Understanding *DFARS* Technical Data Rights Regulations

About the Author

ANDREA B. MAYNER, CPCM, is an attorney with the law firm of Stokes Lawrence, P.S., in Seattle, Washington, where she practices general business and corporate law. She is a member of the NCMA Puget Sound Chapter. Send comments on this article to **cm@ncmahq.org**.

There are many categories of government rights and methods for acquisition. See practical suggestions for how contractors can maximize protection of proprietary information and sell commercial software to the government and military.

BY ANDREA B. MAYNER

This article is reprinted from August 1997 Contract Management and is meant as a refresher on this subject.

Let us first dispense with two widely held misconceptions about rights in technical data and computer software (referred to as "data rights"), as they pertain to government contracts.

(1) Data rights concern the government's right to use technical data and computer software (including computer software documentation) developed under a government contract. Data rights do not concern contractors' rights to use such data and software. Regardless of the scope of the government's rights, the contractor may freely use the same data or software for its own commercial purposes.

(2) Data rights are about categories of licenses in recorded information, as opposed to ownership. The government buys, by contract, a license in the recorded expression of a design (technical data). Similarly, when the government purchases software, it does not purchase ownership rights; it purchases a license to use the software. It is the contractor that actually retains ownership of technical data and computer software. Simply put, the "rights" the government takes mean how the government may make use of the data and software developed under a government contract and to whom the government may give such rights.

In a sense, the government wears two hats. As the buyer of goods and services, it wants to receive the most favorable license (unlimited rights) to data and software. On the other hand, the government is also the maker of economic policy and must ensure that private industry is in a position to maximize commercial benefits from public contracts.

The 1995 *Defense Federal Acquisition Regulation Supplement (DFARS)* data rights regulations, which replaced the 1988 regulations, are not only easier to understand—they are also far more favorable to the developing contractor than were the 1988 regulations. The 1995 regulations provide more opportunity for contractors to retain proprietary rights in both technical data and computer software by restricting the government's ability to acquire liberal rights.

A key point to understand is that the *DFARS* data rights regulations pertain to noncommercial (military) technical data and computer software. The regulations contain very limited language with regard to acquiring commercial technical data and computer software. This is because the 2995 regulations provide that commercial data and software will be purchased under the same licenses offered to the public. Of interest is the fact that the 1995 regulations do not even contain a clause for commercial computer software, and there is only a short clause provided for acquiring commercial technical data (DFARS 252.227-7015).

Data and Software Eligible for Protective Rights

Before beginning a discussion of the different categories of rights and how the government acquires those rights, it is important to understand two key criteria that determine whether technical data and computer software may receive protective rights. These key criteria are (1) source of funding, and (2) whether the item has actually been "developed," as defined by the regulations. The degree of protection that technical data and computer software can receive depends, in large part, on whether they meet these criteria.

Source of Funding

The source of funding that a company uses for development may be either public (government) or private. If the funding used directly by the contractor to develop an item comes from the government in the performance of a contract, the item is said to have been developed with government funds. The *DFARS* at 252.2227-7013 defines "developed exclusively with government funds" as development not accomplished either wholly or partially at private expense. This means that if development is fully paid for by the government under a contract, it is considered to have been developed at government expense.

The *DFARS* defines "developed exclusively at private expense" as development "accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof." This is a significant change from the 1988 regulations. An item is considered to have been developed at private expense even it if was paid for with indirect (overhead or general and administrative) funding. The 1988 regulations required that development be funded either with company earnings or through independent research and development to be considered "developed at private expense."

"Developed with mixed funding" means partially at private expense and partially at government expense. The percentage funded by either party is irrelevant to this definition.

"Developed"

The basic data rights clause for technical data (DFARS 252.227-7013) defines "developed" as "item, component, or process exists and is workable." Note that this refers to the item, component, or process to which the technical data pertains—it should not be confused with development of the technical data itself. An item is considered "developed" when its function or workability has been demonstrated. This is generally established when the item has been analyzed or tested sufficiently to demonstrate that there is high probability that it will function as intended, although it need not be reduced to practice. In general, this means that the item or process has reached the testing phase. In practical terms, this means that merely designing an item does not constitute development, if the item has not reached the testing stage.

