PROGRAM MATERIALS
Program #36126
October 29, 2026

# Federal Contractor Rights in Intellectual Property

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# Federal Contractor Rights In Intellectual Property



**October 29, 2026**

By Wojciech Z. Kornacki, Esq.

Lecturer

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# Agenda

What are key concepts in Federal Contractor IP rights?

What are Federal Contractors IP Rights (and obligations)?

What are best practices on how to protect your Federal Contractor IP Rights?

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# Sources

FAR and DFARS

DODI 5010.44 – IP

IP Guidebook for DoD Acquisition

Federal Caselaw (Federal Courts, Boards for Contract Appeals, GAO)

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# DODI 5010.44

Acquisitions will be increasingly dependent on technology

Acquiring and licensing IP is vital for functionality, sustainability, and affordability

IOT balance the U.S. Government and industry needs and standards – it is important to have early and effective communications

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# DODI 5010.44

IP Strategy:

Assess long-term program requirements and total ownership costs of IP

Identify all major system interfaces, acquire the appropriate IP rights, and include appropriate requirements for non-major systems interfaces

Negotiate IP deliverables (technical data **TD**, computer software **CS**, associated license rights)

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# DODI 5010.44

Key definitions:

IP – information, products or services that are protected by law as intangible property (technical data, computer software), inventions, trade names, creative works)

IP rights – legal rights governing IP (ownership, license, authorizations, may include access to classified information)

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# DODI 5010.44

Key definitions:

IP deliverables – products, services, & information about products and services that are required to be delivered or provided to the U.S. Government by contract or legal instrument and that include or embody IP (technical data, computer software)

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# FAR 52.227-11

Contractor's Rights – ownership – the Contractor may retain ownership of each subject invention

Contractor's Rights – license – nonexclusive royalty fee. The license may be transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business.

The license may be revoked under limited circumstances

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# FAR 52.227-11

Contractor's obligations – disclose in writing each subject invention within 2 months. The Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any sale or public use

Contractor's obligations – elect in writing whether or not to retain ownership of any subject investigation

Contractor's obligations – file either a provisional or nonprovisional patent application on an elected subject invention

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# FAR 52.227-11

Government's Rights – ownership – the Contractor will be required to assign the rights to the Government.

The Contractor must disclose or elect ownership of the subject invention on time – 60 days

The Contractor will continue to retain ownership rights if the Contractor made additional filings before the agency invokes its rights

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# FAR 52.227-11

License – If the Contractor retains ownership of any subject invention, the Government will have a ‘nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practices for or on its behalf, the subject invention throughout the world’

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# FAR 52.227-11

The Contractor must execute and promptly deliver to the agency all instruments necessary to establish/confirm the rights the Government has throughout the world & assign title to the agency when requested

The Contractor shall require that all its employees disclose promptly in writing each subject invention in order that the Contractor can comply with the disclosure

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# FAR 52.227-11

The Contractor must include specific statement concerning subject inventions '**This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in the invention**'

The Contractor must inform the Contracting Officer of any decisions not to file a nonprovision patent application/not to proceed or not to pay fees

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# FAR 52.227-11

March-in-rights – the Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 USC § 203 / § 210 (c) and 37 CFR 401.6 (outlines procedures for march-in-rights)

Rights to a subject invention will not be assigned in the United States without the written approval of the agency except where an assignment is made to an organization that has as one of its primary functions the management of inventions, provided that the assignee shall be subject to the same provisions as Contractor

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# FAR 52.227-11

Subcontracts – the Contractor must include all subcontracts for experimental, developmental, or research work under the substance of the patent rights clause required by FAR

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# IP Guidebook for DOD Acquisitions

IP rights will play a greater role because of the ever-increasing complexity of products and services

Current approach focuses on carefully tailored IP rights and balancing the needs of the industry via Specially Negotiated License Rights, or Other Transaction Agreements, etc.

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# IP Guidebook for DOD Acquisitions

6 Core Principles

1 Integrate IP planning into the acquisition strategy
2 Acquisition Professionals Must Understand IP
3 Negotiate specialized provisions for IP deliverables
4 Communicate with industry regarding planning, expectations, & objectives
5 Respect & protect IP technology developments (USG and private sector)
6 Clearly identify and match data deliverables with license rights

***Data/Software deliverables are of no value unless there are license rights to use it, and the USG accepts those deliverables***

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# IP Guidebook for DOD Acquisitions

Innovation and Full and Open Competition

Avoid Sole Source – (higher costs, no incentive for innovation, limits technology use, weakens best value assurance)

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# IP Guidebook for DOD Acquisitions

Government's Rights – unlimited – the USG may use, modify, reproduce, perform, display, release, or disclose the data in any manner and for whatever purpose **TD / CS**

Government's Rights – unrestricted – (not defined), may also permit others to use data for specific purposes **TD**

Government's Rights – government purpose rights – reproduce, perform, display, use, release data without restriction. Cannot release the data for any commercial purpose **TD / CS**

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# IP Guidebook for DOD Acquisitions

Government's Rights – limited rights – non commercial products only – cannot release data outside of the Government except in limited circumstances. May not use the data for manufacturing additional quantities; the Government may share data with a Covered Government Support Contractor (CGSC) **TD**

Government's Rights – restricted rights – non commercial use only – the government may use software on 1 computer at a time and make minimum copies for a backup. The Government may share with CGSC **CS**

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# IP Guidebook for DOD Acquisitions

Government's Rights – Specifically Negotiated License Rights (SNLR) 'lesser rights' in exchange for other considerations. The government cannot have lesser rights than limited or restricted rights

Government's Rights – SBIR/STTR Data Rights – apply when the Government enters a research / development efforts awarded as a SBIR contract. If a product was developed as part of an SBIR/STTR, the Government is entitled to SBIR/STTR Data Rights – generally equivalent to limited/restricted rights, **TD / CS**

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# IP Guidebook for DOD Acquisitions

Government's Rights – Commercial Data Rights – the Government may use, modify, reproduce, display, disclose. The Government will not manufacture additional quantities and will not release the date outside of the Government without Contractor's permission unless there is an emergency repair / overhaul. **TD**

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# IP Guidebook for DOD Acquisitions

Government Tactics for Obtaining IP

**Procedure – FAR/DFARS:** + limits disputes/bid protests – requires compliance with all rules and understanding, may discourage industry

**Procedure – Non FAR Vehicles:** + more flexible IP rights allocations – requires familiarity with other vehicles, does not provide IP tools of the FAR

**Procedure – Organic Development:** + DOD has maximum rights – may cost more

**Procedure – Repurpose of Legacy Technology** + short development cycle – may cost more and not meet the needs

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# IP Guidebook for DOD Acquisitions

Government Tactics for Obtaining IP

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# IP Guidebook for DOD Acquisitions

Definitions:
Commercial – any item (not real property) that is customarily used by the general public / non Government entities – sold/leased to the general public

Computer Software (CS) – computer program, source code, designs that would enable the software to be reproduced

Data – recorded information regardless of media

IP Rights – legal rights governing IP (ownership, license, authorizations)

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# IP Rights & GAO Bid Protests

GAO has no jurisdiction

GAO Decision – Controlled FORCE Inc, B-408853

Protester argued that the Navy violated IP laws by incorporating it data into the solicitation

GAO: The remedy is a lawsuit for money damages at the U.S. Court of Federal Claims. We have no jurisdiction

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# IP Rights & GAO Bid Protests

Armed Services Board of Contract Appeals has jurisdiction

ASBCA No. 56175

Computer Sciences Corporation argues that the government must pay $35,000,000 for IP development in conjunction with its contract performance. The Army moved for summary judgment

ASBCA held that because the intent of the parties under the contract was at the heart of the dispute – the motion for summary judgment was denied because the record needed to be developed

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# IP Rights & Boards of Contract Appeals

ASBCA No. 57266

Distributed Solutions Inc., (DSI) argued that Air Force had to pay for a license fee to use the software it owns

DSI argued that the Air Force did not have perpetual right to its software for free after the contract ended. The Board explained that if DSI intended for the AF's rights to terminate – it should have stated so. The modification did not terminate AF's rights

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# IP Rights & Boards of Contract Appeals

The Court of Appeals for the Federal Circuit Decided The Civilian Board of Contract Appeals Has Jurisdiction Over Master Subscription Agreement (MSA)

CBCA 8087(6360)-REM, 8088(6627)-REM
Appellant alleges the Government breached the software license agreement, under the master subscription agreement. CBCA decided that MSA is not a procurement contract

Court of Appeals for the Federal Circuit: Appellant raised sufficient allegations under the Contract Disputes Act

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# IP Rights & Federal Courts

*Scale AI, Inc. v. United States*, 2026 U.S. Claims LEXIS 2168
Bid protest concerning intellectual property as a factor in contract award, among others. During its proposal evaluation, Scale AI received 'unacceptable' ratings, and it filed a bid protest raising numerous issues.

Court: The agency acted rationally when evaluating Scale AI's proposal. Scale AI raised too many arguments where it could not win, and it spent too little time on matters where it could make an impact.

'*rather than concentrating its fire on the bullseye, Scale put its efforts toward issues lying in the outer rings*.'

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# IP Rights & Federal Courts

*APL Microscopic, LLC v. United States, 144 Fed. Cl. 489* (2019)
The Government infringed on plaintiff's right to reproduce the copyrighted material – when it uploaded the copyrighted information into its server – and then the website

The Court denied the Government's motion to dismiss because plaintiff established sufficient facts – plaintiff argued that each public display amounted to a separate violation

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# IP Rights & Federal Courts

*Echelon Servs., LLC v. United States, 2026 U.S. Claims LEXIS 2251*
The Army entered into a contract with plaintiff for purchase of software licenses at a heavily discounted rate, but after the base year, it did not exercise the options – plaintiff's option years progressively increased pricing; plaintiff filed a lawsuit – the Army argued that plaintiff signed away its rights under the Anti-Assignments act – the Court directed the parties to confer regarding specific legal issues.

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# Conclusion

Know Your IP Rights and Strategically Negotiate Contracts

Decide Which Contractual Vehicles Is Best for You, and for the Government

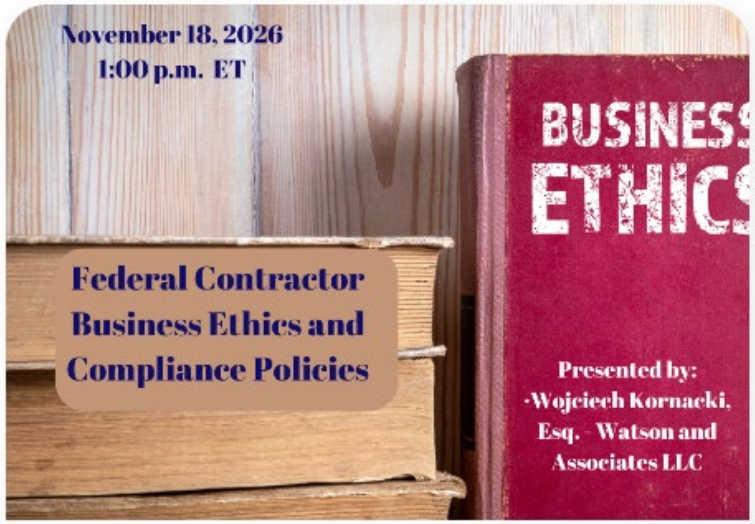
Protect Your IP Rights and Clearly Communicate with the Government

Timely Invoke Your IP Rights pursuant to FAR

Monitor for IP Rights Compliance and Document Violations

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# Additional Courses:




2026-11-18




2026-12-10

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# Thank you!



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CRITICAL THINKING, CLEAR DIRECTION, DECISIVE RESULTS

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# DoD INSTRUCTION 5010.44

# INTELLECTUAL PROPERTY (IP) ACQUISITION AND LICENSING

| | |
|---|---|
| **Originating Component:** | Office of the Under Secretary of Defense for Acquisition and Sustainment |
| **Effective:** | October 16, 2019 |
| **Releasability:** | Cleared for public release. Available on the Directives Division Website at https://www.esd.whs.mil/DD/. |
| **Incorporates and Cancels:** | Paragraph 6.a.(4) of Enclosure 2 of DoD Instruction 5000.02, "Operation of the Defense Acquisition System," January 7, 2015, as amended |
| **Approved by:** | Ellen M. Lord, Under Secretary of Defense for Acquisition and Sustainment |

**Purpose:** In accordance with the authority in DoD Directive 5134.01 and the July 13, 2018 Deputy Secretary of Defense Memorandum, this issuance:

- Establishes policy, assigns responsibilities, and prescribes procedures for the acquisition, licensing, and management of IP pursuant to Sections 2320, 2321, and 2322(a) of Title 10, United States Code (U.S.C.).
- Establishes the DoD IP Cadre, pursuant to Section 2322(b) of Title 10, U.S.C.
- Designates the Assistant Secretary of Defense for Acquisition (ASD(A)) as the senior DoD official overseeing development and implementation of DoD policy and guidance for acquisition, licensing, and management of IP for DoD.

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# SECTION 1: GENERAL ISSUANCE INFORMATION

**1.1. APPLICABILITY.** This instruction:

a. Applies to:

(1) OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this instruction as the "DoD Components").

(2) Acquisition, licensing, and management of IP that is acquired, created by or for, or used by or on behalf of the DoD for purposes relating to the acquisition, operation, maintenance, modernization, and sustainment of defense products and services, regardless of the legal instrument governing such activities, and regardless of whether the IP is treated as a product or a service.

b. Does not apply to:

(1) Licensing or other technology transfer of U.S. Government-owned IP or technology covered by DoD Directive 5535.03 and DoD Instruction 5535.8.

(2) Branding and trademark licensing by DoD Components covered by DoD Directive 5535.09 and DoD Instruction 5535.12.

**1.2. POLICY.** Weapon and information systems acquired by DoD in support of the warfighter are, and will be, increasingly dependent on technology for its operation, maintenance, modernization, and sustainment. Acquiring and licensing the appropriate IP is vital for ensuring the systems will remain functional, sustainable, upgradable and affordable. Because balancing the interests of the U.S. Government and industry in IP can be difficult, early and effective understanding, planning, and communications between the U.S. Government and industry is critical, as is ensuring delivery, acceptance, and management of the necessary IP deliverables (e.g., technical data and computer software), with appropriate license rights. The DoD requires fair treatment of IP owners, and seeks to create conditions that encourage technologically advanced solutions to meet DoD needs.

a. It is DoD policy to acquire, license, and manage IP to:

(1) Enable coordination and consistency across DoD Components in developing and implementing strategies for acquiring and licensing IP and communicating with industry.

(2) Ensure that program managers are aware of the rights and obligations of the Federal Government and contractors in IP, and that program managers fully consider and use all available techniques and best practices for acquiring and licensing IP early in the acquisition process.


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(3) Encourage customized IP strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

b. The following core principles govern the DoD acquisition, licensing, and management of IP:

(1) Integrate IP planning fully into acquisition strategies and product support strategies to protect core DoD interests over the entire life cycle. Seek to acquire only those IP deliverables and license rights necessary to accomplish these strategies, bearing in mind the long-term effect on cost, competition, and affordability.

(2) Ensure acquisition professionals have relevant knowledge of how IP matters relate to their official duties. Cross-functional input and coordination is critical to planning and life-cycle objectives.

(3) Negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights. This is most effective early in the life cycle, when competition is more likely.

(4) Communicate clearly and effectively with industry regarding planning, expectations and objectives for system upgrade and sustainment. Avoid requirements and strategies that limit the DoD's options in accessing vital technology and commercial solutions available from industry.

(5) Respect and protect IP resulting from technology development investments by both the private sector and the U.S. Government.

(6) Clearly identify and match data deliverables with the license rights in those deliverables. Data or software deliverables are of no value unless and until the license rights to use it are attached, and the U.S. Government actually obtains and accepts those deliverables.


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# SECTION 2: RESPONSIBILITIES

**2.1. ASD(A).** Under the authority, direction, and control of the Under Secretary of Defense for Acquisition and Sustainment, the ASD(A):

a. Serves as the senior DoD official overseeing development and implementation of DoD IP policy and guidance for DoD.

b. Manages a cadre of personnel who are experts in the acquisition, licensing, and management of IP, coordinating their development and activities, including:

(1) Establishing an appropriate leadership structure and office for the IP Cadre.

(2) Ensuring the Cadre has the appropriate number of staff and such staff possesses the necessary skills, knowledge, and experience to carry out the duties in Paragraph 3.3., including in relevant areas of law, program management, contracting, acquisition, logistics, configuration management, engineering, financial analysis, and valuation.

**2.2. PRESIDENT, DEFENSE ACQUISITION UNIVERSITY (DAU).** Under the authority, direction, and control of the ASD(A), the President, DAU:

a. In collaboration with the IP Cadre lead, develops and updates IP curricula and reference materials, making use of IP lessons learned from actual case studies to derive experiential learning materials for the acquisition workforce.

b. Provides IP training to help the U.S. Government identify, acquire, and license IP at the earliest appropriate time and at the most affordable cost, while treating industry fairly and providing incentives to participate in the defense marketplace.

c. Provides and continuously improves training and education tailored to the various disciplines that must implement and manage IP acquisition and licensing activities.

**2.3. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE.** Pursuant to Section 140 of Title 10, U.S.C., and DoD Instruction 1442.02, the General Counsel of the Department of Defense, as the chief legal officer of the DoD, and as Director, Defense Legal Services Agency, provides legal advice and services in support of this issuance and in support of the IP Cadre established in Section 3.

**2.4. DOD COMPONENT HEADS WITH ACQUISITION AUTHORITY OR CONTRACT ADMINISTRATIVE RESPONSIBILITIES.** The DoD Component heads with acquisition authority or contract administrative responsibilities:

a. Oversee implementation of this issuance, and identify one or more offices with responsibility to coordinate matters related to the functions described below with the IP Cadre.


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b. Ensure that program personnel engaged in all stages of the acquisition life cycle have relevant knowledge of the rights and obligations of the Federal Government and contractors regarding IP matters, IP law and regulations, program management, logistics, contracts, data management, valuation, and other disciplines as appropriate. Program personnel must fully consider and use all available techniques and best practices early in the acquisition process for identifying, acquiring, licensing, and enforcing the U.S. Government's rights to IP necessary to support operation, maintenance, modernization, and sustainment.

c. Incorporate consideration of types of IP deliverables and level of associated license rights into source selection evaluation factors, and as negotiation objectives in sole-source awards, as appropriate. Ensure there is sufficient clarity in contractors' identification and assertion of restrictions on IP rights to enable the U.S. Government to assess how those assertions may affect DoD interests over the life cycle, e.g., by requiring contractors to align assertions to specific IP deliverables, to particular system components or/processes, and to development or modernization funding.

d. Facilitate coordination and consistency across the DoD in strategies for determining the IP deliverables and IP rights necessary for operation, maintenance, modernization, and sustainment.

e. Incorporate IP planning elements into acquisition strategies, emphasizing the criticality of long-term analysis and planning during the earliest phases of the program, while preserving flexibility to address developments in the program sustainment strategy. Planning before solicitation for programs will address costs and benefits of procuring required IP and IP rights in light of corresponding investment and the government's means to reuse and adapt same. This includes configuration management planning that considers how mixes of contractor and government changes impacting delivered IP and data reuse and the ability to compete life-cycle support.

f. Communicate clearly and effectively with industry on IP matters early in the program life cycle. When both DoD and industry are making and planning technology investments, IP considerations will be critical to recognizing a return on such investments. For example, DoD Component heads will ensure IP matters are prioritized and included in such things as industry days, draft solicitations, one-on-one meetings with potential offerors, and presolicitation notices.

g. When communicating with industry, explore ways to share appropriate details about the program's IP strategy and product support strategy. During such communications, address the need for competitive and affordable product support and upgrades while providing appropriate protections for privately developed IP.

h. Acquire the necessary IP deliverables and associated license rights at fair and reasonable prices, while supporting the product support and reuse strategy. Improve the quality and consistency of financial analysis and valuation practices for determining fair and reasonable prices and appropriate needs for IP and IP rights in order to develop program budgets and evaluate proposals.

i. Ensure that IP strategies identify and enable actions to ensure return on U.S. Government investment in IP developed in whole or in part at U.S. Government expense, including by


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negotiating for delivery of that IP and acquiring the appropriate associated license rights, preferably at the time of development of the technology.

j. Ensure IP deliverables (e.g., technical data and computer software) and associated license rights are acquired and managed as necessary to support the use of modular open systems approaches pursuant to Chapter 144B of Title 10, U.S.C.

k. Establish and maintain IP management procedures to ensure that time-sensitive actions are executed as appropriate to avoid an unintentional loss of IP rights, e.g., inspection and acceptance of IP deliverables, challenge and validation of asserted restrictions on deliverable IP, exercise of time-limited contract options for IP deliverables or IP rights.


