATA

- "Technical Data" means
  - Under FAR: means recorded information of a scientific or technical nature; does not include computer software or financial, administrative, cost or price, or management data (52.227-14(a))
  - Under DFAR: means recorded information of scientific or technical nature (including computer software documentation); does not include computer software incidental to contract administration such as financial and/or management information (252.227-7013(a)(15))

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COMPUTER SOFTWARE

- "Computer Software" means -
  - Computer programs that comprise a series of instructions, rules . . . that allow or cause a computer to perform a specific operation
  - Recorded information comprising source code listings, design details algorithms, processes, . . . and related material that enable the computer program to be produced, created, or compiled
  - Does not include computer databases or computer software documentation

(52.227-14(a); and see 252.227-7014(a)(4))

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COMMERCIAL COMPUTER SOFTWARE

- Means software developed or regularly used for nongovernmental purposes which
  - Has been sold, leased or licensed to the public or offered for sale, lease, or license to the public;
  - Has not been offered, sold, leased or licensed to the public but will be available for commercial sale, lease or license in time to satisfy the delivery requirements of the contract; or
  - Satisfies one of the above and would require only minor modification to meet the requirements of this contract (252.227-7014(a)(1))

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TYPES OF RIGHTS

- Limited Rights
- Restricted Rights
- Unlimited Rights
- Government Purpose Rights
- Inchoate Rights

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LICENSE RIGHTS

- Government gets License (permission to engage in otherwise restricted activities)
- Contractor keeps Title (ownership)
- Licenses are for both civilian and defense procurements
- Applies to both commercial Technical Data and Computer Software

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BAYH-DOLE ACT

- Prior to 1980, government funded inventions were owned by the government. This did not allow for the transfer of inventions to industry and did not encourage commercialization.
- Bayh–Dole Act (enacted in 1980) authorized the Department of Commerce to create standard patent rights clauses to be included in agreements for federal funding with universities and small businesses

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STANFORD V. ROCHE

- Supreme Court held that title in a patented invention vests first in the inventor, even if the inventor is a researcher at a federally funded lab subject to the Bayh–Dole
- Use of language such as a promise or commitment to assign (in the future) is not tight enough to convey title –Be careful of failure to use proper language of affirmative transfer
- Use “do hereby assign [or grant]”

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LIMITED RIGHTS

- Term Used in Civilian and Defense Contracts
- Term Only Applies to Technical Data
- Most Protection a Contractor Can Get for Technical Data, "Developed" at Private Expense
- "Developed" at private expense and not developed in the performance of a contract

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LIMITED RIGHTS CONT'D

- Within the government, it may use, modify, release, perform, display, or disclose technical data, in whole or in part, within the government (252.227-7013(a)(14))
  - Cannot use the technical data to manufacture
  - Cannot release or disclose technical data outside the government

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RESTRICTED RIGHTS

- Term Used in Civilian and Defense Contracts
- Term Only Applies to Computer Software (Non-commercial)
- Most Protection Contractor Can Get for Computer Software, Developed at Private Expense

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RESTRICTED RIGHTS CONT'D

- With restricted rights, government has right to –
  - use a computer program with one computer at one time; program may not be accessed by more than one terminal unless permitted by contract
  - transfer to another agency without further permission of the Contractor if the transferor "destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer" (252.227-7014)

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GOVERNMENT PURPOSE RIGHTS

- Mainly used in Defense Contracts
- Applies to both Noncommercial Technical Data and Computer Software developed with mixed funding
- Allows government to use data internally and externally for government purposes

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UNLIMITED RIGHTS

- Term Used in Civilian and Defense Contracts
- Term Applies to Technical Data and Software developed under a government contract
- Allows the Government to Do Whatever It Wants With the Data
  - But, unlimited rights are not exclusive rights – contractor still may be free to license and contractor retains ownership

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UNLIMITED RIGHTS CONT'D

- **Government Will Take Unlimited Rights in**
  - data developed exclusively at government expense
  - form, fit, function technical data
  - computer software documentation required to be delivered under the contract

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HOW WAS DATA DEVELOPMENT FUNDED?

- Develop core components internally before government contract and with private funds
- If developed before government contract and financed without any direct government funding, then government with fewest rights:
  - Limited rights in Technical Data
  - Restricted rights in Software

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PRIME AND SUBCONTRACTOR

- If subcontractor has limited rights data, subcontractor can bypass prime and give data directly to government
- Prime should contract with subcontractor to use data to the extent necessary for the prime to perform the contract
- If subcontractor's efforts are used and privately funded have separate subcontract agreement and include "works made for hire" provisions

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LEGENDS AND MARKINGS

- Use only the legends provided in the particular data rights clause in your contract
- Do not get creative
- Unjustified vs. nonconforming markings DFARS

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MAINTAINING RECORDS

- Keep careful records of and track the development of all efforts including:
  - when was data "developed" (i.e., when did it become workable) – before or during performance of the contract
  - what data was "developed" internally vs. developed under contract
  - how was data development funded – at private expense or at government's

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QUESTIONS?

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