DFARS 252.227-7014 provides an analogous definition of "developed" tailored for computer software. It should be noted that the definition of "developed" is not entirely without ambiguity. Because it can be subjective, it is wise to deal with this issue in the early phase of development by seeking appropriate technical and legal advice.

What Are Technical Data and Computer Software?

Technical Data

Technical data means all "recorded information, regardless of the form or method of the recording, of a scientific or technical nature" (DFARS 252.227-7013(a)(14)). The most common type of technical data is a drawing, but technical data also includes documented research, descriptions, designs, or processes. It can be in almost any form: graphical, pictorial, textual, and the like. Technical data includes only recorded information; it does not include computer software or data incidental to contract administration such as financial information.

Computer Software

Computer software means "computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled" (DFARS 252.227-7014(a)). Computer software includes neither computer databases nor computer software documentation.

When the government purchases software, it does not purchase ownership rights; it purchases a license to use the software.

Categories of Rights

Unlimited Rights

Unlimited rights, which apply to both technical data and computer software, are the most liberal rights that can be given to the government. This category permits the government to use the data and software delivered under a contract without any restriction whatsoever. Included is the right to distribute the data and software to competitors for reprocurement purposes. The government can disseminate unlimited-rights data and software to the public freely, and any recipient party may use the data for any purpose whatsoever, even if that party or purpose has no connection to U.S. government business. With unlimited rights, the government is free to authorize other contractors to commercialize the item or software, but this does not preclude the contractor who developed the item from commercializing it or using it for any other purpose.

Unlimited Rights in Technical Data

DFARS 252.227-7013(b)(1) defines nine criteria of data for which the government has unlimited rights. If any one of the following criteria applies, the government receives unlimited rights:

(1) Data pertaining to an item that was developed exclusively with government funding (again, this refers to government funding of a contract, not funding reimbursed by the government through indirect cost pools);

(2) Data produced under the contract (specific to the contract in question) and related to research when the research or work for which the data was produced is an element of performance under the contract. This means that the government can receive unlimited rights in data pertaining to research only if the research was required under the current contract;

(3) Data created exclusively with government funding in the performance of a contract, even if the item to which the data pertains does not require development or production under the contract. This is a seemingly confusing concept. The intent is probably to provide a method for the government to fund the creation of technical data for items that were developed elsewhere. For example, the government might request that a contractor prepare special manuals for a commercial component. In this case, the technical data (manuals) will have been created exclusively at government expense, although the item to which the data pertains is not;

(4) Form, fit, and function data, which is data that describes the overall physical, functional, and performance characteristics. These types of data generally are innocuous because it is difficult for a competitor to use form, fit, and function data to actually replicate the developed item;

(5) Data necessary for installation, operation, maintenance, or training purposes. This simply refers to manuals and training material;

(6) Corrections or changes to technical data that the government provided to the contractor. This seems obvious, since it refers to government-furnished data. The contractor should, however, be careful not to include in the changes or modifications data that can otherwise be given to the government with greater restrictive rights;

(7) Data that is publicly available or data that has been released to third parties without restrictions on use, except when the release to another party is the result of a sale or transfer of the technical or business entity to the other party. If the data is available publicly, then the contractor cannot by definition impose anything less than unlimited rights on the government;

(8) Data in which the government has obtained unlimited rights under another government contract or as a result of negotiations. Although appearing eighth in this list, it is this author's contention that this criterion can easily trap unsuspecting contractors. Once the contractor has given the government (any agency of the government, not just the Department of Defense (DOD)) unlimited rights to particular data, the same data can never be given to the government with less than unlimited rights. This means that data previously given to the government with unlimited rights under a contract pursuant to 1988 regulations must also be given to the government with unlimited rights under a contract pursuant to the 1995 regulations (even if the data qualifies for protective rights under the 1995 regulations); and

(9) Data that previously was given to the government with lesser rights (such as limited rights or government purpose rights) and the restrictions have expired, or data that was given with government purpose rights and the contractor's exclusive right to it for commercial purposes (usually five years) has expired (see also government purpose rights).