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# SECTION 3: THE IP CADRE

**3.1. CADRE PURPOSE.** The IP Cadre facilitates the development and use of a highly competent and consistent approach across the DoD for acquiring, licensing, and managing IP, by providing timely expert advice, assistance, and resources to the acquisition workforce on IP matters. IP Cadre members will advise, assist, and provide resources to DoD Components on IP matters at various stages of the life cycle of a system.

**3.2. ORGANIZATION AND MANAGEMENT.** The IP Cadre is established under the authority, direction, and control of the ASD(A). It will consist of a director, and such subordinate organizational elements and members as established within resources assigned. The IP Cadre will interact with the DoD Components to facilitate a highly competent and consistent approach to assigned areas. In performance of assigned functions and responsibilities, the director of the IP Cadre will:

a. Provide oversight and coordination on all acquisition and licensing policy and procedures for DoD IP.

b. Coordinate actions and exchange information with other DoD organizations that have collateral or related functions.

c. Identify and distribute best practices.

d. Interface on assigned functions with Congress, industry, academia, as well as organizations throughout the DoD engaged in activities throughout the life-cycle of programs.

e. Support development of requirements for training and credentialing the acquisition workforce.

f. Provide assistance, when requested by the DoD Components, within the scope of the IP Cadre roles and responsibilities.

**3.3. ROLES AND RESPONSIBILITIES.** Members of the IP Cadre:

a. Issue and interpret policies relating to acquisition, licensing, and management of IP, consistent with law and regulation.

b. Advise and assist in the development of an acquisition strategy, product support strategy, and IP strategy for a system.

c. Conduct or assist with the financial analysis and valuation of IP.

d. Assist program offices in drafting relevant IP provisions in solicitations, contracts, other transaction agreements, and licenses.


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e. Assist contracting officers in interactions with contractors, including communications and negotiations with contractors regarding solicitations and awards.

f. Assist contracting officers in the conduct of challenges to contractors' asserted restrictions on IP or if IP deliverables are incomplete or do not comply with the terms of a contract.

g. Coordinate with the DAU, academia, and industry to develop and update IP curricula and reference materials, including guidance, training courses, and case studies.

h. Address the management of IP deliverables and IP rights to support the creation and sustainment of a competitive environment, from program inception through sustainment.

i. Facilitate coordination and consistency across the DoD in strategies for determining the IP deliverables and IP rights necessary for operation, maintenance, modernization and sustainment.


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# SECTION 4: IP IMPLEMENTATION GUIDANCE

**4.1. IP STRATEGY.** Each DoD program will have a robust IP strategy to identify and manage the full spectrum of IP and related matters (e.g., technical data and computer software deliverables, patented technologies, and license rights) from the inception of a program and updated throughout entire product life cycle—initially as part of the acquisition strategy, and during the operations and support phase as part of the life-cycle sustainment plan.

a. The IP strategy will describe, at a minimum:

(1) How program management will assess long-term program requirements, and total ownership costs of IP deliverables and associated license rights necessary for competitive and affordable operation, maintenance, modernization, and sustainment over the entire product life cycle. This includes integrating, for all systems, the IP planning elements required by Paragraph (S-70) of Section 207.106 of the Defense Federal Acquisition Regulation Supplement for major weapon systems and subsystems thereof.

(2) How IP and related matters necessary to support the program's use of modular open systems approaches, including in accordance with Sections 2320 and 2446a through 2446c of Title 10, U.S.C., will be addressed. This includes providing guidance for how solicitations and contracts will:

(a) Identify and require all major systems interfaces to be based on widely supported and consensus-based standards (if available and suitable), which are preferably non-proprietary.

(b) Include requirements to acquire the appropriate IP rights in such major systems interfaces.

(c) Include appropriate requirements for other non-major systems interfaces (e.g., interfaces necessary to segregation and reintegration activities).

b. Customize IP strategies based on, at a minimum, the common, shared, and unique characteristics of the system and its components, the system architecture and interfaces, the product support strategy, the organic industrial base strategy of the DoD Component concerned, whether the item can be found in the commercial market, and whether the standard commercial licensing terms meet DoD needs.

c. IP strategies must consider the use of specially negotiated licenses to acquire customized IP deliverables (e.g., technical data, computer software) and associated license rights appropriate for particular elements of the product support strategy.

**4.2. DOD COMPONENT IP REQUIREMENTS.**

a. Program management offices will use both direct competition at various levels and indirect means, such as best value considerations over the life cycle, to create competitive environments that encourage improved performance and cost control. Strategies to be


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considered include, but are not limited to, competitive prototyping, dual sourcing, modular open systems approaches that enable competition for upgrades, acquisition of complete technical data packages for selected systems and components, competition at the subsystem level, and opportunities for small business and organizations employing the disabled.

b. Regarding IP developed at private expense, in whole or on part, the DoD Components will use all available techniques and best practices for developing and continuously refining requirements for the acquisition and licensing of IP and IP rights necessary for operation, maintenance, modernization, and sustainment, showing preference for modular open system approaches. The DoD Components will negotiate specialized licenses and delivery requirements whenever doing so will more effectively balance DoD and industry interests than the more limited standard license categories.

c. DoD Components will consider and use all available techniques and best practices, including modular open systems approaches when cost effective and feasible. Doing so will ensure visibility into the U.S. Government's and industry's relative investments in the development of the IP, and the approach to managing the associated IP rights as part of a strategy for return on such investments. This approach will reduce the risk of paying more than once for IP and IP rights. DoD Components will ensure these efforts account for IP rights that are not based on the source of development funding, e.g., technical data necessary for operation, maintenance, installation, and training; form, fit, and function data.

d. Information systems used to provide authorized access, retention, integration, sharing, transferring, and conversion of IP deliverables throughout their programs' life cycles must support product configuration management, data loss prevention, and data sharing or exchange.


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# GLOSSARY

## G.1. ACRONYMS.

| | |
|---|---|
| ASD(A) | Assistant Secretary of Defense for Acquisition |
| DAU | Defense Acquisition University |
| IP | intellectual property |
| U.S.C. | United States Code |

**G.2. DEFINITIONS.** These terms and their definitions are for the purpose of this issuance.

**IP**. Information, products, or services that are protected by law as intangible property, including data (e.g., technical data and computer software), technical know-how, inventions, creative works of expression, trade names.

**IP deliverables**. Products or services (including information products and services) that are required to be delivered or provided to the U.S. Government by contract or other legal instrument and that include or embody IP (e.g., technical data and computer software).

**IP rights**. The legal rights governing IP, including ownership as well as license or other authorization to engage in activities with IP (e.g., make, use, sell, import, reproduce, distribute, modify, prepare derivative works, release, disclose, perform, or display IP). When the IP involves access to classified information, DoD Directive 5535.02, DoD Instruction 2000.03, and Volume 2 of DoD Manual 5220.22 may apply.


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Defense Federal Acquisition Regulation Supplement, current edition

Deputy Secretary of Defense Memorandum, "Establishment of the Office of the Under Secretary of Defense for Research and Engineering and the Office of the Under Secretary of Defense for Acquisition and Sustainment," July 13, 2018

DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L))," December 9, 2005, as amended

DoD Directive 5535.02, "DoD Patent Security Review Process," March 24, 2010, as amended

DoD Directive 5535.03, "DoD Domestic Technology Transfer (T2) Program," May 21, 1999, as amended

DoD Directive 5535.09, "DoD Branding and Trademark Licensing Program," December 19, 2007

DoD Instruction 1442.02, "Personnel Actions Involving Civilian Attorneys," September 30, 2010

DoD Instruction 2000.03, "International Interchange of Patent Rights and Technical Information," January 17, 2006, as amended

DoD Instruction 5535.8, "DoD Technology Transfer (T2) Program," May 14, 1999, as amended

DoD Instruction 5535.12, "DoD Branding and Trademark Licensing Program Implementation," September 13, 2013

DoD Manual 5220.22, Volume 2, "National Industrial Security Program: Industrial Security Procedures for Government Activities," August 1, 2018

United States Code, Title 10



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# 52.227-11 Patent Rights-Ownership by the Contractor.

As prescribed in 27.303(b)(1), insert the following clause:

Patent Rights-Ownership by the Contractor (*May* 2014)

(a) As used in this clause-

*Invention* means any invention or discovery that is or *may* be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or *may* be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq*.)

*Made* means-

(1) When used in relation to any invention other than a plant variety, the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

*Nonprofit organization* means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State *nonprofit organization* statute.

*Practical application* means to manufacture, in the case of a composition of product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

*Subject invention* means any invention of the Contractor *made* in the performance of work under this contract.

(b) *Contractor's rights.*

(1) *Ownership*. The Contractor *may* retain ownership of each *subject invention* throughout the world in accordance with the provisions of this clause.

(2) *License.*

(i) The Contractor *shall* retain a nonexclusive royalty-free license throughout the world in each *subject invention* to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to any domestic subsidiaries and *affiliates* within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The Contractor's license *may* be revoked or modified by the agency to the extent necessary to achieve expeditious *practical application* of the *subject invention* in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(c) *Contractor's obligations.*

(1) The Contractor *shall* disclose *in writing* each *subject invention* to the *Contracting Officer* within 2 months after the inventor discloses it *in writing* to Contractor personnel responsible for patent matters. The disclosure *shall* identify the inventor(s) and this contract under which the *subject invention* was *made*. It *shall* be sufficiently complete in technical detail to convey a clear understanding of the *subject invention*. The disclosure *shall* also identify any publication, on sale (*i.e.*, sale or *offer* for sale), or public use of the *subject invention*, or whether a manuscript describing the *subject invention* has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor *shall* promptly notify the *Contracting Officer* of the acceptance of any manuscript describing the *subject invention* for publication and any on sale or public use.

(2) The Contractor *shall* elect *in writing* whether or not to retain ownership of any *subject invention* by notifying the *Contracting Officer* within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the *United States*, the period for election of title *may* be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor *shall* file either a provisional or a nonprovisional patent application or a Plant Variety Protection Application on an elected *subject invention* within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the *United States*, the Contractor *shall* file the application prior to the end of that statutory period. If the Contractor files a provisional application, it *shall* file a nonprovisional application within 10 months of the filing of the provisional application. The Contractor *shall* file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor *may* request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (c)(2), and (c)(3) of this clause.

(d) *Government's rights*-

(1) *Ownership.* The Contractor *shall* assign to the agency, on written request, title to any *subject invention*-

(i) If the Contractor fails to disclose or elect ownership to the *subject invention* within the times specified in paragraph (c) of this clause, or elects not to retain ownership; provided, that the agency *may* request title only within 60 days after learning of the Contractor's failure to disclose or elect within the specified times.

(ii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the agency, the Contractor *shall* continue to retain ownership in that country.

(iii) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a *subject invention*.

(2) *License.* If the Contractor retains ownership of any *subject invention*, the Government *shall* have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the *subject invention* throughout the world.

(e) *Contractor action to protect the Government's interest.*

(1) The Contractor *shall* execute or have executed and promptly deliver to the agency all instruments necessary to-

(i) Establish or confirm the rights the Government has throughout the world in those *subject inventions* in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection and plant variety protection for that *subject invention* in any country.

(2) The Contractor *shall* require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly *in writing* to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each *subject invention* in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on *subject inventions* and to establish the Government's rights in the *subject inventions*. The disclosure format *should* require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor *shall* instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor *shall* notify the *Contracting Officer* of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor *shall* include, within the specification of any *United States* nonprovisional patent or plant variety protection application and any patent or plant variety protection certificate issuing thereon covering a *subject invention*, the following statement, "This invention was *made* with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in the invention."

(f) *Reporting on utilization of subject inventions*. The Contractor *shall* submit, on request, periodic reports no more frequently than annually on the utilization of a *subject invention* or on efforts at obtaining utilization of the *subject invention* that are being *made* by the Contractor or its licensees or assignees. The reports *shall* include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency *may* reasonably specify. The Contractor also *shall* provide additional reports as *may* be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (h) of this clause. The Contractor also *shall* mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor’s permission.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, neither the Contractor nor any assignee *shall* grant to any person the exclusive right to use or sell any *subject invention* in the *United States* unless the person agrees that any *products* embodying the *subject invention* or produced through the use of the *subject invention* will be manufactured substantially in the *United States*. However, in individual cases, the requirement for an agreement *may* be waived by the agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been *made* to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the *United States*, or that under the circumstances domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any *subject invention* in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.

(i) Special provisions for contracts with *nonprofit organizations*. If the Contractor is a *nonprofit organization*, it *shall*-

(1) Not assign rights to a *subject invention* in the *United States* without the written approval of the agency, except where an assignment is *made* to an organization that has as one of its primary functions the management of inventions, *provided*, that the assignee *shall* be subject to the same provisions as the Contractor;

(2) Share royalties collected on a *subject invention* with the inventor, including Federal employee co-inventors (but through their agency if the agency deems it appropriate) when the *subject invention* is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) Use the balance of any royalties or income earned by the Contractor with respect to *subject inventions*, after payment of expenses (including payments to inventors) incidental to the administration of *subject inventions* for the support of scientific research or education; and

(4) Make efforts that are reasonable under the circumstances to attract licensees of *subject inventions* that are small business concerns, and give a preference to a small business concern when licensing a *subject invention* if the Contractor determines that the small business concern has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to *practical application* as any plans or proposals from applicants that are not small business concerns; *provided*, that the Contractor is also satisfied that the small business concern has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor.

(5) Allow the Secretary of Commerce to review the Contractor's licensing program and decisions regarding small business applicants, and negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of paragraph (i)(4) of this clause.

(j) *Communications. [Complete according to agency instructions.]*

(k) *Subcontracts.*

(1) The Contractor *shall* include the substance of this clause, including this paragraph (k), in all subcontracts for experimental, developmental, or research work to be performed by a small business concern or *nonprofit organization*.

(2) The Contractor *shall* include in all other subcontracts for experimental, developmental, or research work the substance of the patent rights clause required by FAR subpart 27.3.

(3) At all tiers, the patent rights clause *must* be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor *shall* not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's *subject inventions*.

(4) In subcontracts, at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes statute in connection with proceedings under paragraph (h) of this clause.

(End of clause)

*Alternate I* (Jun 1989). As prescribed in 27.303 (b)(3), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The license *shall* include the right of the Government to sublicense foreign governments, their nationals and international organizations pursuant to the following treaties or international agreements: _____*

[**Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

*Alternate II* (Dec 2007). As prescribed in 27.303 (b)(4), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of the contract and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under the treaties or international agreements with respect to *subject inventions made* after the date of the amendment.

*Alternate III* (Jun 1989). As prescribed in 27.303 (b)(5), substitute the following paragraph (i)(3) in place of paragraph (i)(3) of the basic clause:

(3) After payment of patenting costs, licensing costs, payments to inventors, and other expenses incidental to the administration of *subject inventions*, the balance of any royalties or income earned and retained by the Contractor during any fiscal year on *subject inventions* under this or any successor contract containing the same requirement, up to any amount equal to 5 percent of the budget of the facility for that fiscal year, *shall* be used by the Contractor for the scientific research, development, and education consistent with the research and development mission and objectives of the facility, including activities that increase the licensing potential of other inventions of the facility. If the balance exceeds 5 percent, 75 percent of the excess above 5 percent *shall* be paid by the Contractor to the Treasury of the *United States* and the remaining 25 percent *shall* be used by the Contractor only for the same purposes as described above. To the extent it provides the most effective technology transfer, the licensing of *subject inventions shall* be administered by Contractor employees on location at the facility.

*Alternate IV* (Jun 1989). As prescribed in 27.303 (b)(6), include the following paragraph (e)(5) in paragraph (e) of the basic clause:

(5) The Contractor *shall* establish and maintain active and effective procedures to ensure that *subject inventions* are promptly identified and timely disclosed, and *shall* submit a description of the procedures to the *Contracting Officer* so that the *Contracting Officer may* evaluate and determine their effectiveness.

*Alternate V* (Dec 2007). As prescribed in 27.303 (b)(7), include the following paragraph (d)(3) in paragraph (d) of the basic clause:

(d)(3) *CRADA licensing.* If the Contractor performs services at a Government owned and operated laboratory or at a Government owned and Contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the Government *may* require the Contractor to negotiate an agreement with the CRADA collaborating party or parties regarding the allocation of rights to any *subject invention* the Contractor makes, solely or jointly, under the CRADA. The agreement *shall* be negotiated prior to the Contractor undertaking the CRADA work or, with the permission of the Government, upon the identification of a *subject invention*. In the absence of such an agreement, the Contractor agrees to grant the collaborating party or parties an *option* for a license in its inventions of the same scope and terms set forth in the CRADA for inventions *made* by the Government.

**Parent topic:** 52.227 [Reserved]

# Intellectual Property Guidebook
# for DoD Acquisition

30 April 2025

Office of the Under Secretary of Defense
for Acquisition and Sustainment

Washington, D.C.

Distribution Statement A. Approved for public release: distribution is unlimited.


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**Approved by**

TENAGLIA.JOHN.M.[redacted] Digitally signed by TENAGLIA.JOHN.M.[redacted]

30 April 2025

John M. Tenaglia
Principal Director,
Defense Pricing, Contracting, and Acquisition Policy
OUSD A&S/DPCAP

Date

**Intellectual Property Guidebook Change Record**

| Date | Change | Rationale |
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# SECTION 1: BACKGROUND

## 1.1. INTRODUCTION.

**Purpose:**

"A strong IP system benefits every innovative community across America, from rural towns to bustling cities."[1] Department of Defense (DoD) needs a thriving, innovative, and healthy Defense Industrial Base to develop advanced technology to achieve and maintain technological strength and achieve National Security objectives. IP protects industry innovation and generates revenue while also serving as a linchpin for national security.

DoD IP Acquisition has the challenge of meeting the DoD's mission for national security while incentivizing innovation in industry and protecting the nation's resources. This task places a monumental responsibility on DoD acquirers to balance the inherent need to justly pay industry for their development and encourage continued innovative work, while also being good stewards of taxpayer dollars by acquiring what is necessary to sustain defense capabilities and protecting the Government's ROI.

The primary purpose of this guidebook is to aid acquisition professionals in the development, execution, and management of effective IP Strategies that support all functional areas' requirements and objectives across program life cycle. It provides guidance on the implementation of IP laws and regulations, explains legal and operational challenges in acquiring IP and associated IP rights, and promotes partnerships with industry. This guidebook will also assist other Department organizations and requiring activities as they consider IP requirements and protections outside of programs of record.

This guidebook complements the most recent version of DoD Manual (DoDM) 5010.12 which is the authoritative source of guidance for properly requiring data in contracts.

**Scope and Structure of the IP Guidebook.**

- **Section 1** provides an **overview** of policies and statutes that direct IP practices in the DoD while considering the evolution of IP that led to the current priorities.
- **Section 2** offers a strategic overview of **fundamental IP concepts** which must be understood prior to undertaking any efforts to develop an IPS for a program.
- **Section 3** describes the **core principles of an IPS** and its vital role in a program.
- **Section 4** discusses essential elements and considerations in **developing an IPS** including identifying IP needs for a program, integrating IP into other acquisition plans, and preparing for successful execution in contracts.

[1] United States Patent and Trademark Office, Latest USPTO report finds industries that intensively use intellectual property protection account for over 41% of U.S. gross domestic product, employ one-third of total workforce (Mar. 17, 2022), https://www.uspto.gov/about-us/news-updates/latest-uspto-report-finds-industries-intensively-use-intellectual-property-0#:~:text=A%20strong%20IP%20system%20benefits,by%20workers%20in%20other%20industries.

- **Section 5** explains **how to effectively execute the IPS** through crafting solicitations, evaluating IP, and negotiating for IP.
- **Section 6** outlines the importance of **managing IP** during the performance of the program, including delivery of data, managing data rights, and continuous updates to the IPS.
- **Appendices A and B** provide source references, resources, tools and resources.