Unlimited Rights in Computer Software or Computer Software Documentation

DFARS 252.227-7014(b)(1) defines six criteria of unlimited rights in computer software or computer software documentation for which the government receives unlimited rights. As with technical data, if any of these criterion applies, the government receives unlimited rights:

(1) Computer software developed exclusively at government expense;

(2) Computer software documentation required to be delivered under the contract; and

(3) Corrections or changes to computer software or documentation furnished to the contractor by the government.

And the following three are the same for unlimited rights in technical data:

(4) Computer software or documentation that is publicly available;

(5) Computer software in which the government has obtained unlimited rights under another government contract or as a result of negotiations; and

(6) Computer software that was previously given to the government with lesser rights and the restrictions have expired, or computer software that was given with government purpose rights and the contractor's exclusive right to use for commercial purposes has expired.

Limited Rights

Limited rights, which apply only to technical data and not to computer software, represent the greatest degree of protection the contractor can obtain for technical data delivered to the government under a contract. Limited rights permit the government to make very limited internal uses of data, but they do not permit the government to disclose such data outside the government, except in limited circumstances such as emergency repair or overhaul.

Limited rights protection prevents the government from authorizing a third party to become a competitor

of the developer in either the commercial or governmental marketplaces. It does, however, permit the government to "use, duplicate, or disclose" technical data, provided such materials are not disclosed outside the government or used by the government itself to manufacture the item to which the data pertains. Because limited rights data cannot be disclosed outside the government, the data cannot be divulged to competitors for reprocurement purposes. Therefore, the developing contractor retains exclusivity in the governmental marketplace.

Software developed at government expense or with mixed funding may only be resold in the commercial marketplace.

DFARS 252.227-7013(b)(3) provides limited rights protection only for data pertaining to items, components, or processes developed exclusively at private expense, or data created exclusively at private expense in the performance of a contract that did not necessarily require the development or production of the item, component, or process. In order to assert limited rights, the contractor must be prepared to present evidence that the item to which the data pertains was developed at private expense, or if the item itself was not required to be developed, the contractor will have to demonstrate that the technical data was developed at private expense.

Restricted Rights in Computer Software or Computer Software Documentation

Restricted rights, which are analogous to limited rights in technical data but apply only to computer software or computer software documentation, place limits on how the government may use (non-commercial) computer software. DFARS 252.227-7014(b)(3) provides that restricted rights apply where computer software and/or documentation is developed at private expense. As with limited rights, the contractor will have to be prepared to demonstrate that the computer software was developed at private expense if challenged by the government.

Restricted rights permit the government to use the software on only one computer at a time, to transfer the program to another computer, to make archival copies, to modify the software (the modified version still has restricted rights), and to permit other contractors to service the program, or permit other contractors to use the software during emergency repairs (provided the servicing contractor signs a nondisclosure agreement). The government may not give restricted rights software to other contractors to duplicate or commercialize, nor may such materials be given to other contractors for reprocurement or reverse engineering purposes. As with limited rights data, restricted rights in computer software provides exclusivity to the contractor in the governmental marketplace.

Government Purpose Rights

The government purpose rights (GPR) license, which is applicable to all mixed-funding situations, allows the government to use technical data and/or computer software for government purposes only including competition but excluding commercial use. GPR authorizes the government to release, reproduce, or disclose the technical data or computer software within the government without restriction and to release or disclose the data outside the government for government purposes only, such as competitive procurement.

If the government obtains GPR, the contractor faces the prospect of competition in follow-on procurements without the benefit of exclusive access to the data or software it has developed. On the other hand, the developer retains the exclusive benefit of the data or software in the commercial marketplace. GPR are effective for five years following award of the contract unless otherwise negotiated. Upon the expiration of the five-year period, the government automatically enjoys unlimited rights.

Specifically Negotiated License Rights

Specifically negotiated license rights (or nonstandard rights) include any license other than unlimited, limited, restricted, or GPR. The regulations provide that standard rights "may be modified by mutual agreement to provide such rights as the parties consider appropriate…" (DFARS 252.227-7013(b)(4)). Contracting officers are encouraged to negotiate specifically negotiated license rights when appropriate, but they may not accept anything less than limited or restricted rights. Therefore, specifically negotiated license rights can best be characterized as a compromise between unlimited and limited (or restricted) rights. The government generally will negotiate non-standard rights when it wants rights broader than those offered by limited, restricted, or GPR. It should be emphasized that this is a negotiation between the parties; therefore, the contractor should expect to receive consideration for relinquishing any additional rights to the government beyond those required by the regulations.

Procedural Requirements

It is not enough that data or software qualify for protection. That protection will be forfeited and the government will obtain unlimited rights if the contractor does not follow the prescribed procedures.

Prenotification

The *DFARS* includes solicitation provisions (see DFARS 252.227-7017) that call upon offerors to identify any software or technical data expected to

be delivered with less than unlimited rights. This disclosure enables the government to address such questions as whether to seek greater rights for recompetition, or whether form, fit, and function data will suffice. It is in contractors' interest to comply and to require subcontractors and suppliers to similarly comply.

In the event a contractor fails to identify particular technical data or software that is to be delivered with less than unlimited rights, the *DFARS* permits post-award identification of restrictions only where (a) the asserted restriction is based on new information, or (b) the failure to assert the restrictions before award was inadvertent and the omission did not materially affect the source selection decision. It certainly is preferable, however, to identify restricted data and/or software during the solicitation phase. Note that the government may challenge at any time a contractor's assertion of less than unlimited rights.

Restrictive Markings on Non-commercial Data and Software

To obtain the protection granted by the regulations, the contractor must ensure that every copy of data, software, and documentation for which it claims the government has less than unlimited rights bears a prescribed legend. In the case of software, the contractor must conspicuously and legibly mark the appropriate legend on the software document or storage container as well as each page of printed material.

If markings are inadvertently omitted from data or software delivered to the government, the contractor may ask the contracting officer to apply proper labeling. The request must be made within six months of delivery. The government is not liable for any use or disclosure that may have occurred before application of the legends. DFARS 252.227-7013 contains the required legend for technical data, and DFARS 252.227-7014 contains the legend for computer software.

Selling Commercial Software to the Government

Commercial Software Defined

Commercial computer software is defined as software developed or regularly used, which

- Has been sold, leased, or licensed to the public;
- Has been 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 delivery requirements of the contracts; or
- Satisfies a criterion expressed in one of the above and would require only minor modification to meet the requirements of the contract.

This means a contractor may assert that military software developed at private expense is commercial if the

contractor has a good-faith belief that when it is delivered under the contract, a slightly modified version will simultaneously be available for license to the public. By claiming the software as commercial, it would be completely exempt from the data rights regulations. If the military software had no commercial applicability, it still could be given to the government with restricted rights—as opposed to unlimited rights or GPR—because it was funded exclusively at private expense. The reason contractors would want to privately fund military software is to maintain exclusivity in both the governmental and commercial marketplaces.

Although the criteria for determining if software is commercial do not specifically mention that commercial software must be developed at private expense, commercial items are automatically presumed to have been developed at private expense. Furthermore, the government is not permitted to challenge an assertion of private funding unless it can demonstrate that it actually did provide part or all of the funding.

This definition of commercial software is much broader than the one used in the 1988 regulations, which required that software be sold in "substantial quantity" to be considered commercial. In addition, contractors are able to make minor modifications to commercial software at government expense—and it will be still considered commercial.