## 1.2. IP POLICY IN THE DOD.

**Figure 1. Significant IP Policy Events**

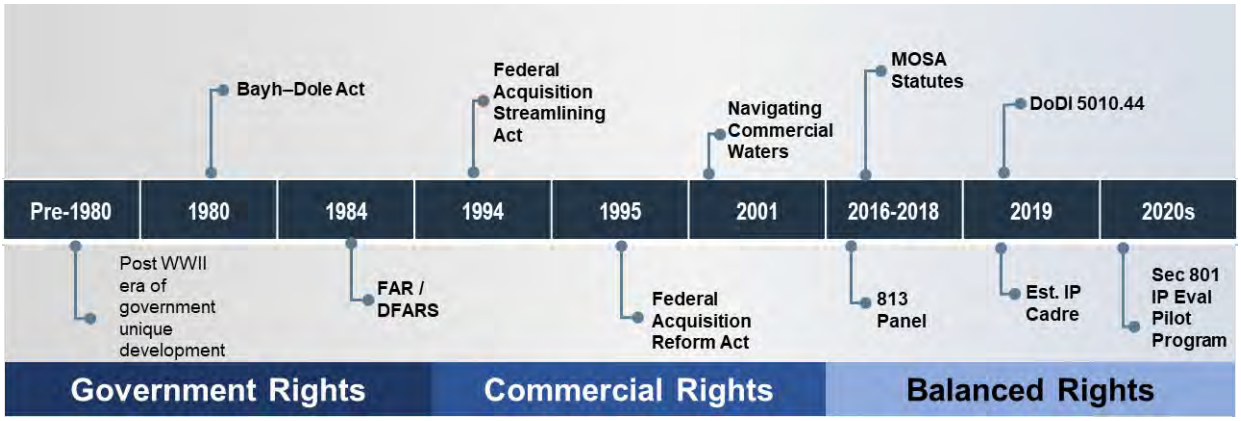



Figure 1 shows the evolution of IP policies and practices in the DoD which can be broken down into three general approaches to safeguarding the Government's rights and interests: a focus on the need to always acquire rights to all technical data (TD); a shift to the assumption that the Government needed little to no TD rights due to the focus on commercial; and currently an approach focused on tailored IP rights and a balancing of industry and DoD interests via Specially Negotiated License Rights (SNLRs), Other Transaction Agreements (OTAs), and MOSA.

In 2019, DoD issued the first consolidated IP acquisition policy for DoD: DoD Instruction (DoDI) 5010.44, IP Acquisition and Licensing, which provided six core principles regarding the acquisition, management, and licensing of IP (Figure 2).[2] These principles emphasize early life cycle planning, competitive acquisition of TD, interest-based negotiations, collaboration with industry, and tailored IP agreements.

[2] U.S. DEP'T OF DEF. INSTR. 5010.44, INTELLECTUAL PROPERTY (IP) ACQUISITION AND LICENSING 4 (16 Oct. 2019) [hereinafter DoDI 5010.44].

**Figure 2. Six Core IP Principles**

1) Integrate IP planning fully into the acquisition strategy (AS) and Product Support Strategy (PSS) to protect core DoD interests over the entire life cycle. Seek to acquire IP deliverables and license rights necessary to accomplish these strategies, bearing in mind the long-term effect on cost, competition, and affordability.
2) Ensure acquisition professionals have relevant knowledge of how IP matters relate to their official duties. Cross-functional input and coordination is critical to planning and life cycle objectives.
3) Negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights. This is most effective early in the life cycle when competition is more likely.
4) Communicate clearly and effectively with industry regarding planning, expectations and objectives for system upgrade and sustainment. Avoid requirements and strategies that limit the DoD's options in accessing vital technology and commercial solutions available from industry [throughout the life cycle].
5) Respect and protect IP resulting from technology development investments by both the private sector and the U.S. Government (USG).
6) Clearly identify and match data deliverables with the license rights in those deliverables. Data or software deliverables are of no value unless and until the license rights to use it are attached, and the USG obtains and accepts those deliverables.

## 1.3. FEDERATED IP CADRE.

Under Section 838 of the NDAA for FY2020, Congress directed the establishment of the IP Cadre to ensure a consistent, strategic, and highly knowledgeable approach to acquiring or licensing IP by providing expert advice, assistance, and resources to the acquisition workforce on IP matters, including acquiring or licensing IP.[3] Recognizing the limited reach of a small OSD office and the criticality of robust accessible resources to the workforce, the functions of the IP Cadre extend to each Military Department (MILDEP) and to the Defense Acquisition University (DAU) with their own IP experts dedicated to assisting programs in the implementation of IP policy and best practices.

[3] *See* 10 U.S.C. § 1701 (2025).

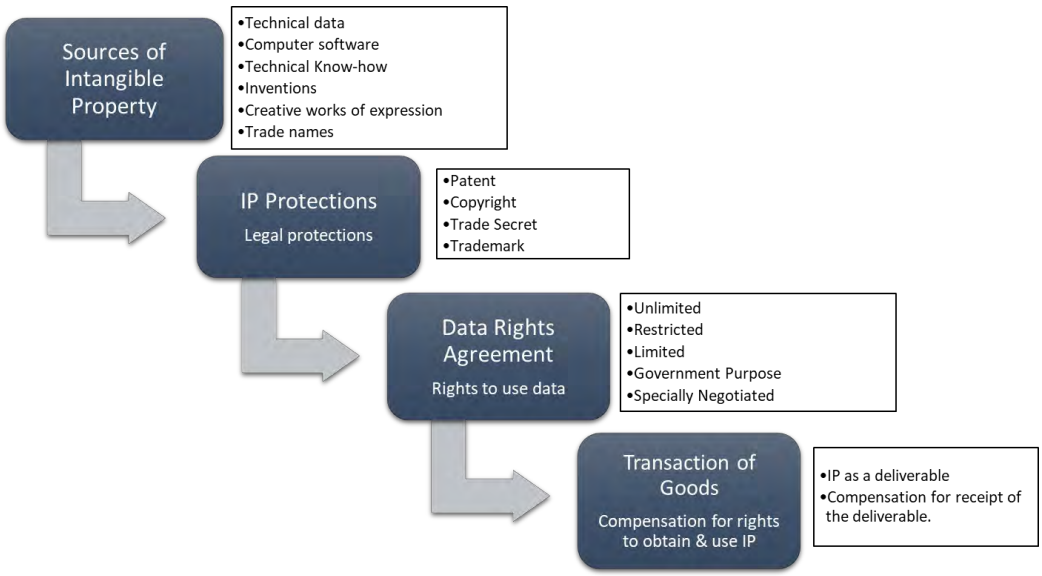
## SECTION 2: FUNDAMENTAL CONCEPTS OF IP

### 2.1. BUILDING BLOCKS OF IP ACQUISITION.

IP is information, products, or services that are protected by law as a type of intangible property, including certain data (e.g., TD and computer software (CS)), technical know-how, inventions, creative works of expression, or trade names. Common types of IP include patents, trademarks, copyrights, and trade secrets.

In its simplest terms, IP acquisition is a transaction of goods: the deliverables and rights to use someone's IP in exchange for compensation. There are four key building blocks of this transaction: 1) types of intangible property sources; 2) the IP protection of that property; 3) the license agreement with the Government; and 4) the transaction of goods (deliverables) with the Government.

**Figure 3. Building Blocks of IP Acquisition**




**1)** The first building block to understand is that the creator of the IP is generally the sole "owner" of the IP. It is the sole property of the creator and remains the property of the creator throughout the transaction with the Government. The sources in this block are not necessarily IP unless they are protected by the legal protections in block 2. The Government does not "own" IP via a data rights agreement, even if the agreement is for Unlimited Rights. (There is a rare exception if the creator formally transfers ownership of the IP.)

**2)** The next building block includes the legal ways that creators are protected from others using their IP without permission and compensation. Patents, copyrights, trade secrets, and trademarks are the legal methods to protect the creator's rights and are foundational to many creators' business and licensing models. These protections allow the creator to justly receive

compensation for use of their IP. This is one mechanism to secure their return on their investment.

**3)** The third building block is where we start to frame the transaction through data rights agreements for specified IP. Data rights agreements are the mechanism by which the IP owner grants the license rights to use their IP with specified conditions or restrictions. The term "data rights" has historically been a short-hand way to refer to license rights acquired in copyrights and trade secrets relating to data deliverables — usually in the form of TD and CS. This approach to use the phrase "data rights agreements", allows DoD to use a single set of license rights to address what would otherwise be separate forms of IP protection for trade secrets and copyrights. "Data rights" do not cover patent or trademark rights.

**4)** Finally, the transaction can take place for data, CS, and rights in exchange for just compensation. This step includes the identification of what IP is being requested, in what form the data will be delivered, paired with what rights will govern its use, and finally an exchange of just compensation, all of which are documented through a contract or other agreement.

## 2.2. IP AND ROI.

**IP Protections are a primary mechanism to secure ROI.**

**To secure the Government's ROI – Ensure the program obtains deliverables and rights to the Government's investment.**

ROI is an important topic to understand in approaching interest-based negotiations and tailored IP agreements because IP is a form of business capital that provides competitive advantage. IP holds immense value for businesses, and they should have the ability to monetize that IP as revenue so that they can re-invest in new development, distribute to investors, or increase corporate capital and ultimately continue the business cycle. To enable that, the Federal Government promises exclusive legal control of qualifying IP.

It is important to remember that not all companies calculate ROI in the same way because companies have different values, strategies, goals, objectives, funding, etc. Additionally, understanding that ROI is both short-term and long-term is critical to identifying the IP value.

Alternatively, the ROI for the Government and DoD is inherently different from industry because the Government is not working for profit to re-invest and continue the business cycle. In the most general sense, the DoD's ROI is an enhanced, sustainable, and affordable capability for warfighters. As such, ROI is measured in ways such as cost avoidance savings that can allow for other investments, agility to rapidly meet new capability requirements, or the ability to sustain and repair critical aging equipment. Additionally, Congress has highlighted that a critical measure of ROI is making sure that DoD "does not pay more than once for the same work."[4]

Due to the shared investments in most DoD acquisitions, acquisition professionals must understand the competing interests of the DoD and private business throughout the acquisition process. The outcomes of IP agreements are a fundamental means to demonstrate the ROI for

[4] National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 813(b)(3)(A), (2015).

each party; on the one hand the Government receives data, CS, and rights to accomplish its mission, and industry receives initial monetary compensation and potentially long-term advantage.

**Leveraging competition while encouraging industry innovation is the core of IP strategic analysis and planning.**

### 2.3. IP AND COMPETITION.

In today's global military competition, DoD needs to encourage continuous technological innovation and question the notion that a single solution from a single vendor will necessarily meet the warfighter's needs for the life of a capability requirement. IP plays a critical role in fostering and enabling competition throughout the life cycle of a capability and was a cornerstone of the President's statement on competition in the defense sector evaluation of the state of competition in the country.

> *"IP, as a return-on-investment model, both encourages and restricts competition. From a technology standpoint, the IP statutory and regulatory framework should drive competition to create innovative technology as a prerequisite to qualify for IP protection. From a business standpoint, the resulting IP protection itself establishes a form of limited monopoly to commercialize that new technology, creating tension with competition. IP, as a form of legal protection, grants exclusive or limiting rights to individuals (e.g., inventors or authors) for their intellectual creations, such as inventions, works of art or music, or technical know-how. The exclusive rights and legal remedies granted to IP owners are not undesirable or problematic merely because they may restrict full and open competition for technologies protected by those exclusive IP rights*."[5]

The question then becomes — how can the DoD use IP to directly enable competition? In simple terms, having a competitive environment in the future requires taking advantage of a competitive environment in the present by including IP rights as part of competitive source selection evaluation to acquire the data, CS, and associated rights needed for future competition.

When the Government does not have the data, CS, and rights to enable continued competition, the program becomes forced into a sole-source situation, also known as vendor-lock. This is different from a deliberate sole source acquisition which may be desired based on market intelligence and a business case analysis of alternative acquisition strategies. In a vendor-lock situation, the program did not intentionally transition to a sole source but later realized the Government didn't acquire the necessary data, CS, and rights often because of poor IP strategic planning from the beginning of the program. The negative effect of a vendor-locked situation may include higher prices, inability for future technology insertion, stagnating the incentive for innovation, and potentially not receiving the best value to the Government.

[5] U.S. Dep't of Def., Rep., State of Competition within the Defense Industrial Base 7 (Feb. 2022).

**Figure 4. Potential Negative Effects of Vendor Lock**

- Encourages higher (non-competitive) prices
- Reduces incentive for innovation
- Limits technology insertion from other sources
- Weakens assurance of best value

The reason that absence of competition may stagnate innovation is because the original equipment manufacturer (OEM) has locked in long term ROI on the current IP/capability and therefore does not need to continue innovative development into solutions that may better meet the mission. Additionally, the lack of competition may limit the ability to compete for technology insertions unless the sole source provider delivers a MOSA solution with modular system interfaces (MSIs) that could mitigate the impacts of a single vendor.

To avoid vendor-lock, the DoD must appropriately recognize and plan for the impact of restrictive IP rights, and judiciously use competitive pressure, its market power, and all the other tools available to mitigate against undesirable restrictions on competition. With effective advance strategic planning the DoD can obtain sufficient IP rights to enable sustainment while incentivizing innovation and cost effectiveness in the defense industrial base.

## 2.4. IP AND MOSA.

MOSA is both an engineering (design) and business/acquisition (IP, contracting, competitive environment) approach to design, develop, and acquire systems in a modular, segregable, and standardized manner. MOSA consists of a technical and business architecture that supports using system interfaces compliant with widely supported and consensus-based standards, to the extent that standards are available and suitable to facilitate increased competition and innovation while yielding significant cost savings or avoidance, schedule reduction, opportunities for technical upgrades, increased interoperability, and other benefits during the sustainment phase. Using MOSA to the maximum extent practicable is a statutory requirement for all Defense acquisition programs[6].

IP rights and MOSA support each other. Modular systems are only effective with clear and robust understanding of each vendor's IP, the interfaces between them, and with the appropriate delivery of data to facilitate use of the interfaces. Without necessary IP, the Government may not reap the business benefits of a modular system, which is counter to the intent of MOSA. MOSA also enables and motivates better recognition of contractor and Government investments in development of a system. MOSA strives to keep the fruits of those investments separated to avoid inequities that can result when a minimal investment by one party can effectively capture the fruits of substantial investment by the other party. Without using MOSA, the Government may require delivery of much more contractor IP to meet its needs, raising costs and creating negotiation challenges.

[6] *See* 10 U.S.C. § 4401 (2025) [hereinafter § 4401].

**NOTE: This is discussed at greater length in the "Implementing a MOSA for Department of Defense Programs", or addressed in short form as the MOSA Guidebook which is linked in Appendix A.**

## 2.5. STANDARD DFARS DATA RIGHTS.

Table 1 below provides high-level definitions of standard data rights applicable to Federal Acquisition Regulation (FAR)-based contracts. Note that different clauses apply to commercial[7] and noncommercial[8] products and services for TD. Noncommercial software and documentation have their own clause[9] while commercial software has policy[10] but no standard clause. All contracts or solicitations for which any portion of contract performance is governed by Small Business Innovation Research Program (SBIR), or Small Business Technology Transfer Program (STTR) policies have a special clause for SBIR/STTR data.[11] See the actual DFARS clauses for complete definitions. These terms are **NOT** applicable in non-FAR based agreements such as OTAs. (See Section 5 for more information on OTAs.)

While the data rights categories include common terms, the categories are often used incorrectly or without the proper context. Remember these words have very specific regulatory meanings. Note that the term "noncommercial" is interchangeable with "other than commercial," since DFARS 252.227-7013 and 7014 utilize the term "Other Than Commercial Products and Commercial Services" and "Other Than Commercial CS and Other Than Commercial CSD."

**For purposes of this guidebook, the term "noncommercial item" generally refers to "any product or service other than a commercial product or a commercial service.**

[7] *See* DFARS 252.227-7015 (2025) [hereinafter 7015].
[8] *See* DFARS 252.227-7013 (2025) [hereinafter 7013].
[9] *See* DFARS 252.227-7014 (2025) [hereinafter 7014].
[10] *See* DFARS 227.7202-1 (2025).
[11] *See* DFARS 227.7104-4(a)(1) (2025).

## Table 1. Standard DFARS License Rights (e.g., "Data Rights")

| Standard Rights | Description |
|---|---|
| **Unlimited Rights** *(for noncommercial TD or CS)*[12] | ▪ Unlimited Rights give the Government the ability to use, modify, reproduce, perform, display, release, or disclose the data in any manner, and for any purpose whatsoever, and to have or authorize others to do so (absent any separate security classification or export control restriction). |
| **Unrestricted Rights** (for *commercial TD*) | ▪ The Government shall have the unrestricted right to use, modify, reproduce, release, perform, display, or disclose commercial TD, and to permit others to do so for specific types of data. Of note, unlike the term "Unlimited Rights," the DFARS does define Unrestricted Rights themselves. |
| **Government Purpose Rights** *(for noncommercial TD or CS)* | ▪ Government Purpose Rights give the Government the ability to reproduce, modify, perform, display, use, disclose, or release the data for Government purposes without restriction.[13] However, the Government cannot release the data for any commercial purpose. Government Purpose Rights expire after a time limit (the standard is five years after contract execution unless another time is negotiated in the contract) at which point the Government Purpose Rights become Unlimited Rights. |
| **Limited Rights** *(for noncommercial TD)* | ▪ Limited rights apply to TD associated with noncommercial products only. The Government may use the TD within the Government but not release the TD outside of the Government except in limited circumstances. The Government may not use the data for manufacturing additional quantities of the item. However, the Government may share this data with a Covered Government Support Contractor (CGSC). |
| **Restricted Rights** *(for noncommercial CS)* | ▪ Restricted Rights apply to noncommercial CS only. The Government may only run the software on one computer at a time and may make only the minimum copies needed for backup. The software may not be released outside of the Government except in limited circumstances and only after notice is provided to the owner. However, the Government may share this data with a CGSC. |
| **Specifically Negotiated License Rights** | ▪ Specifically (or "Specially," as commonly referenced) negotiated license rights (SNLRs) agreements are statutorily preferred when the standard data rights arrangements defined in the DFARS do not meet the Government's needs; or when the Government is willing to accept lesser rights in exchange for other considerations. The SNLRs negotiation allows for a mutual agreement between an IP owner and the Government to find a better balance of interests for both parties. The new terms are spelled out in a unique SNLR agreement. A SNLR agreement pertaining to TD associated with noncommercial products or software is usually a compromise between Limited or Restricted, SBIR/STTR, Government Purpose, and Unlimited Rights. A SNLR agreement for this type of data must not result in the Government having lesser rights than Limited or Restricted Rights as defined in the DFARS. |
| **SBIR /STTR Data Rights** *(for noncommercial TD or CS)* | ▪ SBIR/ STTR data rights apply to both TD associated with noncommercial products and noncommercial CS. These rights apply when the Government enters a research and development effort awarded as a SBIR contract. If a product was developed as part of an SBIR/STTR effort, the Government is entitled to SBIR/STTR Data Rights, which are generally equivalent to Limited or Restricted Rights, but for a period known as the SBIR/STTR protection period. After the SBIR/STTR protection period, the Government is granted Government Purpose Rights perpetually. |
| **Commercial Data Rights** *(for commercial TD)*[14] | ▪ Similar to "Unrestricted Rights," the DFARS does not define the term "Commercial Data Rights." The Government may use, modify, reproduce, release, perform, display, or disclose TD within the Government only. The Government shall not—(i) use the TD to manufacture additional quantities of the commercial products; or (ii) release, perform, display, disclose, or authorize use of the TD outside the Government without the contractor's written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial products furnished under this contract, or for performance of work by CGSC. |

[12] As explained in Section 2.5, the term "noncommercial item" generally refers to "any product or service other than a commercial product or a commercial service.

[13] A "Government purpose" means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

[14] For Commercial CS, there is no standard set of "data rights"; however, it is advisable to note the default policy for standard rights in commercial CS under the DFARS. It states that the DoD shall acquire commercial CS under the licenses customarily provided to the *public* unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs. (Emphasis added).

## 2.6. SPECIAL CATEGORIES OF DATA

Confusion on the unique rights and limitations of these categories creates challenges for meeting DoD needs for data, CS, and rights. There are five main categories of data[15]:

- Operations, Maintenance, Installation, and Training (OMIT)
- Form, Fit, Function (FFF)
- Modular System Interfaces (MSI)
- CS Documentation (CSD)
- Detailed Manufacturing or Process Data (DMPD)

### 2.6.1 OMIT

OMIT is data necessary for operation, maintenance, installation, or training purposes (other than detailed manufacturing or process data). OMIT data will be required regardless of development funding when the Core Logistics Analysis determines there is a requirement for a core capability.[16]

As part of the "standard rights" for noncommercial items, DoD may require contractors to grant the Government Unlimited Rights in TD necessary for OMIT purposes, regardless of the source of development funding.[17]

### 2.6.2 FFF

Another special type of data is FFF data. FFF is defined in the commercial[18] and noncommercial[19] TD rights clauses and the SBIR/STTR data rights clause[20] as "TD that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items."

FFF is another type of data for which the Government may require Unlimited Rights (noncommercial) or an unrestricted right to use (commercial) regardless of development funding. It is not subject to a DMPD exclusion like OMIT data. However, like OMIT and DMPD, there is also possibility of FFF overlapping with DMPD. In this case, the data is treated as FFF for the purposes of determining rights regardless of the overlap. For example, DMPD for some physical part should have dimension and tolerance information and that same dimension and tolerance information would also be necessary in FFF data and therefore receives Unlimited Rights.[21] Traditionally, FFF data was used for what may now be viewed as an earlier incarnation of MSIs to enable MOSA. Until the MSI-related statutory requirements in 10 U.S.C. § 3771(b)(7) are

[15] There are other special categories such as test data, analyses, and studies that are not covered in this guidebook, but detailed information can be found in the DFARS. *See e.g.,* DFARS 227.71 (2025); *see also* DFARS 227.72 (2025).
[16] 10 U.S.C. § 2464 (2025), (hereinafter 2464).
[17] *See id.; see also* DFARS 252.227-7018(c)(1)(ii) (2025) [hereinafter 7018].
[18] *Id.* at (a).
[19] 7013, *supra* note 8, at (a).
[20] 7018, *supra* note 17, at (a); *see also* Class Deviation 2020-O0007, Protection of Technical Data and Computer Software Under Small Business Innovation Research Program Contracts (2020) [hereinafter Deviation 2020 -O0007].
[21] *See* Sec. 2.8.2 for a detailed discussion of how FFF data can be used to implement MOSA objectives.

implemented in the DFARS data rights clauses, FFF data will play a major role in meeting program MOSA requirements

### 2.6.3 MSI

To implement MOSA, the Government will have to identify MSIs. MSIs are defined in 10 U.S.C. § 4401(c)(4) as "a shared boundary between major systems, major system components, or modular systems, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements."[22]

MSI TD rights are defined in 10 U.S.C. § 3771(b)(7) for both mixed funding and exclusively private expense funding scenarios. When the DFARS is updated to reflect that definition, MSI TD will become a special type of data, and the Government will be able to require Government Purpose Rights in certain TD pertaining to MSIs. The data rights rules are expected to go into effect in the future; check with the legal office to verify they have been implemented.

### 2.6.4 CSD.

CSD is the software equivalent of what is traditionally considered OMIT. The DFARS defines it as "owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the CS or provide instructions for using the software."[23] As such, the Government is granted Unlimited Rights in CSD.

### 2.6.5 DMPD

DMPD is the TD that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.[24] The license rights for DMPD depend on development funding or negotiation rather than automatically qualifying for Unlimited Rights like other forms of OMIT data.

The Government **can** order DMPD, and the contractor **can** agree to deliver it. But the Government cannot require the contractor to grant Unlimited Rights to DMPD related to privately developed products or processes.

DoD activities should be judicious in requiring such data, especially when DMPD is a result of investment made at private expense. However, when data and associated rights are truly needed for mission objectives (e.g., for statutory depot requirements[25], advanced manufacturing in a contested logistics environment, to supplement the supply chain for a long lead item, or when IP owners cannot meet DoD's operational objectives), the Government should detail the specific use case for the DMPD, then negotiate just compensation for the delivery and use of the DMPD for the particular component and uses. This is a guiding principle for tailoring license rights. In contrast, when DMPD is developed using Government funding, DoD activities should

[22] § 4401, *supra* note 6, at (c)(4).
[23] 7014, *supra* note 9.
[24] 7013, *supra* note 8.
[25] *See e.g.,* § 2464, *supra* note 16; 10 U.S.C. § 2466 (2025); 10 U.S.C. § 2469 (2025).

proactively plan to order necessary data and associated license rights in the contract and ensure delivery requirements are met to realize the Government's ROI.

There are some important considerations for acquiring DMPD:

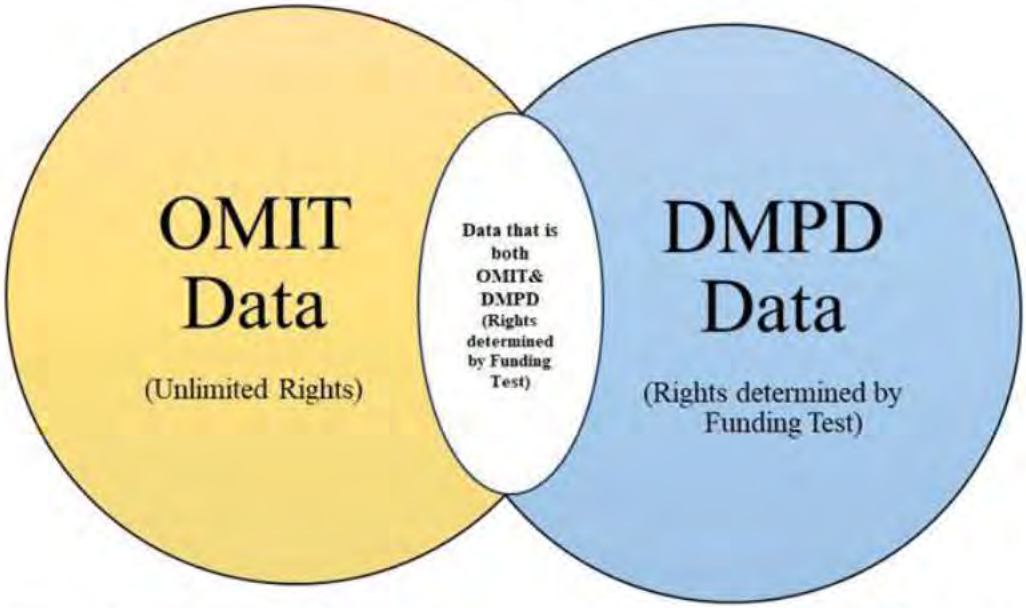
- DoD may acquire DMPD associated with commercial items **if** there is an applicable exception to the general policy which is to acquire only the TD customarily provided to the public with a commercial product, commercial service, or commercial process. [26]
- DMPD appears as a limitation in the data rights rules for TD. DoD may not normally share TD in which it has Limited Rights or SBIR/STTR Data Rights with third parties. However, in certain circumstances the Government may share DMPD data with third parties (e.g., for emergency repair and overhaul or for certain disclosures to a CGSC[27]).
- Reprocurement needs **may not** be a sufficient reason to acquire DMPD under two circumstances: 1) when items or components can be acquired using performance specifications, FFF data; **or** 2) when there are a sufficient number of alternate sources, which can reasonably be expected to provide such items on a performance specification or FFF basis.[28] While this is a true statement of a factual possibility, it is not a prohibition on requiring DMPD.

### 2.6.6 OMIT and DMPD Overlap.

**What about data that is both OMIT and DMPD?** For any portion of OMIT data that also qualifies as DMPD, Government rights in that DMPD will be determined by the usual application of the development funding test (rather than the standard grant of Unlimited Rights for OMIT data regardless of development funding). The OMIT rule excludes DMPD from both noncommercial[29] and commercial[30] TD that contractors may be required to grant Unlimited/Unrestricted Rights regardless of development funding. The DoD can require Unlimited Rights in OMIT data but not in DMPD data related to privately developed technology.

[26] *See* DFARS 227.7102-1(a) (2025).
[27] 7013, *supra* note 8, at (a); 7018, *supra* note 17, at (a); Deviation 2020-O0007, *supra* note 20.
[28] DFARS 227.7103-2(b)(1) (2025).
[29] 7013, *supra* note 8, at (c)(1)(v).
[30] 7015, *supra* note 7.

**Figure 5. OMIT Data vs. DMPD Data**




This DMPD exclusion mentioned above does not prohibit sale or delivery of that DMPD by the contractor. If specific data is necessary for OMIT purposes but is also DMPD used for detailed manufacturing or process, it can be requested by the Government in the requests for proposal (RFP). The contractor may agree to deliver or furnish this data, but the Government cannot compel the contractor to provide it. This exclusion is often a point of confusion and misused as a justification to avoid providing any DMPD or OMIT data.

**Plain English: If technical data is considered both necessary for OMIT purposes and DMPD, the rules for DMPD apply regarding standard rights. This does not relieve the contractor of providing the data necessary for OMIT, but the data may not be required to have Unlimited/Unrestricted Rights.**

**Table 2. Special Categories of Data**

| Categories | Definition/Description | Example Uses | Example Data Products |
|---|---|---|---|
| ***Detailed Manufacturing or Process Data (DMPD)*** | ▪ TD that describes the steps sequences and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.[31] | ▪ Depot level repairs (when a repair requires DMPD that the SAE GEIA-STD-0007 standard cannot address, use MIL-STD-31000) | ▪ Additive Manufacturing requires DMPD data to 3D print or manufacture spare parts and components and SNLRs when development was funded at private expense |
| ***Form, Fit, & Function (FFF)*** | ▪ TD that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.[32] | ▪ Design interface<br>▪ Sustaining engineering<br>▪ Support equipment<br>▪ Facilities and infrastructure<br>▪ Maintenance planning and management<br>▪ Performance & Impact analysis,<br>▪ Design conformance | ▪ Engineering drawings (e.g., Design/ Interface control-type drawings, performance specifications), configuration management, SysML/UML models, interface control documents, wiring diagrams, some provisioning data.<br>▪ Depot maintenance work requirements technical bulletin (dis-assembly and reassembly) repair and overhaul procedures. Engineering data for provisioning |
| ***TD necessary for Operation, Maintenance, Installation, or Training (OMIT)*** | ▪ TD necessary for operation, maintenance, installation, or training purposes (other than detailed manufacturing or process data)[33] | ▪ Maintenance planning and management<br>▪ Training and training support<br>▪ Supply support<br>▪ Packaging, handling, storage, & transportation<br>▪ Manpower and personnel<br>▪ Support equipment<br>▪ Design interface<br>▪ Performance of depot maintenance activities | ▪ Level of Repair Analysis (LORA), Failure Mode, Effects, and Criticality Analysis (FMECA), Middle-Tier Acquisition, Reliability-Centered Maintenance, FTA, bill of materiel, Logistics Product Data, Engineering data for provisioning, screening data, preliminary provisioning parts list, provisioning parts list, test incident reports, diagrams, XML, schematics, quality reports, quality deficiency reports, provisioning conference, physical configuration audit<br>▪ Modeling & Simulation referent data |
| ***CSD*** | ▪ TD that describes owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium that explain the capabilities of the CS or provide instructions for using the software." | ▪ IT Systems Continuous Systems Report<br>▪ Performance of depot maintenance activities | ▪ Software user manual |

[31] 7013, *supra* note 8, at (a).
[32] *Id.*
[33] *Id.* at (c)(1)(v), note there is not a formal definition of OMIT in the DFARS or statute.

## 2.7. Funding Test and Determining Standard rights

**2.7.1 Three funding sources:** There are three basic funding scenarios in DoD acquisition that drive standard/default rights and create a consistent framework of ROI. The three scenarios are:

1. Industry as the sole developer/investor of IP
2. DoD as the sole developer/investor of IP
3. A joint development/investment arrangement

**1. Industry as Sole Developer/Investor:** In this scenario, the development of a capability is entirely funded by industry and DoD is a pure "consumer." In this role, industry has borne all the development risk and as the exclusive IP creator/owner, the contractor controls the IP and can impose limitations on who may have rights to it and required compensation. This is typically the situation for commercial items. A typical commercial consumer requires little IP to satisfy life cycle use and care of the product (e.g., a user manual and minimal care and maintenance instructions). Detailed design specifications, manufacturing information, and other TD or CS are not typically provided to commercial users.

Also, industry naturally seeks greater market power and ROI considering its private investments. DoD needs to be mindful of potential disincentivizing effects of constraining private ROI in its attempts to meet the mission and get a good deal. Constraining industry's IP ROI may discourage future investment or participation in the DoD market. Accordingly, the DoD should balance industry ROI concerns with DoD mission goals when tailoring and negotiating delivery requirements and associated data rights during the acquisition process to foster an ongoing relationship with industry.

Due to DoD's unique mission and regulations, the Government is likely to need additional data rights necessary for OMIT purposes, DMPD, and FFF data to conduct repairs and do more extensive maintenance organically down range or as needed for core logistics capability required by statute.[34] DoD may also require broader rights to software source code to address cyber vulnerabilities, mission assurance, or supply chain risk considerations. DFARS data rights allow for the acquisition of data for these purposes even though DoD did not invest in the development of the IP.

**2. DoD as Sole Developer/Investor:** In this scenario, the Government has either fully funded the industry's IP development, or the IP development was done organically by a Government organization (lab, engineering center, etc.) or individual Government employee[35] and subsequently transferred to industry through either a formal technology transfer (T2) program or as Government Furnished Information (GFI) on a program, the Government has unlimited rights to the IP.

Because the DoD has fully funded the initial risk-capital, it therefore should have Unlimited Rights to the IP. The Government should always make it a priority to secure those rights and

[34] *See e.g.*, § 2464, *supra* note 16.
[35] Government employee inventions made in the scope of their employment are subject to a determination of rights under Executive Order 10096 as to whether the invention should belong to the government or the inventor or the government should have license rights. In addition,

associated ROI through appropriate documentation, contracting language, and receipt of deliverables. The Government must order and receive the required deliverables to exercise its rights in that data.

**NOTE: Even as sole investor, the Government must request delivery of its IP. The Government's rights due to its investment (the funding rule) are useless without delivery. Additionally, there will be costs associated with packaging deliverables (e.g., compiling software code or formatting and marking technical data for delivery, converting from contractor format to Government format), even if the Government invested in the IP's development.**

**3. DoD and Industry as Co-Developers/Investors:** Most commonly, DoD capabilities are developed as a partnership between industry and Government. DoD and its industry partners are often co-investors and sometimes co-developers of military technology and systems. These situations rely on thorough IP strategies and agreements to assure both parties interests are achieved, and each receives the just value for their investment. This will likely include a combination of the standard rights and specially negotiated licenses (SNLs). To facilitate an equitable share of IP rights in this collaborative environment, it is critical that all parties have a good understanding of acquisition laws and policies as well as fundamental implications of IP rights and protections.

Government funding of non-FAR development is not recognized as Government funding for purposes of the funding test in the DFARS. Only direct charges for efforts under FAR contracts are necessarily treated as Government funding for the data rights funding test. It is possible that non-FAR grants, agreements, or other vehicles with Government funding may lead to subsequent FAR contract acquisition of that technology making it critically important that IP agreements in OTAs and other non-FAR vehicles cover Government data rights.

Separately, in FAR contracts, indirectly reimbursed costs, such as Independent Research & Development (IR&D) costs, do not count as Government funding under the funding test.[36] Legal counsel should be consulted about non-FAR-to-FAR transitions and the handling and ramifications of indirect costs and IR&D for data rights purposes.

**Non-FAR agreements do not automatically grant data rights under the funding rule. Rights need to be specifically stated in the agreement.**

government employee-inventors, whether civilian or military may be entitled to a cash award or even a share of any royalties from licensing. *See* DEPT. OF DEF. INSTR.5535.08, DOD DOMESTIC TECHNOLOGY TRANSFER PROGRAM, para. 3.3.d [hereinafter DoDI 5535.08] for additional information.

[36] *See e.g.,* ATK Thiokol, Inc. v. U.S., 598 F.3d 1329 (Fed. Cir. 2010), https://casetext.com/case/atk-thiokol-v-us.

### 2.7.2 Pairing standard rights and funding source for noncommercial.

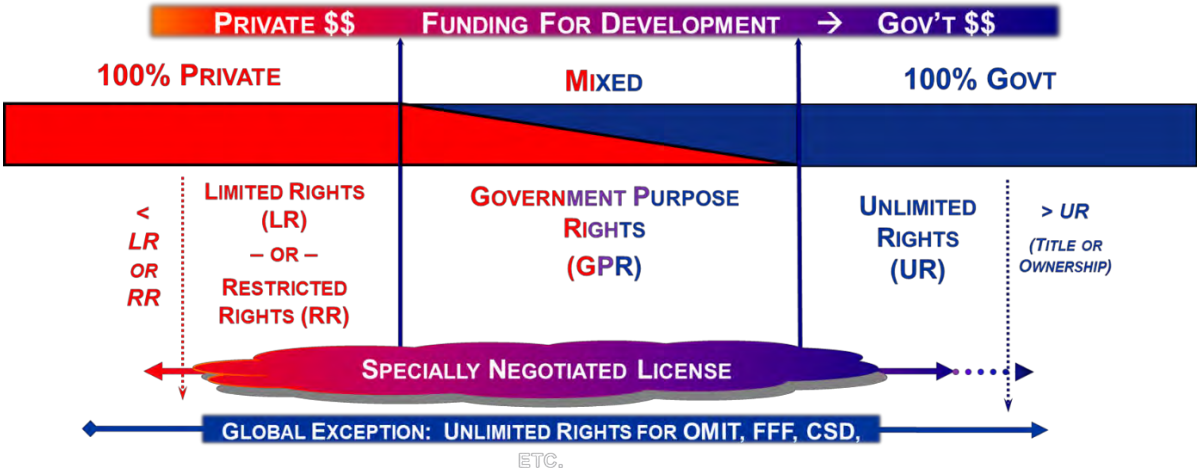
Figure 6 below depicts Government license rights under the DFARS for noncommercial TD and CS as a spectrum from fully private funding on the left to fully Government funding on the right. Note: The funding test does not apply to commercial items.)

The graphic illustrates the three funding scenarios just covered paired with the associated standard data rights: Limited/Restricted Rights with private funding; Government Purpose Rights with mixed funding; and Unlimited Rights with Government funding.

The SNL "cloud" in Figure 6 indicates that, regardless of funding, a unique license agreement can be entered between the two parties and can provide a range of rights based on tailored requirements.

Below that, the blue "Exception" box spanning from left to right indicates that, regardless of funding, the Government's has standard unlimited license rights in TD necessary for OMIT (other than DMPD) and FFF TD.

**Figure 6. Mapping Noncommercial Data Rights and Development Funding**




## 2.8. THE DOCTRINES OF SEGREGABILITY AND MODULAR LICENSING

**2.8.1 Doctrines of Segregability:** As discussed in the mixed funding scenario of joint development (subsection 2.7.1, paragraph 3), there is likely to be a combination of rights across a system to account for the co-development of a system by Government and industry. The funding test doctrine of segregability for rights refers to the situation in which different physical parts of a system or sections of software have different data rights based on the noncommercial funding test. Generally, the assessment of the funding source should be at the lowest practicable segregable level of the system architecture.[37] This feature has been coined "the doctrine of segregability," and more recently and informally as the "doctrine of modularity," or "modular licensing."

[37] *See e.g.,* DFARS 227.7103-4(b) (2025); DFARS 227.7203-4(b) (2025).

In practice, this may result in discrete subsystems or components of a larger system being categorized as developed exclusively at private expense and therefore subject to the most significant license restrictions from the Government's perspective (e. g., Limited Rights in noncommercial TD, or Restricted Rights in noncommercial CS[38]). Since these narrower or restrictive categories of license rights generally do not allow release of the data or software for competition, this practice can result in the Government having incomplete data, CS, and rights for a system or subsystem — sometimes referred to as "Swiss cheese" data rights.

**Figure 7. Swiss Cheese Data Rights**



In such a case, DoD would be unable to release the complete, detailed TD package with data rights covering the entire system for a competitive solicitation due to the restrictions on the data covering the proprietary subsystems or components. This circumstance can limit competition on large systems funded substantially by the Government. Often, this license schema compels the Government to rely on the discrete subsystem OEM for parts, new units, or maintenance or repair on the entire system.

A related type of DFARS segregability is known as clause segregability and applies only to TD. Per DFARS 227.7103-6(a), for commercial items (other than software), if the Government paid for any portion of the development of a commercial item, the clause at DFARS 252.227-7013 will govern the TD pertaining to any portion of the commercial item that was developed in any part at Government expense. DFARS 252.227-7015 will govern the TD pertaining to any portion of a commercial item that was developed exclusively at private expense. This means that the funding-based rights can sometimes apply to portions of a commercial item (other than software).

**2.8.2 Mitigation - Modular Licensing:** To mitigate IP-based restrictions on competition in these scenarios, DoD can utilize MOSA and SNLs. MOSA combines system engineering open architecture techniques with open licensing and related legal and business considerations to isolate proprietary technology and prevent overleveraging of limited private investments and undermining of return on Government investment. By mitigating the impact of these "Swiss cheese" holes, the Government can effectively manage the whole "cheese".

MOSA enables the Government to limit the impact of restrictions on privately developed components by treating those components and technology as proprietary "black boxes" that are described with releasable FFF data and well-defined and described functionalities, interfaces, and MSIs to the remainder of the system components. This allows other vendors to identify suitable alternatives for the proprietary black boxes, or, if necessary, to contract with the OEM

[38] *See e.g.,* 7013, *supra* note 8, at (a); 7014, *supra* note 9, at (a).

for support for those black boxes, but to limit such sole-source efforts to the black box itself. If the Government needs to ensure capability to repair or replace components in such a black box, MOSA does not necessarily solve that problem, but it offers a useful tool in addressing IP licensing challenges.