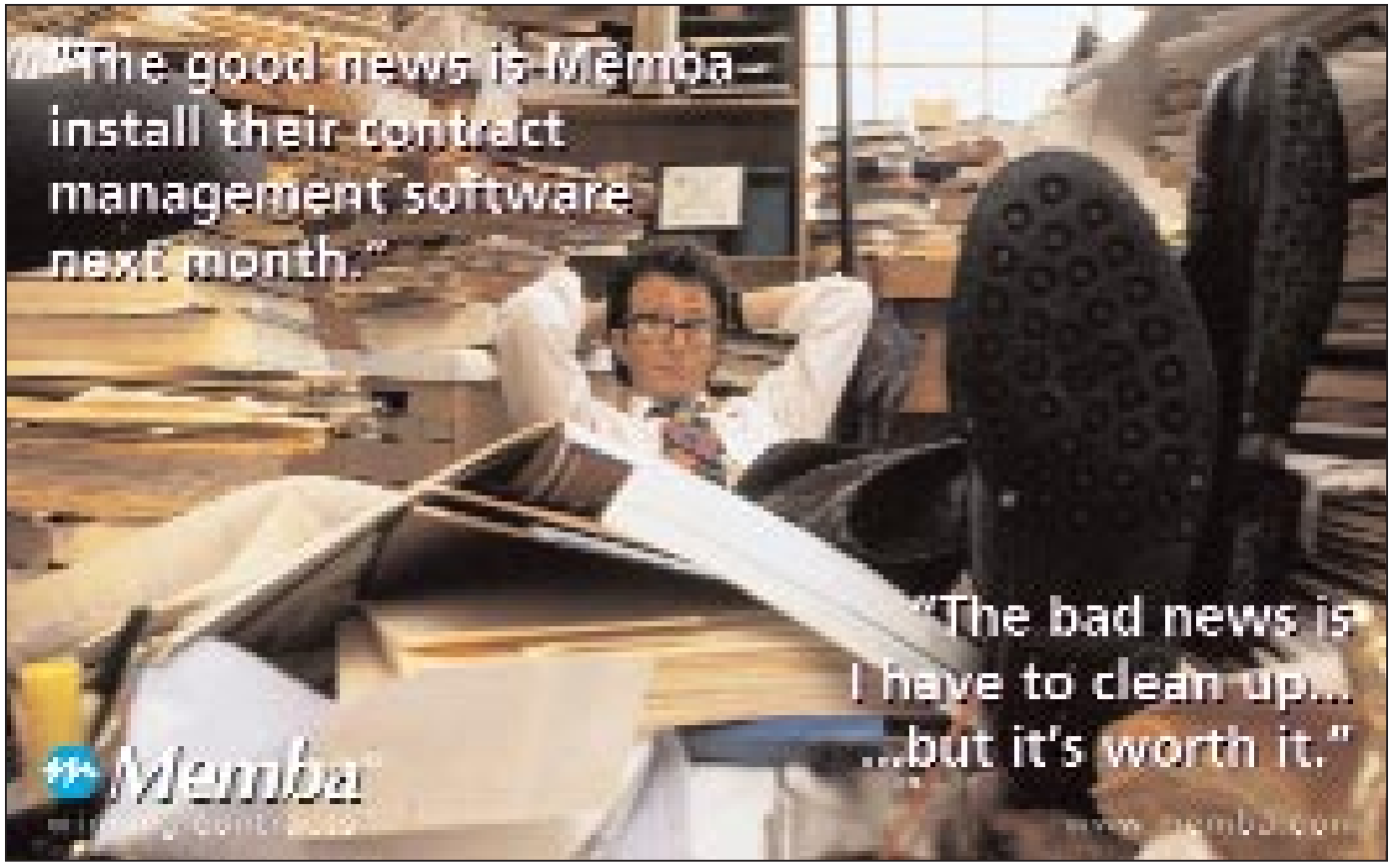
With the passage of the 1995 regulations, the government's rights in commercial computer software and related documentation are expressly limited to those customarily provided to the public. The intent is to reflect the commercial marketplace. One of the primary differences between selling software as "commercial," as opposed to selling it as "noncommercial with restricted rights," is that should the software be sold as "commercial," the developer is not required to provide the government with the source code unless the contractor customarily provides such code to the public.

Modifying Commercial Software

Under the *DFARS* in Subpart 227.72, a developer may make "minor modifications" to software that otherwise meets the tests for commerciality. If the modifications are other than minor, the software may still meet the definition of commercial if the software as modified is offered for sale to the general public, and if the software as modified is still customarily used for nongovernmental purposes.