## 2.9. MISCONCEPTIONS ABOUT IP AND DATA RIGHTS

**1)** It's too early in the program life cycle, so the program can't plan for IP now: FALSE!

- EARLY and continuous analysis using historical data from similar systems identifies logistic, maintenance, and operational concepts; the need for enabling organic/in-house (Gov't personnel/facilities) sustainment (depot) capability, and training which informs EARLY data needs required to develop PS input to the IPS, prior to RFP, re-procurement, or similar activity. There are various risk mitigation strategies that may be incorporated into a program's IPS (see Figure 9 Examples of Program Uncertainty and IP Mitigation Strategies).

**2)** The program can't get delivery of DMPD data: FALSE!

- There is no preclusion or restriction on Government requiring delivery of DMPD data.
- The Government may receive DMPD data with lesser rights than Unlimited Rights. When ordering DMPD data, request delivery in a contract data requirements list (CDRL) and consider developing a SNL tailored to the specific use case.

**3)** If the program paid for the development of the item, then it can automatically get the data later, when it needs it, and it will have all the rights to use the data: FALSE!

- There is no relationship between source of funding and ability to require delivery after contract award. Having rights to data, but not asking for delivery of the data does not meet the need. Both are required and they are separate contractual agreements.
- The Government must secure rights in data, during solicitation and ideally during competition, by requiring delivery of data by including terms in the contract, documented in a CDRL and appropriate data item description (DID) that require the contractor to provide specific TD and software items that satisfy the Government's needs.
- Unless the program required delivery of the data in a CDRL, the Government may not be able to use the data when they need it even if the Government is entitled certain rights.

## SECTION 3: THE 5W'S OF THE IPS

This section will cover the foundations of the IPS: what it is, why it's critical, where to find direction for the IPS, when to consider it, who writes it, and key attributes.

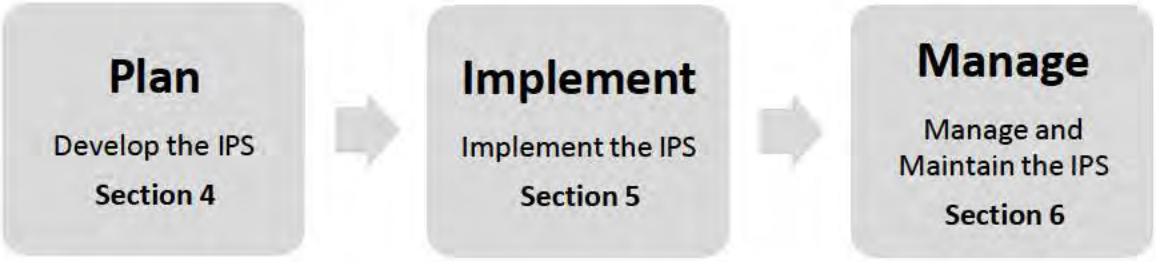
### 3.1. WHAT IS THE IPS?

DoDI 5010.44 states "each DoD program will have a robust IPS" and provides IP implementation guidance for "the full spectrum of IP and related matters (e.g., TD and CS deliverables, patented technologies, and license rights)."[39] DFARS 207.106 discusses assessing IP needs of the system and establishing an AS that provides for the TD and CS deliverables with associated license rights needed to sustain the systems over their life cycle.[40] Importantly, among other requirements, both the assessment and IPS must be developed "before issuance of a solicitation for the weapon system or subsystem."[41]

The (IPS, which is embedded in the AS and reflected in the IP Management Plan for PS in the life cycle sustainment plan (LCSP), is the strategic plan to meet data requirements for the whole program and for the life of the program. The IPS is the result of strategic planning and critical analyses of data requirements derived from sources like the capability development document (CDD), AS, systems engineering plan (SEP), PSS, program protection plan (PPP), test evaluation management plan (TEMP), and business financial plan. It provides a strategic framework or architecture that maps use cases for data to execute plans and deliverables that address risks, issues, and opportunities for how to satisfy those requirements.

#### 3.1.1 Three Phases of the IPS.

**Figure 8. Three Phases of an IPS**




The IPS is a living document and follows the basic phases of any strategy:

1) Plan and formulate the strategy: The first phase is the formulation or development of the IPS itself.
2) Implement the strategy: Contracts or other formal agreements are the mechanism in which the Government implements strategies so, this phase is focused on the contracting process from pre-solicitation to RFP and CDRL planning to negotiations.

[39] DoDI 5010.44, *supra* note 2, at sec. 4.1.
[40] DFARS 207.106 Paragraph (S70)(1)(i)-(ii) (2025).
[41] *Id.* at (S-70)(2)(i).

3) Control, evaluate, and manage the strategy: This phase includes critical activities like deliverable reviews for markings and managing data rights. Additionally, managing the IPS includes updating it as assumptions and risks are realized, the program objectives change, or other major decisions are made.

**The IPS should not be viewed as a one-time compliance check.**

## 3.2. WHY IP IS CRITICAL TO THE PROGRAM?

**"I have always found that plans are useless, but planning is indispensable."**

**- Dwight D. Eisenhower**

**3.2.1 Critical to Program Execution:** IP is of critical importance for national security, national prosperity, competition, and innovation at the strategic level. But IP is most critical for successfully executing the program with effective, affordable, and agile solutions for the warfighter's required capability. The analysis and critical thinking that drives the IPS is a mechanism to break down the complex derived requirements that the program depends on. The IPS documents these findings so that the program can have a consistent understanding of the requirements and approach throughout the life cycle.

A few examples of data, CS, and rights necessary to execute program requirements are:

- TD to support maintenance and repairs by deployed warfighters, or activities at DoD depots, sustainment centers, and shipyards in accordance with 10 U.S.C. § 2464[42].
- TD for airworthiness certification of repaired equipment.
- Software source code and other software components required for operability may be necessary to ensure cybersecurity depending on the method of vulnerability testing.
- Test results or performance envelope data may be needed for aircraft accident investigations.
- Other types of data may be necessary for Government contract management activities (e.g., Earned Value Management needed to report to various Government offices beyond the original program.)

**Failure to plan for and secure necessary data and IP rights can hinder DoD's ability to execute its critical missions and increase operating costs in the near and long-term.**

**3.2.2 The IPS is Risk Mitigation for Program Uncertainty:** One of the most important reasons to think through a robust IPS early is that it reduces risk to the program. Acquisition of

[42] § 2464, *supra* note 16.

warfighter capabilities and planning for weapon systems with potential life cycles exceeding 30 years inherently carries uncertainty and risk. Many programs highlight the uncertainty of data requirements (final technical design, sustainment strategy, etc.) as a reason NOT to consider IP acquisition early in the program during competition.

This uncertainty has led programs down two common but opposite approaches: **buy everything or buy nothing**. Both paths have pitfalls that can limit flexibility and options for agile decision making throughout the life of the program. However, the uncertainty is the reason why it is so important to do detailed analysis, tailor the strategy, and buy the right data early.

Much uncertainty in data requirements can be reduced through detailed independent PS Analyses (e.g., level of repair analyses, PS business case analyses using historical analogous system data, data from market research and intelligence, and data from industry days). These types of analyses help identify critical components and modules that will be candidates for sustainment activities like depot level repair, additive manufacturing, re-procurement, MOSA and then to plan for data deliverables and license rights that provide flexibility to implement future updates or changes to program strategies and plans throughout the life cycle.

**The objective of developing a complete and executable IP Strategy is to achieve a balanced approach, ensuring the acquired IP is neither excessive nor insufficient.**

Figure 9 below highlights some examples of uncertainty programs may face, how they drive uncertainty in IPS development, the resulting IP implementation, and ways to mitigate those outcomes regarding data, CS, and rights. For example, program uncertainty in future operational requirements will create uncertainty in what specific data requirements to plan for. The IPS then may be built to either overreach and as for "everything" driving challenges with industry or may underestimate the need and create long-term vendor lock as well as mission impacts. To mitigate this scenario, a combination of tactics may be employed such as deferred ordering, priced options, and use of historical data for similar systems.

All these mitigation tactics are enabled by a robust IPS that considers and acknowledges uncertainty upfront and builds flexibility into the framework.

**Figure 9. Examples of Program Uncertainty and IP Mitigation Strategies**




## 3.3. WHERE IS IPS DIRECTION?

The requirement to prepare an IPS is codified in several statutes and regulations: namely, 10 U.S.C. §§ 4211[43] and 3774[44] as well as DoDI 5010.44[45] and accompanying Adaptive Acquisition Framework (AAF) Pathway policies. All programs should develop and prepare an IPS; this is especially true for any acquisition that will involve technology development, organic sustainment, planned competitive evolutionary or incremental upgrades, interoperability, or integration with other systems, or that will otherwise call for acquisition of IP or IP rights.

## 3.4. WHEN IS THE IPS PREPARED?

Developing an IPS is most impactful early and should be initiated as early as practicable and updated at appropriate milestones or whenever events or circumstances materially affect the associated assumptions, conditions, risks, issues, or opportunities.

As with all planning, the greatest freedom of maneuver or trade space exists at the beginning of the planning process. This is especially true in acquisition when opportunities for competition are at their peak. Additionally, the nature of contractual agreements understandably makes it harder to change once an agreement is signed; so, it is best to be clear about requirements, value, and expectations for future needs as early as possible to build in flexibility.

Two common factors have encouraged the delay of meaningful discussion of data rights issues until after contract award:

1) The first is the reality of program acquisition priorities focused on short term cost, performance and, most critically, schedule rather than long-term impacts. However, this short-term or near-sighted approach often leads to higher costs, inferior performance, and

[43] 10 U.S.C. § 4211 (2025).
[44] 10 U.S.C. § 3774 (2025) [hereinafter § 3774].
[45] DoDI 5010.44, *supra* note 2.

significant schedule delays down the line when alternative solutions become necessary. Planning early should enable the program to build in cost into the initial budget estimates and ensure the data necessary for performance is negotiated prior to contract award.

2) The second is that DFARS data rights procedures[46] allow merely documenting IP owner assertions of restrictions on use of data in the contract at award and postponing Government scrutiny of asserted restrictions until after contract award. However, postponing decisions on IP often does not have favorable outcomes for the Government due to reduced trade-space and negotiating power post-award. Addressing IP concerns and assertions of data restrictions post-award often takes an extended period to resolve. Unfortunately, during the period for dispute resolution, the Government must abide by the asserted restrictions even if the restrictions are ultimately determined to be unjustified.

The IPS is required for all major program decision points in accordance with the specific AAF Pathway guidance and should be updated throughout the program life cycle anytime a major change (like a solicitation or engineering change proposals) occurs. Additionally, similarly to other program strategies, there may be an accompanying plan that implements the strategy. For example, while the formal AS signed by the Milestone Decision Authority (MDA) may not be updated often, the program management plan, risk management plan, contract plan etc. are often revisited and updated to reflect status of the program and important changes like budget. IP should be viewed in a similar way because the specific implementation of the high-level strategy will require more granular detail, and new information may cause a change to the data rights framework.

### 3.5. WHO IS RESPONSIBLE FOR THE IPS?

The program manager (PM) is ultimately responsible for the AS and developing a plan to meet the program requirements, but IP must be a team effort. The development and continuous updating of an effective and robust IPS will require active participation of subject matter experts from a wide variety of disciplines, including engineering, logistics, contracting, cost, accounting, and legal.

To strategically plan for all data needed on the program, the support of a robust and knowledgeable cross-functional Integrated Product Team (IPT) is necessary. In support of writing the AS, the PM should establish a cross-functional IPT under the leadership of a data manager, or personnel serving in that role. The IPT should identify and evaluate data requirements and a framework of rights that will meet program life cycle objectives and draft the IPS. The IPT includes the PM, engineers, test managers, PS Managers (PSMs) and logisticians, contracting officers, data managers, IP subject matter experts (SMEs) or specialists, and acquisition and IP lawyers to fully cover the analysis necessary to determine the IP requirements. Each functional expert will contribute essential information to understand the data requirements, contracting tools, and legal limitations or opportunities available to collectively craft a plan that meets the program objectives and mitigates risk.

[46] *See e.g.,* DFARS 252.227.7017 (2025).

### 3.6. IPS ATTRIBUTES

**A good IP Strategy reflects critical analysis that shows that the supporting set of planned tactics to achieve IP strategic goals are realistically achievable within budget and time constraints.**

DoDI 5010.44 outlines what the IPS should minimally contain as part of the AS and LCSP.[47] The strategy should contain sufficient details to allow senior leadership and the MDA to assess whether the strategy makes good technical, business, financial, and legal sense, effectively implements laws and policies, and reflects the Department's acquisition, sustainment, and modernization priorities. It should describe the PM's plans for the acquisition, use, and protection of IP (e.g., TD and CS deliverables, patented technologies, and license rights), and identify and manage the full spectrum of IP and related matters (e.g., TD and CS deliverables, patented technologies, and license rights). Further guidance for what "sufficient detail" may look like is below.

**Table 3. Attributes to Integrate in an IPS**

| Examples of Attributes/Measures to Integrate in an IPS | |
|---|---|
| ⊕ Maps IP requirements to program objectives | ⊕ Supported by IP market intelligence |
| ⊕ Describes use cases for data requirements (5Ws): (the right data, with the right rights, at the right time) | ⊕ Recognizes that IP owners can decline to sell data and data rights and contains strategies to encourage IP owners to meet war fighter needs |
| ⊕ Tailors TD and software deliverables, and associated license rights necessary to equitably meet mission and program objectives (e.g., MOSA, reprocurement manufacturing, detailed depot repair.) and industry interests | ⊕ Updated as necessary and appropriate as new material information emerges, such as IP owner data rights assertions or refusals to sell data |
| ⊕ Describes how the strategy aligns with the applicable rules of the chosen contracting strategy (full and open competition, OTA, sole source, etc.) | ⊕ Considers needs for all types of data including TD, CS, financial and administrative data |
| ⊕ Estimates life cycle costs related to TD and license rights. | ⊕ Addresses both short-term needs (such as for developmental or operational testing, airworthiness, or source qualification) and long-term needs (such as for maintenance, repair, and reprocurement) |
| ⊕ Incorporates analysis of data, CS, and rights already possessed to determine gaps | ⊕ Leverages source selection evaluation |
| ⊕ Identifies risk mitigation strategies and flexible options. (e.g., priced options, deferred ordering, deferred delivery, data escrow agreements, access agreements, and SNL agreements) | ⊕ Identifies risks related to data deliverables and rights |

[47] An LCSP is required for all covered systems and is the principal document establishing the system's PS planning and sustainment, pursuant to 10 U.S.C. §4324, for "covered systems" defined in that statute. For covered systems, the LCSP must contain a comprehensive PSS; *see also* DoDI 5010.44, *supra* note 2.


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## Table 4. Attributes to Avoid in an IPS

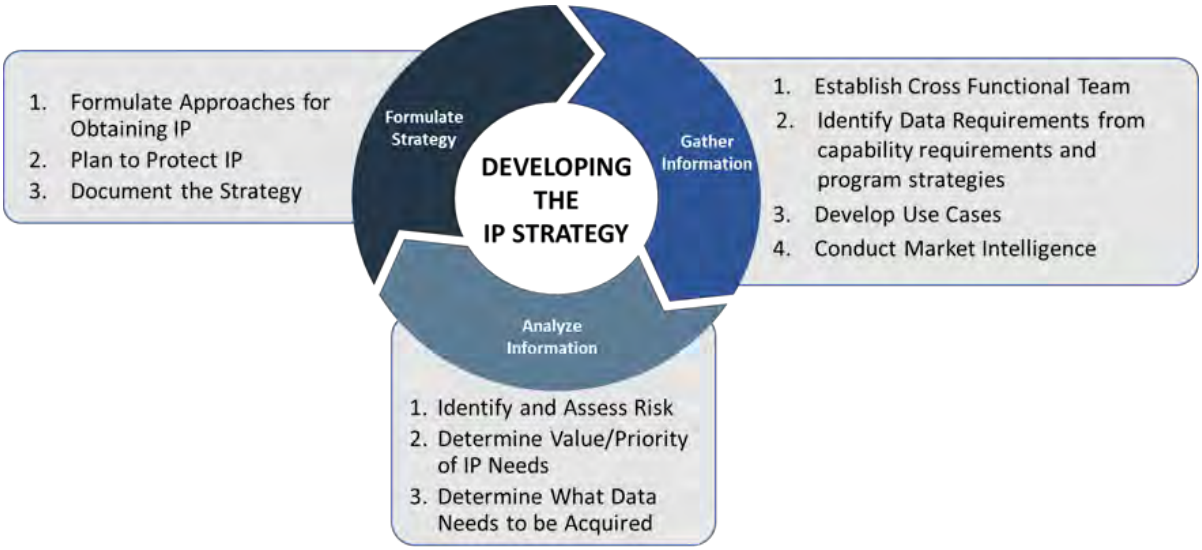
| Examples of Attributes/Measures to Avoid in an IPS | |
|---|---|
| Ø States a requirement for unlimited or Government purpose rights "in everything" | Ø Assumes the IP owners will agree to sell all data, CS, and rights requested at an affordable price |
| Ø Copies from another program without tailoring to specific needs and circumstances; considering updated policy and guidance | Ø Assumes reverse engineering can be done using Limited Rights, manufacturing data, or other proprietary data |
| Ø Fails to assess and mitigate effects of "doctrine of segregability" as necessary | Ø Fails to plan for fulfillment of all data, CS, and rights needs for all types of data for the full program life cycle |
| Ø Does not identify use cases for non-standard data rights requested | Ø Does not map rights to deliverables |
| Ø **Simply stated, "the Program shall acquire all TD and software, and rights needed for the Program" without any further detail on implementation** | |

**WARNING: Referencing old IP strategies that pre-date DoDI 5010.44 and other current statutes and policies may not provide good examples of a tailored, balanced, and robust IP strategy.**

## SECTION 4: DEVELOPING THE IPS

As discussed in Section 3, the first phase of the IPS is to formulate the strategy itself. There are three major steps in formulating the IPS: gather information, analyze information, and formulate the strategy. There are many components to each of these steps that will be covered in this section.

**Figure 10. Three Steps to Develop an IPS**




### 4.1. GATHER INFORMATION.

**4.1.1 Establish Cross-Functional IPT:** To effectively acquire necessary IP and associated rights, the cross-functional IPT must consider all aspects of the program that require IP to be successful. This team includes the PM, engineers, test managers, PSMs and logisticians, contracting officers, data managers, and acquisition and IP lawyers to fully cover the analysis necessary to determine the IP requirements. The right team is essential to understanding the tools available and the constraints on the Government's ability to require what it desires in the way of IP rights. Identifying the right team is a deliberate step and should not be overlooked.

**Figure 11. Objectives of the Data Management IPT**

| Objectives of the IPT | |
|---|---|
| 1. What data and associated rights do we need to support development (when relevant), fielding, short- and long-term production, and operations and sustainment? | 5. What risks, issues, and opportunities result from lack of or availability of data and associated rights? |
| 2. What data and associated rights do we already have and what are the Government's rights/licenses for that data? | 6. What is the best approach or combination of approaches for meeting the identified needs considering the associated risks, issues, and opportunities? |
| 3. When do we need the data and associated rights to use it? | 7. What will it cost over the life of the system, program, project, mission, or K? |
| 4. Is the data best sourced from the public domain, a private party, or internally from the Government? | 8. What measures. metrics, or other results will be integrated to guide implementation? |

**4.1.2 Identify Data Requirements:** The objective of this step is to identify specific data, CS, and rights needed (e.g., TD, CS, contract administration data) to execute DoD capability requirements during all phases of a program: development, manufacturing, sustainment, demilitarization, and disposal. While some of this information may not be known with certainty, there are several methods to plan for and mitigate that uncertainty, especially independent PS analysis.

IP requirements are derived from the program's primary capability requirements documents (e.g., Initial Capabilities Document, CDD) and subsequent functional strategies (e.g., Single Acquisition Management Plan, SEP, TEMP, PSS, LCSP, PPP, etc.) to meet technical, functional, and operational requirements. These program strategies are enabled by and dependent on IP data in several ways. As such, the IPS should directly inform, support, enable, and implement these plans through robust and collaborative critical thinking as an IPT.

One way to break down the program's unique requirements for hardware and software as they support the various functional areas is to conduct a requirements analyses guided by the work breakdown structure (WBS) and subsequently conduct a LORA. These cross-cutting analyses help all functional areas understand cost, schedule, and performance risks, as well as potential issues and opportunities associated with the data needed to implement program plans. These analyses also inform the data needs mapped to use cases: the who, what, where, when, why, and how the data is needed.

Identifying requirements by subject matter helps determine where the IPT can find the derived IP requirements and what they might be.

### 4.1.3 IP Requirements to Support Engineering and Technical Objectives and Activities.

**Figure 12. Examples of Engineering/TD Requirements**

- Hardware and software design data
- Developmental or operational test data
- Qualification or certification data
- Software defect reports and various technical progress reports
- Briefings

Engineering tasks inherently require data: test data, finite element analysis results, drawings, performance measurements, etc. As such, it is important to ensure that this data is captured in the data requirements. These requirements can then be integrated into a robust IPS to acquire and maintain engineering data throughout the program. The key documents that guide the identification of engineering and TD requirements are the CDD, SEP, TEMP, PPP, and WBS. Examples of considerations for engineering data include:

- Development data, including any data about a proprietary system used to develop the system, that could be used over program life cycle for sustainment and procurement.

- Data required to obtain and maintain airworthiness certification is critical to qualifying aircraft to be flown and to ensure the safety of aircrews and noncombatants.
- Data to support nuclear surety is critical to ensuring the safety of warfighters and noncombatants.
- Unique uses for test data to support other program activities, future competitive upgrades or improvements, sustainment assessments, interoperability with other systems, and sharing engineering data between programs.

IP planning should be part of initial system engineering design considerations because the ability (or probability) of getting the necessary IP and associated rights may drive specific engineering solutions like commercial versus non-commercial solutions or MOSA. The IPS should be customized based on the common, shared, and unique characteristics of the system to include architecture and interfaces, PSS, core logistics analyses, depot source of repair determination, and commercial availability of the item.

Implementing MOSA requires a thorough IPS that ensures MSIs are identified and what rights are needed to create an open architecture and black boxes. In turn, anticipated IP challenges to be mitigated help to inform where modularity and black boxes are desirable. The program's plan for MOSA should be documented in both the AS (including the embedded IPS) and in more detail in the SEP. Identifying MSIs and the appropriate data, CS, and rights to enable that strategy throughout the program is an example of how closely functional plans and strategies are tied to the program IPS implementation. (See Appendix A References for a link to the MOSA Guidebook)

If a program is implementing digital engineering as part of its systems engineering approach, careful consideration needs to be given to acquiring the necessary technical baseline documentation accompanied by the appropriate IP rights. Otherwise, the program will fail to reap all the benefits of digital engineering. Additional guidance and a comprehensive list of digital engineering data considerations can be found in the Digital Engineering policy DoDI 5000.97. Examples of considerations for digital engineering data include:

- Digital models, simulations, threads, artifacts, and all associated data to support model-based systems engineering.
- Digital models, simulations, threads, artifacts, and all associated data to support mission engineering analysis.
- Digital models, simulations, threads, artifacts, and all associated data to support certifications, other program activities, future competitive upgrades or improvements, sustainment assessments, interoperability with other systems, and sharing all engineering data between programs.

### 4.1.4 IP Requirements to Support Acquisition/Business Objectives and Strategies.

**Figure 13. Examples of Acquisition/Business Data Requirements**

- Integrated Master Schedule
- Earned Value Management Data
- Vendor Risk and Mitigation Data
- Data Enabling Competition Objectives
- IP Valuation Data
- Market Factors
- Contract Administration Data

The acquisition and business requirements for IP may be less obvious than the engineering/technical ones. A good place to start is the draft AS that identifies key plans, activities, and objectives that rely on data. The contract strategy is also a significant consideration for the IPS because a certain contract strategy may implicate which IP regulations, if any, are applicable (i.e., FAR vs non-FAR). Some data required to support acquisitions may not be TD or CS so, even if using a FAR contract, may not be covered by the DFARS clauses for rights in TD and CS. Some considerations include:

- Competition objectives.
- Small business partners plans and strategies.
- Information sharing requirements (like financial reporting and analysis).
- Long term contract strategy.
- Industry's business objectives.
- The market economy for the program's tech space.
- Commercial best practices.

Some of these considerations drive IP requirements and, conversely, others may be decisions driven by IP requirements from other functional areas. This is why it is so critical to conduct this cross-functional analysis of requirements early in the program before major decisions are made. For example, if the AS is to have periodic competition for planned upgrades throughout the life cycle, the Government needs to ensure the IP requirements contain IP data, CS, and rights to support that acquisition objective. On the other hand, if the IP requirements highlight a need for other than standard rights, the acquisition and contracting approach needs to plan for that.

As always, cost and budget are critical factors to planning that may influence or be influenced by IP requirements. If there is not sufficient budget at the current phase to order all necessary data required, mechanisms such as deferred delivery and priced options (see Section 5.3) can be utilized to ensure that the Government negotiates and plans for the right IP even if it cannot be acquired in the initial contract award. IP requirements that are identified early in the program,

should be included in the Life Cycle Cost Estimate and subsequently in the Program Objective Memorandum (POM)/Budget.

Additionally, as mentioned in the ROI discussion in Section 2, it is very important to consider who the potential contracting partner is and how their business model and objectives impact their position on IP for the program, as this could greatly influence the acquisition and PSS.

Finally, another aspect of the acquisition that will greatly affect the IPS is if the program is joint, multi-national, or part of the Foreign Military Sales or Excess Defense Articles programs. IP rights that only directly cover Government needs may not be sufficient to address the needs of security cooperation partners such as desire for their own organic sustainment capability or joint military operations. If there is any contemplation of international security cooperation in connection with a weapon system, it is a best practice to consult with and include representatives of those interests in the cross-functional IPT for IP planning.

### 4.1.5 IP Requirements to Support Life cycle PS.

**Figure 14. Examples of PS Data Requirements**

- **Technical Manuals**
- **Provisioning**
- **Depot Maintenance**
- **Software User Manuals**
- **Training Manuals**
- **PS Analysis (PSA)**

The PSS is the strategy to deliver affordable and effective PS across the life cycle. Decisions made early in the life cycle have significant impact on life cycle costs and help formulate initial system cost positions. PS Managers (PSMs) and Logisticians must complete a detailed analysis of the sustainment Key Performance Parameters and Key System Attribute in the CDD (availability, maintainability, etc.) and account for the overarching AS and PSS.

These analyses will include PSA, such as FMECA, LORA, and Business Case Analysis (BCA). The results of the initial LORA and PS BCA determine tailored data needs and necessary rights to begin to incrementally develop the PS package over the design, development, test, production, and fielding phases to meet user demonstration and test events required to deliver a validated and verified PS package. The PSM is crucial in the development and delivery process, as the PM's advocate to the Integrated PS Element for cost input into the planning, programming, budgeting, execution, and POM process to ensure funds are available to execute future PS activities.

Delivery of depot repair package data (e.g., depot repair manuals, support equipment and tools) can be delayed for a reasonable period until those data deliverables are required (mid-way into initial operational capability plus four years). The data rights must be established at contract inception, but those deliverables may not be required until sometime later to establish initial depot capability and capacity. This combination of information will frame the holistic approach to IP needs for life cycle PS planning by identifying required TD and levels of rights and tailoring PS inputs for the IPS.

The PSM should coordinate with the cross functional IPT early on any needs they might have in sustainment that haven't been considered and/or verify that their needs are captured in the IPS

(e.g., TD package and CS deliverables, method of delivery, and associated license rights, etc.). **For detailed guidance on IP Planning for PS see Appendix B for access to the IP for PS Toolkit.**

### 4.1.6 Connect Data Requirements to Delivery Requirements by Determining Use Cases:

Once the IPT has developed data requirements based on the core functional considerations, and pursuant to 10 U.S.C. § 4324, the PS BCA, the functional Subject Matter Experts (SMEs) on the IPT need to validate and verify data needs are tailored using Figure 2-2 of the LCSP Outline, Version 3.0, hosted on DAU.[48] This table is a best practice tool to assist the PSM IPT in tailoring data needs to uses at the WBS level, based on data analysis and stakeholder guided critical thinking. This process is not limited to the PSM IPT and can be used by other functional IPTs for documents such as the SEP, TEMP, and PPP, to guide the team in understanding "how to" articulate data needs and licenses necessary to implement program plans.

Use case pairs connect program data needs with one or more use cases, or how the data will be used at that time, to determine when the data is needed and what rights the Government needs. The connection of data with uses provides the IPT a guide for when to ask for data, what type of data to ask for, and how to structure the contract specifically for the types of license arrangements and other arrangements that will satisfy the use cases, prior to developing an RFP. For example, original equipment manufacturer (OEM) design data and SNLs may be necessary for qualification of additive manufacturing parts and to implement maintenance in contested environments. The data and licenses need to be tailored to where, who, and how the data will be used. This structure should also clearly define the content and formatting requirements for each corresponding deliverable via CDRLs and DIDs.

Use case analysis ensures the PM and all stakeholder equities (e.g., data needs, uses, risks, opportunities, delivery timing aligned with program test and developmental or operational demonstration events) have been considered and incorporated into actionable deliverables through contracting methodologies and CDRLs, source selection and evaluation factors and criteria, that incentivize desired outcomes.

A use case tailored to IP requirements provides a practical description of all needs for data and IP rights by identifying particular TD, software, or other data along with the intended purpose, effect, and condition of use.

[48] U.S. DEP'T OF DEF., LIFE CYCLE SUSTAINMENT PLAN VERSION 3.0, FIG. 2-2 at 17 (13 Oct. 2022).

**Figure 15. IP Use Case Development: FILL-IN-THE-BLANK**

**IP FILL-IN-THE-BLANK**
**Mapping IP To Use Case**

To map IP to use case(s) an IP requirement should take a form substantially like:

"**Data**_____[*e.g., TD, software, or other*] **necessary for** _____ [task] (*or other data description*) **and rights for** _____[who] (*e.g., Government employees, IP owners, contractors, consultants, foreign allies, the general public, etc.*) [location] (*e.g., a particular deport, in theater, the IP owner or contractor's facility, anywhere, etc.*) **to perform**_____[a task] (*e.g., maintain an engine, repair fuselage damage, diagnose a system failure, train warfighters to operate a rangefinder, identify a sonar target, etc.*) **on/under** _____**[condition]** (*e.g., obsolescence, supply shortage, exercise of an option, expiration of a more restrictive license, etc.*) **in the** _____[timeframe] (*e.g., immediately upon delivery and perpetually, ten years after contract award and thereafter*)."

Another simple way to frame use cases is to answer the 5W's plus how for each data requirement (Fig. 21). The answers to these questions create a problem statement clearly defining the task deliverable and informing the necessary rights. These statements can be used in the RFP to clearly communicate to industry what the tailored requirement is. An example is: Engine TD is needed to conduct scheduled maintenance by active-duty maintainers in CONUS and OCONUS locations every 250 flight hours for the life of the system. Additional examples of IP use cases will be published as a job aid.

**Figure 16. IP Use Case Development: 5 W's**

**What** data is needed? (technical data, computer software, etc.)

**Why** is the data needed? (what task relies on the data (repair engine, replace a circuit card, perform maintenance on a motor)

**Who** needs to use the data? (the entire government, the government depot, third party integrator, support contractors, etc.)

**Where** will the data reside and be used (physical location, vendor IDE, etc.)

**When** will the data be used? (contingency, daily, 20 years in the future, etc.)

**How** will the data be used? (Are there other intended uses beyond the core task? additive manufacturing, competition, reprocurement, etc.)

The Work Breakdown Structure may also provide a useful framework for identifying potential use cases and data but may not lead to inclusion of all IP needs for the life cycle of a system including, for example, operational and contract administrative purposes, upgrades or technology refreshes, environmental disposal, and demilitarization.

While several approaches for identifying use cases have been presented, no single approach directly addresses all IP needs or circumstances. So, care and attention should be paid to determining the best approach for a given system and acquisition effort. In many instances, multiple approaches can and should be used in the same system and acquisition effort to generate use cases and corresponding data requirements.

### 4.1.7 Benefits Of Use Cases:

Use case pair analysis enables precise characterization of the Government's IP needs by stating the needs as use-based performance objectives from which Government rights to the data may be negotiated.

Use case pairs provide a useful method of drafting SNLs, which are statutorily preferred[49] and should be negotiated whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights.[50] Identifying use cases promotes tailored IP requirements which naturally should correct the common approach of making broad requests for Unlimited Rights or Government Purpose Rights in all data, which are more likely to meet industry resistance.

Use case pairs may inform the development of IP-related evaluation factors. For example, use case pairs may be used in a Value Adjusted Total Evaluated Price (VATEP) source selection evaluation methodology, which is described (along with other IP-related evaluation methodologies) in Section V. Thus, the use case pair approach helps source selection and special license negotiations to complement each other. Use case pairs allow for better prioritization and understanding of the timing of when IP is needed, resulting in a more effective and executable IPS.

Understanding schedule requirements associated with data requirements help to establish delivery requirements, inform negotiation parameters, and prioritize data requirements and negotiation objectives. IPTs can analyze the data, CS, and rights appropriate for use of deferred delivery and/or priced options at the initial contract when competition is in play. Programs should consider not requiring early delivery of data with broader license rights when data may be delivered later (and broader license rights may "spring" or be conditioned upon a particular date or the occurrence of an event). An important example of timing in use cases is software because it is in a continual cycle of development, testing, and continuous operation through disposal. In this case, programs should document in their IPS the 5W's plus how the Government needs to use TD and software in such continuous efforts and consider that timing rhythm in determining data, CS, and rights use case pairs.

Use case pairs are a very effective approach to interest-based negotiations that maximizes value to both parties. For example, data, CS, and rights necessary for organic maintenance and repair of certain portions of a system may not be required until a later point in the life cycle (e.g., when a system goes into sustainment and transitions from contractor logistics support (CLS) to organic support) allowing the IPS to consider different options to achieve delivery, like priced options,

[49] *See* § 3774, *supra* note 44, at (c).
[50] DoDI 5010.44, *supra* note 2, at Sec. 1.2(b)(3).

rather than delaying delivery because the data isn't needed now. (See subsection 4.3.1 on Select methods for obtaining IP and data).

### 4.1.8 Conduct Market Intelligence.

The last step in Gathering Information for the IPS is to conduct market intelligence specific to the relevant market. With the knowledge of the program's technology or information needs, the IPT should gather additional supporting information about the market's offerings and investment related to these needs. In this context, the marketplace includes private industry, intra-department acquisition efforts, and inter-Government acquisition efforts. This market intelligence will inform risk assessments, assumptions, and cost estimates that will be critical in the next steps to analyze the information and formulate the strategy. A primary objective is to determine whether there will be any obstacles to securing the required TD, CS, or associated license rights based on prior private investments in the marketplace. Market information will help the program understand potential budget constraints and anticipate industry IP positions in proposals.

This information can be gathered through activities such as open-source market research, industry days, science and technology (S&T) assessments, and competitive prototype developments. Even if the procurement is known to be a sole source acquisition, there is still value in conducting broad market research regarding the IP requirements for comparable IP data to help inform the strategy and subsequent negotiations. The IPS should summarize how the Program Management Office communicated with industry regarding Program Strategies related to data and data rights.

At the early stages of a program, the market intelligence will look generally at the economic market and approach to IP in the targeted technology space. Some critical sources of information include how many potential vendors there are, how competitive the marketplace is, common industry practices regarding certain types of data, historical agreements, past performance of potential vendors regarding IP approaches, business strategies of potential vendors, the value of IP to the potential vendors (early tech development, commercial revenue, estimated cost for various data and license rights which may vary by vendor, etc. With this information the IPT can inform the IPS based on anticipated vendor's approaches to data and license rights. Additionally, the market intelligence should evaluate the scope of privately developed technology (including development performed using Independent Research and Development funding) to better understand the Government's anticipated license rights.

Understanding industry's perspective on their own IP's value should be considered as part of the market intelligence effort. IP valuation plays a major role in the mergers and acquisitions of businesses, in IP litigation, in commercial IP licensing transactions, and, often behind the scenes, in defense acquisitions. Industry values IP using three primary methods:

- Cost – the cost of developing or building the IP asset, which could also be viewed as the cost of replacing the asset.
- Market Value – the market value of comparable assets.
- Income – the discounted present value of the expected income stream from the asset.

It is not clear that direct application of industry IP Valuation methods (cost, market, and income) will necessarily assist the Government team in determining the value of IP, but variations or hybrids of the above may be useful. These are not unique to IP, and can be applied to houses, cars, and other assets that are bought and sold. Each of these methods has strengths and weaknesses, and prerequisites for use.

## 4.2. ANALYZE INFORMATION

### 4.2.1 Identify and assess Risk, Issues, Opportunities.

**Risk and Issues**: Once the IPT has gathered the necessary information, the first step in analyzing it is to review it for risks and issues. The objective is to use the risk analysis to tailor the IPS to acquire only the data needed while protecting the Government's investment. There are two perspectives of risk to consider with IP:

- The probability or likelihood of needing a specific piece of data and the consequence of not having it. Put another way, how likely is the program to need the data?
- The probability of not receiving the requested data, CS, and rights (i.e., known needed data) and the consequence of not having that data.

Another way to look at risk in the context of IP is that IP can both be the risk **and** be a mitigation for other program risks:

- IP as the risk itself: for example, a program may need a particular type of maintenance data or it cannot maintain an associated component.
- IP as a risk mitigation strategy: a component has a high likelihood of failure, and the consequence of failure is inability to meet operational availability requirements. So, the risk mitigation strategy is to ensure the program has the data necessary to have multiple tiers of sustainment solutions.

Use cases provide a foundation for discussing probability and consequence in operational contexts. Subsequently, risk mitigation strategies can be put in place. If the use case indicates that there is a low probability of needing a specific piece of data for contingencies, but should that situation arise and there is a catastrophic result because the Government doesn't have the data, then the IPT should consider a strategy like a priced option or data escrow account (see Section 5.4.1) to ensure the program can get the data if needed, without requiring payment and delivery of up front.

Additionally, if the risk analysis determines there is a high likelihood industry may not provide the necessary rights to a critical piece of data, the IPT can plan for that early. In some instances, the IPT may adjust their IPS to re-evaluate the need, find another way to obtain the data, or use a back-up plan to meet the operational requirement. Conducting this risk analysis will help the IPT clearly and objectively understand where to focus specific tactics and techniques in the IPS as well as begin to prioritize requirements for investment.

**Opportunities:** An often-overlooked aspect of risk management is opportunity management. A question for the IPT is how the IPS can create or realize opportunities in the program. For

example, if the program has identified a future opportunity to potentially team with another service or integrate technology from another program, the IPT should evaluate how the right data strategy could help realize those opportunities. IP opportunities are not hard requirements for the system but rather potential positive paths for the program to utilize that are only enabled with the proper data rights. If the program does not consider those data rights and acquire them, the opportunity becomes an impossibility.

### 4.2.2 Determine value and evaluate priority of IP needs.

Value is not primarily about cost; it is about what an entity is willing to pay for something based on its priority/value to program objectives. For industry, their objective may be long-term revenue, so the value is based on how much income they can bring in by retaining data rights. For the Government, the program may have a cost objective for sustainment that is dependent on competing sustainment solutions, so the value of the IP should reflect sustainment cost avoidance. IP Valuation is an essential part of the program office's strategy because it helps shape the future negotiating position by clearly understanding tradeoffs/mitigations/plan which directly drives the best alternative to a negotiated agreement and what the program is willing to negotiate on.

As discussed in the Market Intelligence section, industry conducts detailed IP valuation that ultimately determines the price of their IP—or what they are willing to accept in exchange for their IP rights (recall Section 2 that describes IP acquisition as a basic transaction of goods). For the Government, IP Valuation is the reverse—it is what the Government is willing to pay for the IP in exchange for meeting mission requirements. To determine this valuation, there is an analysis of priority and affordability.

The value of IP to the Government may be measured in attributes such as sustainment cost avoidance, warfighter capability, agility, speed, flexibility, national security, and how the Government can approach risk/opportunity tradeoffs. Some of these attributes are not readily reducible to dollars and cents. These inherent differences in approach to the value of IP between Government and industry lead to several challenges when discussing, evaluating, and negotiating IP rights.

Fortunately, at this point in the IPS development, the IPT has a robust set of use cases that create a framework for IP Valuation. As one example of their benefit, by having the "when" clearly identified, rights available immediately versus rights exercisable can be analyzed as more or less valuable to the Government and the IP owner. At times, such valuations may be complementary and lend themselves to "win-win" scenarios. Early life cycle data rights for certain use case pairs may be of little value to the Government, but of great value to the IP owner.