In general, the contractor may modify its commercial software for sale to the government (at government expense) and still treat the software as commercial, as long as the modifications are minor or otherwise do not destroy the nongovernmental nature of the software, and as long as the government is not purchasing the software through a DOD contract containing the former (1988) data rights clauses.

Another approach may be to offer the government restricted rights in the modified portion of the software and still retain the core software as commercial. This approach is feasible



provided that the modification by itself lacks stand-alone commercial value.

An additional approach is to request that the contracting officer modify the contract to include the 1995 data rights regulations, even if they are applicable to only one line item of the contract under which the software can be purchased and modified. Still another approach is to modify the software at private expense as opposed to under a contract, in which case the software will retain commercial status.

Commercial Software Licenses

Because none of the data rights clauses is applicable to commercial software, commercial items are acquired under the license agreement that the contractor customarily provides to the public. The 1995 regulations prohibit the government from compelling developers to furnish algorithms and source codes related to commercial computer software not customarily provided to the public. The primary exception is for information that documents specific modifications made at government expense. A standard commercial license (such as an end-user license agreement or shrink-wrap license) should include a provision like the following, which pertains to purchases by the federal government:

> Federal Acquisition. This provision applies to all acquisitions of this software by or for the federal government. By accepting delivery of this software, the government hereby agrees that this software qualifies as "commercial" computer software within the meaning of FAR Part 12.212 (October 1995), DFARS Part 227.7202-1 (June 1995), and DFARS 252.227-7014(a) (June 1995). The terms and conditions of this agreement shall pertain to the government's use and disclosure of this software, and shall supersede any conflicting contractual terms or conditions. If this license fails to meet the government's minimum needs or is inconsistent in any respect with federal procurement law, the government agrees to return this software, unused to [company name].

The end-user license agreement should be placed prominently inside the shrink wrap, so breaking the seal automatically means that the user accepts the terms of the license agreement. In addition, the license agreement should be placed electronically into the software in its entirety. It should be included within the source code as well, if possible, in addition to the initial screen seen by the user.

In the event that contractors wish to sell to the government software that qualifies as "commercial" under the 1995 regulations, but the contract under which it is to be sold has the 1988 regulations, the best approach is to submit, as part of a proposal, a request to revise the contract to reflect the 1995 clauses. Clearly state in the proposal that the proposed software is commercial, as defined by the 1995 data rights regulations in the *DFARS* and request that the contract be amended. Recent revisions to the *FAR* encourage contracting officers to update contracts to reflect changes implemented by the Federal Acquisition Streamlining Act (ref. FAR 43.102(c)), so there is no regulatory impediment to revising the contract. It is preferable to have the contract amended to reflect the 1995 clauses, as opposed to selling the software with restricted rights under the 1988 clauses.

An alternative approach is to request that the commercial end-user license agreement be incorporated into the contract, and that a special clause be added to the contract acknowledging that the software is being purchased as a commercial item. Contractors are wise to avoid inadvertently selling to the government commercial software with restricted rights, if it can be sold as commercial.

Restricted rights give the government broader rights than a standard commercial license, such as disclosure of source code. Once it has been sold as anything other than commercial, contractors risk setting a precedent. That is, contractors will not be able to sell the software to the government as commercial, once it has already been sold with restricted rights.

Restrictive Markings on Commercial Software

The data rights regulations do not require commercial software and related documentation to be marked with legends; it is, however, extremely prudent to do so. This will help to ensure that government personnel do not inadvertently disclose proprietary information. Legends should be immediately visible and placed directly on the media in the form of stickers, including all diskettes, CD-ROMs, and packing materials. Legends should also be placed electronically in the software to be seen by users. All related documentation, including user manuals, training aides, and the like should also be similarly marked.

Suggested legend for commercial software delivered under 1995 regulations:

Federal Acquisitions: Commercial Computer Software—Use Governed by Terms of Standard License Agreement ©1997 XYZ Corporation.

Required legend for commercial software delivered under 1988 regulations.

Under DFARS Subpart 227.4 (October 1988): Use, Distribution, and Disclosure Subject to "Restricted Rights" at 252.227-7014(c)(1)(ii).