To be smarter and more strategic, DoD officials must become more knowledgeable of how industry values IP so that they can come to the negotiating table with a respectful understanding of what IP means to their industry partner. Similarly, it is important to communicate to industry the importance (value) of IP data, CS, and rights to the success of the program strategy and for capabilities for the warfighter. There is no simple calculation to equate or compare these two sets of values, but one cannot ignore the other and still expect a balanced and fair agreement.

One way to encourage and enable mutually beneficial outcomes is to negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will better address the parties' interests than the standard or customary license rights. To do this, officials must understand where the value exists in IP and its amount. A potential approach to merging IP valuation and evaluation in source selection is the VATEP method, described in Section 5.5.

### 4.2.3 Establish data to be acquired.

The final step in analyzing the information is to fuse the analysis and determine what the program needs to acquire. With the information of use cases, risks, and value, the IPT should be able to prioritize the data and data rights needed to execute the program successfully.

An essential part of this process is taking that prioritized list and determining where the data needs to come from: IP owner/vendor, other Government programs, previously acquired in the program, etc. Do not assume that all the data must be acquired from the vendor because the Government may already have data available. Should it be determined that the Government has already acquired data to support a system, the IPT needs to determine if the rights previously obtained are sufficient to meet the current and future needs of the program. This information can be found in the data assertions tables from previous contracts.

The IPT should research prior program contracts to determine if the DFARS Deferred Ordering Clause 252.227-7027 ordering period is still open to acquire required data and associated rights to determine whether this may be a preferable way to meet IP requirements in lieu of acquiring in a new contract. The IPT should also investigate whether the Government has any priced options for data or rights in data that could be legitimately and economically exercised to meet the contemplated requirements. In assessing these two alternatives—deferred ordering and exercise of options—the IPT should recall the adage "a bird in hand is worth two in the bush."

Whatever the investigation and assessment determine, the IPS should document the difference between the needed data, CS, and rights and existing data, CS, and rights already available to a program. If the assessment recommends actions to obtain needed data, CS, and rights under already existing contracts, the assessment should include realistic assessments of the likelihood of successfully securing the needed data, CS, and rights.

## 4.3. FORMULATE THE IPS

### 4.3.1 Select methods for obtaining IP and data.

With the robust analysis of IP requirements discussed above, the IPT is ready to select the methods for obtaining the right data, with the right rights, at the right time. There are many sources of IP to consider at the early stages of a program that include a range from organic development in a Government lab to reverse engineering to contracting with a commercial vendor.

The IPT should carefully consider mix of the possible sources (also assisted through earlier market intelligence) and consult with appropriate SMEs about how to leverage the range of sources to meet program needs. It is important to work with contracting and agreements officers

and IP counsel on how to build in flexibility so the program can adapt overtime and possibly introduce other tactics for certain IP requirements as supplementary. For example:

- teaming with a government lab for that technology will inherently give the program greater data rights than if they use a FAR contract to have an industry partner do the work.
- circumstances might suggest an opportunity to supplement a multi-phase FAR/DFARS effort with T2 or reverse engineering to satisfy certain IP requirements or to address emerging or urgent requirements.[51]

Not all acquisition efforts are established programs of record and are looking at broader technology capabilities. Or perhaps through the IPT's analysis, they may determine that a certain needed technology is not available through industry currently. In those case, IP can play a major role in determining how to pursue that technology. Table 7 explores these options, recognizing that effective solutions may leverage agreements beyond the FAR and encompass sources beyond traditional private-sector partnerships.

[51] *See e.g.,* DoDI 5535.08, *supra* note 35, at para. 3.3.d.

**Table 7. Potential Sources or Tactics for Obtaining IP**

| Approaches | Advantages | Disadvantages |
|---|---|---|
| ***Completely organic development*** | ▪ DoD has maximum IP rights<br>▪ May cost less | ▪ Potential lack of expertise and capability<br>▪ May cost more |
| ***Repurpose of legacy technology*** | ▪ May have shorter development time<br>▪ May cost less | ▪ May not meet needs<br>▪ May cost more |
| ***Use of Reverse Engineering*** | ▪ May cost less<br>▪ Avoids development time and effort<br>▪ May be combined with re-engineering for technology enhancement | ▪ May cost more<br>▪ May require new certification and testing<br>▪ Alone, only replicates existing capability<br>▪ May require higher level approvals[52] |
| ***T2 Partnerships (e.g., Cooperative Research and Development Agreements[53])*** | ▪ Allows tapping into Government and industry expertise<br>▪ More flexible IP rights allocations possible | ▪ Activity scope may be constrained by rules (e.g., CRADAs require program to partner with a Federal Labs)<br>▪ Direct Govt funding may not be allowed<br>▪ Requires smart negotiation of IP rights because there are no standard or required clauses |
| ***Non-FAR vehicles (e.g., Public Private Partnerships. Cooperative Agreements, Other Transactions)*** | ▪ May provide more flexibility for the allocation of IP rights<br>▪ May attract nontraditional industry participants | ▪ Does not provide IP tools and framework of the FAR and DFARS<br>▪ May require familiarity with other rules such as the DODGARs or consortia OTAs |
| ***FAR/DFARS contracting without IP -related Evaluation Factors in Source Selection Evaluation Plan*** | ▪ Most traditional and familiar approach<br>▪ Extensive framework and rules for adjudication of IP disputes<br>▪ Allows timely award of contracts without delay for IP dispute resolution | ▪ Complex rules not thoroughly understood in DoD<br>▪ Usually has the effect of postponing resolution of IP disputes to when there is no competition.<br>▪ Prevents use of disputed data rights until final IP dispute resolution |
| ***FAR/DFARS contracting with IP-related Evaluation Factors in Source Selection Evaluation Plan*** | ▪ May traverse some limitations of traditional IP contracting.<br>▪ May avoid IP dispute delays by awarding to "most advantageous"[54] bids and proposals.<br>▪ May avoid lengthy post-award delays in use of needed data for IP dispute resolution.<br>▪ Potentially recognizes pros and cons of all offers more fully and equitably by looking at IP and life cycle costs more holistically | ▪ Requires understanding of complex rules as well as well as unfamiliar IP evaluation and valuation techniques and DFARS Source Selection Procedures<br>▪ Presently, for full compliance with all rules, may require a lot of data and analysis to implement rigorously and defensibly against protest.<br>▪ May dissuade industry participation or offers of best technology due to perception of lack of due advantage from purported private innovation and investment |

[52] *See* DFARS PGI 217.7504(4) (2025).
[53] *See e.g.*, 15 U.S.C. §3710(a) (2025); DoDI 5535.08, *supra* note 35.
[54] *See e.g.*, 10 U.S.C. § 3302(b) (2025); 10 U.S.C. §3303(c) (2025).

### 4.3.2 Plan to protect IP.

One vital aspect of IP that must be planned for is how to protect the IP received throughout the program, as documented in the PPP. There are at least two negative outcomes to failing to properly plan.

- Failure to properly protect IP may negatively impact national security by disclosing technological secrets providing battlefield advantage for the United States. Such disclosures may share that advantage with adversaries or reveal vulnerabilities or countermeasures.
- Industry concerns that their IP might be handled incorrectly leading to a spill that could be detrimental to their business. The Government should always endeavor to meet its contractual obligations, and unnecessary legal liability is a financial drain on the Government and taxpayer and may divert funding from important national security priorities.

IP planning must include consideration of the level of sensitivity of Controlled Unclassified Information and the classification of any classified information and ensure that the systems and procedures contemplated for handling and processing IP and other sensitive information is appropriate for the information. One challenge in the protection of IP is special license terms. License terms should be drafted with the practicalities and logistics of Government compliance in mind.

Licenses can be overly complex with contradictory terms that similarly can lead to disputes and noncompliance. In advanced IP planning, especially when contemplating specially negotiated terms, attention should be paid to the impacts on intended users and IT systems of any contemplated special license terms. Conversely, the impact and limitations of human compliance and the operating logic and capabilities of existing or contemplated IT systems and the willingness of prospective offerors to trust those capabilities should be considered before building reliance on specific bespoke license terms into an IPS.

Sometimes these spills are not the result of poor license drafting, basic neglect, or even intent on the part of the Government. Government systems are frequent targets of adversarial attacks trying to steal our data. IP is often the target of cyber threats either for theft or for potential covert corruption.

- This could be the theft of proprietary design and testing data such as for stealth aircraft. Malicious activity to gain access to IP, designs, or technical information to weaken U.S. technological and military advantage.[55]
- Accordingly, all appropriate measures for protection of proprietary or sensitive critical TD and software including nondisclosure agreements (NDA) and procedures for handling of classified technical information should be strictly followed. This is also an aspect of supply chain risk management.

[55] U.S. DEP'T OF DEF., INSTR. 5000.83, TECHNOLOGY AND PROGRAM PROTECTION TO MAINTAIN TECHNOLOGICAL ADVANTAGE Sec. 3.2 (21 May 2021).

Programs should pay particular attention to identification and protection of technical information, the majority of which resides on unclassified systems. If stolen, this information provides adversaries with insight into U.S. defense and industrial capabilities and allow them to save time and expense in developing similar capabilities or countermeasures.

Therefore, protecting this information is critical to preserving the IP and competitive capabilities of the defense industrial base and the technological superiority of our fielded military systems.[56]

### 4.3.3 Document the IPS.

The information gathering, analyzing, and strategizing phases are complete. The next step is to capture everything in writing. Depending on the phase of the program, the IPS will either be included in the AS or reflected in the IP Management Plan for PS in the LCSP; it may also be a stand-alone document that is summarized in either the AS or PSS. This step is crucial, as the members of the IPT may not be on this program indefinitely, and it is important to memorialize all the work for future use on the program. A unique reference architecture for data, CS, and rights may be created for this program, serving as a map to meet the requirements. While the requirements may change, this research and analysis provide a solid foundation for future decisions.

**Remember**: an IPS is not a blanket statement stating that the program will acquire the data necessary. Rather the IPS describes what data is needed, why it's needed, who and how it will be used, when it's needed, and how to get it. Do not confuse the IPS with the contracting strategy that is the detailed implementation of the IPS. The contracting strategy (covered in Section 5) includes detailed CDRL identification, source selection evaluation approaches, drafting special license agreements, and more.

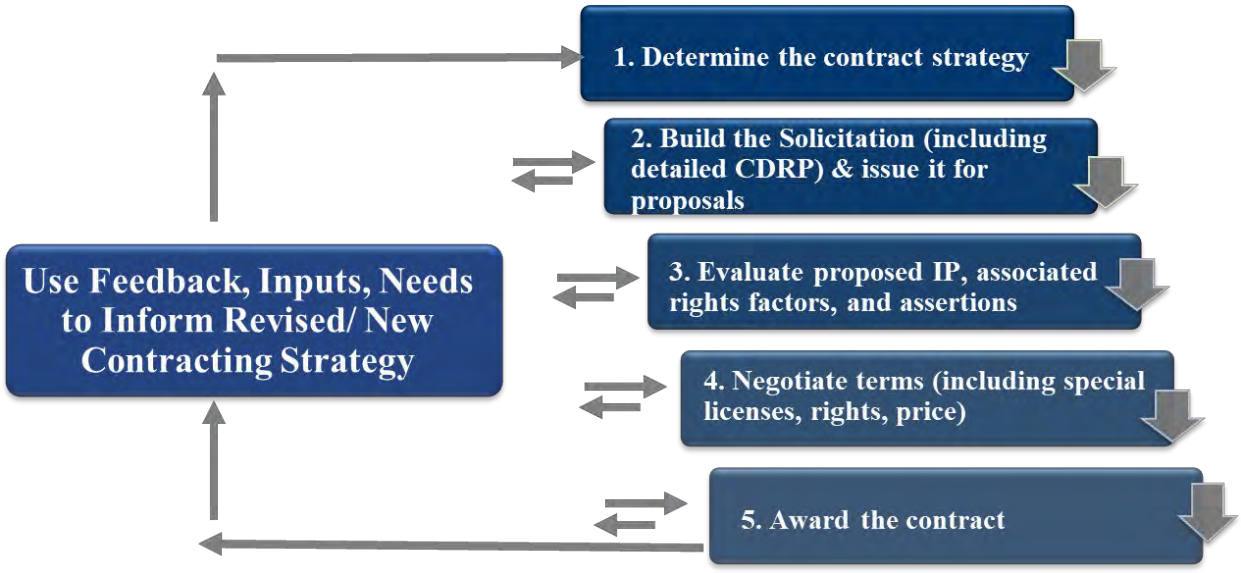
[56] *See* Off. of the Under Sec'y of Def for Res. and Eng'g., Dep't of Def. Technology and Program Protection Guidebook (July 2022).

## SECTION 5: IMPLEMENT THE IPS

Armed with an IPS that supports and aligns to the other program acquisition documentation, the program will be ready to implement those strategies. Assuming that to meet the program data needs some data requirements will need to be satisfied by a contractor, the mechanism in Government acquisition to execute any transaction is a contractual agreement of some kind. These agreements may be FAR-based contracts or other non-FAR agreements, but in either scenario, they are the path to implement the program strategy. Contracting officers should work closely with data managers and program personnel to assure that data requirements are included in solicitations and consistent with the policy expressed in DFARS 227.7103-1 and 227.7203-1. Recalling the discussion of approaches for obtaining IP in Section 4.3, the guidance in this section goes more extensively into the approach of FAR contracting with use of IP as a source selection factor as it is a best practice when it is feasible; this becomes less feasible post milestone B in noncompetitive environments. The contracting process for acquiring IP in each contract generally involves five major steps:

### 5.1. Five Major Steps To Contracting For IP.

**Figure 17. Five Major Steps to Contracting for IP**



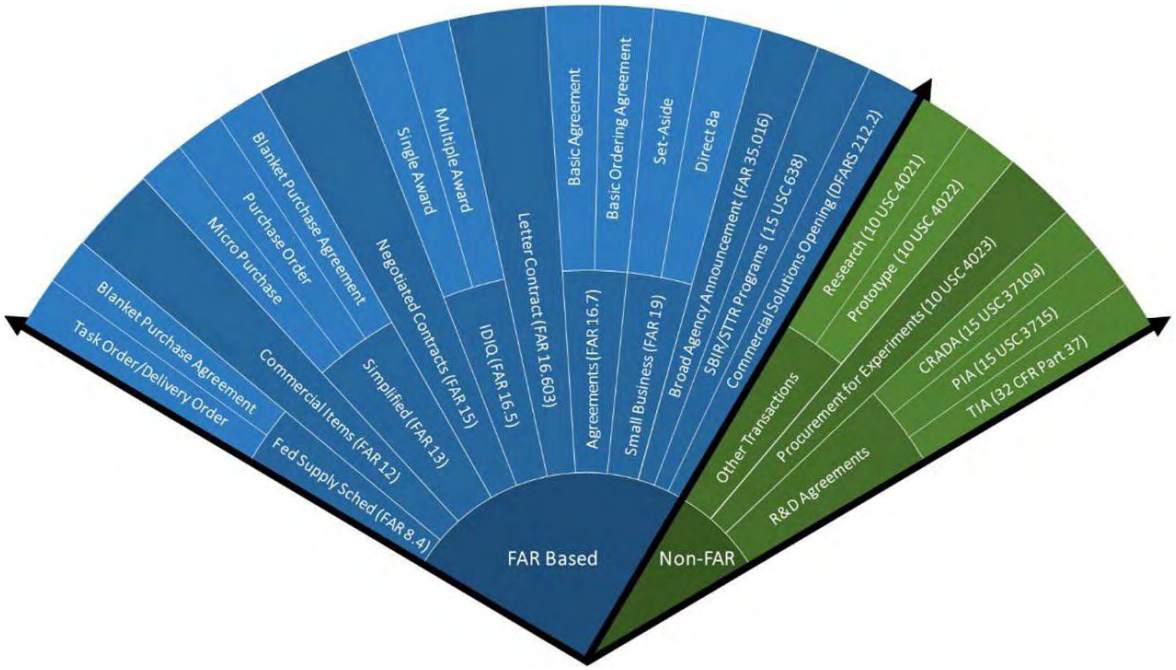

### 5.2. Determine Contract Strategy.

At a high level, there are two options for the contract strategy, FAR and non-FAR, which have significantly different approaches and regulations regarding IP. The familiar contracting cone, below in Figure 18, highlights that there are many options to consider within these two broad categories. It is critical that the team understands how to integrate IP considerations appropriately based on the chosen contracting strategy.

The DoD is accustomed to FAR contracts and the associated standard DFARS clauses used for them. As such, there is a strong temptation to apply those concepts to non-FAR

agreements which can create pitfalls and challenges. This section will briefly cover some of the important rules of engagement for each broad contract strategy.

**Figure 18. Contracting Cone**[57]




### 5.2.1 Federal Acquisition Regulation (FAR).

Recall that DoD cannot always effectively require an IP owner to sell the Government data or associated rights that it needs. There is a complex set of rules for the data rights the Government may or may not require. These act as rules of engagement for the conduct of IP acquisitions subject to the DFARS. The Government may state its negotiation objectives for data and data rights, but the rules of engagement constrain what may be treated as hard requirements, i.e., requirements for which a proposal could be deemed nonresponsive if not met.

These rules of engagement provide a framework for designing and executing both source selection evaluation of IP, and IP negotiations in sole-source awards. However, because of these rules of engagement, some DoD buyers and DoD contractors have mistakenly believed that evaluating IP in source selections was entirely prohibited. This is contrary to long-established policy within the DFARS as indicated in Table 8.

[57] DEF. ACQUISITION UNIV., CONTRACTING CONE (2025), https://aaf.dau.edu/aaf/contracting-cone/.

## Table 8. DFARS IP Requirements Rules of Engagement

| Type of Data | Prohibited Requirements | Expressly Permitted Evaluation | Source(s) |
|---|---|---|---|
| ***Noncommercial TD*** | ▪ Requiring rights beyond standard rights as condition of award or responsiveness<br>▪ Prohibiting or discouraging items developed exclusively at private expense solely because of rights restrictions | ▪ Evaluation factors that assess impact (including impacts on costs, short and long-term mission goals, and competition) created by restrictions on the USG's ability to use or disclose TD | ▪ DFARS 227.7103-1 (c) and (d)<br>▪ DFARS 227.7103-10(a)(5) |
| ***Noncommercial CS*** | ▪ Requiring rights beyond standard rights as condition of award or responsiveness<br>▪ Prohibiting or discouraging software developed exclusively at private expense solely because of rights restrictions | ▪ Evaluation factors that assess impact (including impacts on costs, short and long-term mission goals, and competition) created by restrictions on the USG's ability to use or disclose CS | ▪ DFARS 227.7203-1(c) and (d)<br>▪ DFARS 227.7203-10(a)(5) |
| ***Commercial TD*** | Requiring rights beyond standard rights and data beyond data customarily provided to the public, except as mutually agreed, except for:<br>▪ form, fit, function.<br>▪ data needed for repair, maintenance, installation, operating, or handling.<br>▪ data on USG funded modifications. | | ▪ DFARS 227.7102-1 |
| ***Commercial CS and software documentation*** | ▪ Requiring rights to software or related technical information, beyond customary commercial, except as mutually agreed, terms that conflict with federal law or except for agency needs | ▪ When establishing contract requirements and negotiation objectives for commercial software and software documentation, consider technical and business factors identified in DFARS 227.7203-2(b) and (c) | ▪ DFARS 227.7202-1(d) |
| ***Small Business Innovation Research/*** Small Business Technology Transfer ***Data*** | ▪ Requiring more than SBIR/STTR data rights in SBIR/STTR data as condition of award or responsiveness | ▪ Government may use information from offerors in response to SBIR/STTR solicitations to assess the impact of proposed restrictions on the use or disclosure of TD or CS in the source selection process, as per 227.7103-10(a)(5), 227.7203-10(a)(5), and other relevant acquisition guidance. | ▪ DFARS 227.7104-1<br>▪ SBIR/STTR Policy Directive 8. (b)(6) |

### 5.2.2 "Requiring" Data, CS, and rights.

The FAR restrictions on "requiring" data, CS, and rights are commonly misunderstood within both industry and Government. Acquirers often talk about "requirements" in the sense of capability requirements and what is "needed." So, programs can indicate that certain data are "needed" for the program and include certain contractual data requirements and standard license rights in a solicitation. However, the Government cannot "compel" private entities to enter contracts with the Government. Confusion on this issue may lead to "no bids" on data requirements or requests by IP owners to omit certain data requirements and data rights clauses[58] from a contract.