Commercializing Military Software

Contractors always have the right to commercialize military software that was developed under a government contract, by virtue of the fact that original authors are by default the owners of their work under copyright law. This is incontestable unless the developer has transferred that right to a third party, or if the work is considered "work made for hire" under copyright law.

The "work made for hire" doctrine pertains to work prepared by an employee within the scope of his or her employment. In such a case, it is the employer who retains copyright ownership, not the employee who actually developed the work (it is worth noting that independent contractors are not considered employees under the "work made for hire" doctrine, and therefore, they retain copyright ownership unless it is

specifically relinquished by agreement). What all of this means for government contracting is that the developing contractor retains copyright ownership, not the government.

Contractors often make the mistake of thinking they are required to get approval from the government before commercializing software developed under a government contract. This is not accurate. Because the developing contractor retains ownership, it is free to offer the software for sale in the commercial marketplace. Contractors must be aware, however, that they are not permitted to resell it to the government again, even to a different agency or department. Once the government has paid for something, it is not required to pay for it again. Therefore, software developed at government expense, or with mixed funding, may only be resold in the commercial marketplace.

Furthermore, contractors should use common sense when considering the commercial sale of classified software. Advance approval is both necessary and desirable. One further note is that civilian agencies still require prior approval for a contractor to copyright work, although some legal experts contend that this requirement may be in violation of the U.S. Copyright Act of 1976 (Title XVII United States Code).

The developing contractor should register the copyright with the U.S. Copyright Office, although this is not required in order to retain copyright ownership. It is, however, more difficult to take legal action against an infringer if the copyright has not been registered. Furthermore, attorney fees are not recoverable by the infringed party, but if that party loses, the infringer will be able to recover attorney fees. Additionally, there are certain statutory damages that are not recoverable without a registered copyright.

It is important to note that although the developing contractor has the right to commercialize military software, the government still retains the rights that are defined in the contract. This means that if the software was delivered with unlimited or restricted rights, the contractor cannot later claim that the software is "commercial" and subsequently strive to resell it to the government as such. Once the government has purchased it under a contract with rights greater than those permitted under commercial software licenses, the government cannot be compelled to accept the same software with less than those rights in the future.

Commercial Technical Data

The regulations distinguish between commercial and noncommercial technical data by creating a separate clause for commercial technical data (DFARS 252.227.7015). Commercial technical data includes any item, other than real property or computer software, that customarily is used by the public for non-governmental purposes and that has been sold or offered for sale, lease, or license to the public. For example, a contractor might develop an item under a research and development contract and then make significant commercial profits from

that item. Under the 1995 regulations, the clause on commercial technical data grants the government only limited rights, as opposed to unlimited rights under the 1988 regulations.

General Suggestions

Here are a few last tips:

- Make sure that data rights clauses flow down to subcontractors at the time the request for proposal (RFP) is released. Prime contractors will find themselves facing a virtual nightmare if the rights they are obligated to provide to the government are greater than the rights they can receive from their subcontractors.
- Consider investing in development of either hardware or software in order to retain exclusivity in both the governmental and commercial marketplaces. An investment in new technology will afford contractors a competitive edge in government competitions and will ensure commercial exclusivity.
- Make sure that all development costs related to privately funded items are completely segregated and identified for that particular product.
- Maintain a separate file containing detailed records of product development and funding at every stage of product development for items done at private expense.
- Separate those portions of hardware or software that were developed at government expense into distinct modules from those developed at private expense when delivering these products to the government.
- Be sure that the 1995 regulations are in place before selling commercial software to the government under contract. If the contract still contains outdated 1988 regulations, request that the contracting officer modify it. This is to ensure that commercial software sold to the government will really be considered "commercial" as defined by current regulations. In doing so, the government will be purchasing the software with the same commercial license that is offered to the public.
- Seek legal advice. The data rights regulations remain complicated and require an experienced professional who knows the law well. Avoid waiting until you are involved in a legal dispute with the government to get advice. The best time to ask for help is at the beginning, such as when you are contemplating an investment in development, or when an RFP is released. Be assured—it will be a worthwhile investment. **CM**