The fundamental principle of freedom to contract[59] (or not to contract) effectively results in DoD being unable to *compel* any IP owner to agree to sell data or data rights, regardless of DoD's needs. Additionally, even if an IP owner agrees to sell certain data or data rights in the contract, DoD cannot force or compel an IP owner to perform its contractual obligations(e.g., if the IP owner elects to breach its contractual commitments).[60] Although the DoD may ask for greater than standard data rights, the IP owner can't be required to sell or relinquish greater than standard data rights as a condition of being responsive to a solicitation or as a condition for the award of a contract.[61]

A best practice to minimize confusion is to avoid using a form of "requires" or "requirements" when describing the data rights in a solicitation. Instead, programs should reference use cases for TD and CS and short and long-term mission goals or objectives, such as cost avoidance, sustainment, and competition. It is also recommended to clearly communicate with industry during opportunities like industry days and draft RFP periods to describe the use cases and needs.

### 5.2.3 Inapplicability and Consideration of DFARS Clauses in Non-FAR Agreements.

Non-FAR agreements include, but are not limited to, no-cost agreements, cooperative agreements, OTAs, CRADAs, and test service agreements. Users of non-FAR instruments should be familiar with any rules specific to those instruments.

There are some generally applicable considerations and terms, which may be helpful for both FAR and non-FAR agreements. However, specific DFARS rules are not mandatory for non-FAR agreements nor automatically included in their terms. If advantageous and not otherwise prohibited, the detailed guidance for TD and CS in FAR/DFARS contracts may be considered when developing terms for rights in TD and CS in non-FAR/DFARS contacts or agreements. In the absence of other applicable rules specifying default IP terms, the situation is analogous to special license negotiations with terms to be negotiated for the situation. While non-FAR

[58] Omitting required DFARS data rights clauses is a deviation that requires higher approval. *See* DFARS 201.402(1)(ii) (2025).
[59] Other than exercising authorities like eminent domain (under the Fifth Amendment to the Constitution) or the Defense Production Act (or other very specialized authorities).
[60] Although there is a well-established legal framework for challenging data rights assertions for TD and CS, there is no case precedent where the Court of Federal Claims issued an order compelling a contractor to deliver TD or CS under a DoD contract.
[61] *See* 10 U.S.C. § 3771(b)(8) (2025).

agreements may provide much greater IP flexibility, drafters should consider the downstream ramifications for use and handling data acquired with bespoke licensing terms.

While FAR and DFARS terminology and terms may be borrowed as appropriate or smart for use in non-FAR agreements when consistent with applicable rules, drafters and negotiators of agreement terms should utilize the generally greater flexibility offered by non-FAR agreements to make smart deals for DoD. In some cases, there may be consortium or other umbrella agreement that establishes reusable terms or framework for follow-on agreements.

Agency specific regulations and guidance for the specific non-FAR agreement type should be reviewed in drafting all IP agreement terms.

Modifying standard terms while keeping the standard labels for these modified terms can cause significant confusion, especially when managing data from such modified agreements alongside data from standard FAR/DFARS contracts or within common data management systems. Altering definitions of established terms can lead to inefficient data utilization or non-compliance with agreed upon license terms due to confusion over the meaning or scope of license requirements.

**IMPORTANT CONSIDERATION**

When drafting a non-FAR agreement, it is advisable to avoid using terms defined in the DFARS, such as Government Purpose Rights or Limited Rights, or copying a DFARS clause with its number (e.g., 252.227-7013) while modifying the words of the definition or clause.

### 5.2.4 Other Transactions, Agreements, and Authorities.

An OTA (e.g., commonly referred to as an "OT") refers to an agreement type under the 10 U.S.C. §§ 4021 and 4022 authorities that enable DoD to enter into transactions other than contracts, grants, or cooperative agreements for research projects, prototype projects, follow-on production OTAs and contracts. As such, the "A" in OTAs can mean "authorities" or "agreements;" this guidebook generally refers to the agreement (OTA) made under OT authorities. When leveraged appropriately, OTAs provide the Government with access to state-of-the-art technology solutions from traditional and non-traditional defense contractors (NDCs), through a multitude of potential teaming arrangements tailored to the project[62]

The most prominent feature of OTAs for the purposes of this Guidebook is that they are not subject to the contracting laws and regulations in the FAR and DFARS concerning data rights, rights in patents, and copyrights. However, they do not exist outside of the generally applicable laws regarding patents, copyrights, trade secrets and trademarks, or criminal law, such as regarding theft of trade secrets. For example, 28 U.S.C. § 1498, related to Government liability for patents and copyrights, applies to activities authorized under an OTA. Further, the fact that acquisition contract laws and regulations are not strictly applicable to OTAs does not make those rules entirely irrelevant.

[62] *See* Office of the Under Sec'y of Def for Acquisition and Sustainment, Other Transactions Guide (July 2023).

It may be useful for the Agreements Officer (AO) to be familiar with FAR-based IP rights as these laws and regulations are often used as models and starting points for drafting IP license terms. Personnel supporting existing OTAs may see terms copied from or similar to FAR contract and grant IP terms. Those laws and regulations may also serve to alert license drafters to points to consider.

Since these laws and regulations do not apply to OTAs, negotiation of rights that either mirror standard DFARS rights or are of different scope and operation is necessary. The AO should ensure consideration of the following when drafting IP terms for OTAs:

**Table 9. Other Transactions Issue Topics and Considerations for IP**

| Issue Topic | Considerations |
|---|---|
| ***Disputes*** | Disputes clauses included in the agreement can accommodate specialized disputes arising under borrowed IP terms, such as the exercise of IP march-in rights or the validation of restrictions on TD/CS if such terms are borrowed. |
| ***Flow-down*** | Consider whether IP terms applicable to the awardee should flow down to sub awardees, including whether sub awardees should submit IP licenses or deliverables directly to the USG. In some cases, achieving flow down may involve multi-party negotiations (e.g., with Government, prime, and sub-contractors). |
| ***Licensing*** | Consider restricting awardees from licensing technology developed under the OTAs to domestic or foreign firms under certain circumstances that can hinder domestic manufacture or use of the technology. |
| ***Export*** | Be aware that export restrictions may prohibit awardees from disclosing or licensing certain technology to foreign firms. |
| ***Additional rights*** | Consider including in the IP terms any additional rights necessary for the USG in the case of inability or refusal of the private party or team to continue to perform. |
| ***Time based*** | It may also be appropriate to consider negotiating time periods after which the USG will automatically obtain greater rights. |
| ***Patents*** | Bayh-Dole Act (35 U.S.C. §§ 201-204) requirements on patent/invention rights do not apply to OTAs. Negotiate a patent/invention rights clause necessary to accomplish program objectives and foster the Government's interest while balancing the needs of the awardee. The AO should consider the USG's needs for patent rights to use the developed technology, or what other IP rights will be needed should the agreement provide for trade secret protection instead of patent protection. The AO should also consider clauses that require tracking and reporting of subject inventions made in the performance of OTAs. OTAs are not subject to the Bayh-Dole Act governing the Government's rights in inventions and patents.[63] |
| ***Trade Secret Protection*** | Consider allowing subject inventions to remain trade secrets as long as the USG's interest in the continued use of the technology is protected. In making this evaluation, the AO should consider whether allowing the technology to remain a trade secret creates an unacceptable risk of a third party patenting the same technology or otherwise jeopardizes the USG's right to utilize this technology with third parties, and whether there are available means to mitigate these risks outside of requiring patent protection. |

[63] Bayh-Dole Act 35 U.S.C. §§ 201-204 (2025).

| Issue Topic | Considerations |
|---|---|
| ***TD and Software Rights*** | These rights do not exist unless written into a non-FAR agreement. License negotiations often center on the USG's ability to release or disclose data or software outside the USG. The OTA should address license considerations as described for SNLs elsewhere in this guide but excluding concerns with rights minimums in the DFARS. OTA drafters should consider TD and software rights for Government requirements while balancing awardee interests. Section 4022(f) authorizes follow-on production OTAs and contracts when specified conditions are met. Recall the warning box in Section 2.7 that in later FAR contracts, for purposes of the data rights funding test, earlier Government OTA spending is not considered Government funding for funding-based data rights. So, especially in OTAs that may lead to later production of a prototyped system, OTA drafters should consider Government requirements throughout the life cycle of the project or system. Again, remember that DFARS type data rights or restrictions will not apply unless they are written into an OTA deliberately. |
| ***Data Rights Markings*** | In addition to those considerations, since there are no prescribed restrictive data rights markings for OTAs, consideration of restrictive markings should get special attention. There is ostensibly a lot of latitude on the part of the parties regarding markings indicating proprietary restrictions. However, USG drafters and negotiators should bear in mind the operational impacts of the markings and associated license rights, especially if data from an OTA is expected to be used and/or distributed extensively and for a long time, or to other agencies or third parties, such as contractors. Bespoke markings for a particular agreement may be very useful, but if data marked with unique markings needs to circulate in the larger DoD data ecosystem, such markings may impede efficient data utilization or risk compliance failures with agreed upon restrictions . Consultation with data managers and IP attorneys may be especially useful regarding marking issues. |
| ***Commercial Data*** | The AO should consider commercial TD and commercial CS. The USG typically does not need extensive rights in commercial TD and software. However, depending on the project scope and goals, the USG may need to negotiate for greater rights to utilize the developed technology. If the OTA incorporates terms and conditions from a commercial software license agreement, it would be prudent to negotiate with the IP owner regarding any terms that are inconsistent with Federal law or do not meet the Government's needs |
| ***Cyber Incident Reporting*** | Ensure the company is properly protecting data and compliant with any applicable specific USG reporting procedures in the event USG data is compromised. |
| ***Authorization and Consent*** | Authorization and consent policies provide that work by an awardee under an agreement may not be enjoined for patent or copyright infringement and shifts liability for such infringement to the USG. |
| ***Notice and Assistance*** | If included, notice policy requires the awardee to notify the AO of all claims of infringement that come to the awardee's attention in connection with performing the agreement. If included, assistance policy requires the Awardee, when requested, to assist the USG with any evidence and information in its possession in connection with any suit against the USG, or any claims against the USG made before suit has been instituted that alleges patent or copyright infringement arising out of performance under the agreement. |
| ***Indemnity*** | The USG's liability for damages in a suit for patent infringement may ultimately be borne by the awardee in accordance with the terms of a patent indemnity clause, if included. Indemnity clauses mitigate the USG's risk of extra costs caused by infringement of a third-party owned patent. Such a clause may be appropriate if the supplies or services used in a technology developed under the agreement normally are or have been sold or offered for sale to the public in the commercial open market. Since the operation of U.S, law is limited to the U.S., including an authorization and consent clause when both complete performance and delivery are outside the United States, its |

| Issue Topic | Considerations |
|---|---|
| | possessions, and Puerto Rico may not be necessary.[64] In addition, where trade secret protection is allowed in lieu of patent protection for patentable subject inventions, a perpetual patent indemnity clause might be considered as a mechanism for mitigating risks.[65] Conversely, the agreement should not include a clause whereby the USG expressly agrees to indemnify the awardee against liability for patent infringement. Absent specific statutory authorization, indemnifying an awardee risks an Anti-Deficiency Act[66] violation. |

### 5.3. Draft and Issue the Solicitation.

Now with the contract type decided (FAR/non-FAR, competitive/non-competitive), the team is ready to build the RFP. The RFP should be aligned to the IPS and the chosen approaches for seeking data, CS, and rights to support the program objectives for the current phase as well as future phases. The critical steps in aligning the RFP to the IPS are to identify how the program will order deliverables, describe the specific business and technical needs, build the contract data requirements package, and finally plan the IP Evaluation Criteria.

**Myths:** There are a couple of common pitfalls that lead programs to delay or not procure the data they may need:

**Incorrect Assumption: Data is too expensive and not in the budget.**

**Fact Check**: Obtaining a copy of data generated by an IP owner should not be cost-prohibitive if priced while still in the competitive stages of acquisition. Obtaining data and securing rights will mitigate additional (premium) cost for the data, CS, and rights later after competition has concluded. Ultimately, ordering data earlier should be viewed as cost avoidance to help programs reach their planned cost objectives rather than an added cost. It IS true that buying the data, outside of competition and well into program execution, could be extremely expensive.

**Incorrect Assumption: Because the Government paid for development and therefore has data rights under the funding rule, the Government has rights to the data any time needed.**

**Fact Check**: For FAR/DFARS contracts, securing data rights requires delivery. The program might be entitled to rights to the data based on the funding rule (see Sections 2.7), but this does not equate to a requirement for an IP owner to deliver the TD or CS. If the Government needs the data, the Government needs to buy the deliverables.

These misconceptions and pitfalls leave programs with little effective recourse to obtain needed data, CS, and rights. In some cases, IP owners may state that the Government had time-limited opportunity to order data from funded development activity and failed to do so. Or IP owners assume the Government made a conscious decision in not ordering delivery of data and that was factored into the IP owner's business plans, and they assumed that it was factored into the Government's acquisition plans as well. Ideally, Government decisions to acquire (or not

[64] *Compare* FAR 52.227-1 (2025).
[65] *Compare* FAR 52.227-3 (2025).
[66] *See* 31 U.S.C. § 1341 (2025).

acquire) necessary data, CS, and rights are thoughtful and purposeful and are fully documented within the IPS.

### 5.3.1 Data ordering mechanisms.

In FAR contracts, there are tools that are used to acquire data, (e.g., regular ordering, deferred delivery, deferred ordering, priced options, and escrow accounts). It is important to understand what the tools enable and when they are appropriate for use. As covered in the use case discussion (see Section 4.1.6), timing of the data needs should be a critical factor in determining the most effective ordering mechanism. Table 10 describes the role, scope, and conditions on using each tool.

Definite data requirements with known dates of need should be addressed with regular ordering at contract award. Deferred delivery may be used to acquire definite TD and CS needs on a more flexible or longer schedule. Deferred ordering is best used as a backstop to regular ordering but should not be used as the primary means for acquiring data and data rights. The Deferred Ordering clause (DFARS 252.227-7027) may only be used to order data generated in performance of the contract where the clause was incorporated. The clause may not be used to order data generated under another Government contract where the clause was not included or outside any Government contract. It does NOT allow for ordering of data that was utilized in a contract but not generated in that contract.

Priced options can be advantageous for securing data, CS, and rights that are often not needed until a later time. However, in limited situations where data, CS, and rights acquired by option are obtained with the intent of enabling either organic or third-party competition with an IP owner, and the option is exercisable at award, there may be a lot of uncertainty to the IP owner in its projections of potential future revenues. So, any potential discount for options compared to regular ordering might be minimal or even negative due to the uncertainty for the prospective contractor when an option is exercisable immediately upon award. Therefore, it is important to evaluate the price of the option during competition to leverage competitive pressure on both the option holder and potential replacement contractors. In simpler terms, priced options may come with a higher price tag than using regular ordering.

Alternatively, if the Government is unlikely to want or be able to exercise the option for some period, declining to order data with competitive rights with regular ordering, but instead postponing competition capability with an option with a future exercise period may be mutually beneficial. Having an option exercise period some years in the future may give the IP owner greater certainty in calculating ROI and allow a longer period of ROI before facing renewed competition. It may also be preferable to order data by standard ordering and take delivery early in a contract to allow early technical validation of the data including its suitability for use by third parties, but with greater rights being granted with the later exercise of the option. If data validation is likely to require IP owner support, it may be beneficial to solicit a special license with the ability to use IP owners for early validation activities with an option exercisable later for additional rights to facilitate the full competitive use.

Data Escrow Accounts are agreements the Government makes with the IP owner to place the data with a third party (escrow agent) for safe keeping. The agreements stipulate under what

time or conditions (e.g., 10 years, when the company goes out of business, etc.) the data will be delivered to the Government. There will be a cost associated for the escrow services which will need to be paid. This might be an attractive tool to contractors for negotiation of data and data rights that may mitigate Government concerns regarding data necessary to address diminished manufacturing sources and material shortages (DMS/MS) or parts obsolescence.

## Table 10. Data Ordering Tools

| Tools | FAR/DFARS/PGI Section; & Purpose | Data Rights | Features & Functions | Pricing | Benefits |
|---|---|---|---|---|---|
| **Regular Ordering** | DFARS 215.470(b); To order data as required. | Rights specified by DFARS clauses, special licenses, or commercial licenses. | Delivery of data timing is specified in DD1423 Contract Data Requirements Lists and must be during the contract period of performance (POP). | Price for data, CS, and rights should be determined and evaluated at the time of award. | Allows definite data, CS, and rights requirements to be met on a defined schedule. |
| **Deferred Delivery** | DFARS 252.227-7026; To order delivery of TD and CS identified in contract as deferred delivery. | Rights specified by DFARS clauses, special licenses, or commercial licenses. | Executable during POP, within 2 years after later of: 1) acceptance of all items (other than data or CS); or 2) contract termination, for subcontractor TD, executable within 2 years after contractor accepts the last delivery for the contract of the item (to which the data pertains) from the subcontractor. | Price for data, CS, and rights should be determined and evaluated at the time of award. | Allows definite TD and CS and rights requirements to be met on a flexible schedule. |
| **Deferred Ordering** | DFARS 252.227-702; To order TD and CS generated in performance of the contract. | Rights specified by DFARS clauses or special licenses. | Executable during POP or within 3 years after: 1) acceptance of all items (other than TD or CS); or 2) the termination of the contract. For subcontractor TD, within 3 years after contractor accepts the last delivery for the contract of the item (to which the data pertains) from the subcontractor. | Contractor is only compensated for converting the data or CS into the prescribed form, for reproduction and delivery. The price of rights should be part of the initial contract price and evaluated then. | Allows initially unknown requirements for TD or CS generated in contract performance to be determined and added during a contract. |
| **Priced Option** | FAR 17.2; To obtain a firm price for data, CS, and rights that, except in limited circumstances, are not needed at the earliest possible date. | Rights specified by DFARS clauses, special licenses, or commercial licenses. | Options must be established at contract award. May be exercised during the contract at a time or period specified in the option. Depending on circumstances, option periods longer than 5 or 10 years may require higher level approvals. It especially important to consult counsel on option timing and related fiscal issues. | Price for data or data rights option should be determined and evaluated at the time of initial award. | Allows identifiable but optional requirements for data, CS, and rights to be priced at contract award, preferably competitively. |
| **Escrow Account** | DFARS .227.7203-2 and PGI 227.7203-2; To allow a third-party escrow agent to safekeep designated TD or CS until a specified condition occurs | Rights specified by DFARS clauses, special licenses, or commercial licenses. | If a contractually specified condition occurs, then the Government may obtain delivery of the escrowed TD or CS. Requires agreements with third parties for support. | Price for data, CS, and rights should be determined and priced at the time of award. | Not preferable, it may be useful when formal delivery or access is not feasible or cost-effective during the contract period of performance or delivery schedule |

## 5.4. IMPORTANCE OF IP DELIVERABLES.

### 5.4.1 "Possession is nine-tenths of the law".

Most have heard the adage that "possession is nine-tenths of the law." While this is not literally true in many legal contexts, there is some wisdom in the concept. For a DoD program, it is important to have necessary data rights, but rights in data without possession of the data (called "inchoate rights") is of very little real value because they cannot be exercised. In plain terms, "the program can't use what it doesn't have."

Because IP is a type of intangible personal property interest, making it tangible with clearly defined deliverables is critical to exercising any kind of rights. The confusion between having "data rights" and having "data deliverables" has led many programs to not procure data deliverables early in a program.

Utilizing the needs assessment for IP in the IPS, a Contract Data Requirements Package (CDRP) is developed in accordance with DoDM 5010.12. A CDRP is comprised of CDRLs (DD Form 1423) and other data related instructions such as DID. CDRLs provide instructions to a contractor for data preparation and/or delivery that will meet specific approval and acceptance criteria.

It is a best practice to ensure CDRLs are mapped to Statement of Work or Performance Work Statement requirements to ensure contractors deliver required data, and to document a clear record of what was developed in performance of the contract and required to be delivered. This also helps the Government understand funding-based rights that it may be able to require in later contracts.

**NOTE: DoDM 5010.12, *Acquisition and Management of Contractor-Prepared Data*, provides detailed guidance on the procedures for properly ordering data.**

### 5.4.2 Planning for IP evaluation in proposals.

**DoDI 5010.44 directs DoD Component Heads with contracting authority to "[i]ncorporate types of IP deliverables and level of associated license rights into source selection evaluation factors, and as negotiation objectives in sole-source awards, as appropriate."**
**This is appropriate in both FAR and non-FAR acquisitions, but applicable rules and policies differ.**

Clearly articulating and communicating in an RFP the IP information desired by the Government and how it will be evaluated serves as a strong signaling function for communicating Government interests and priorities regarding IP in any source selection. The objective of Government-industry negotiations is a mutually beneficial outcome for both parties for which the solicitation sets the stage for more in-depth negotiations in most cases. Careful and thoughtful drafting of the solicitation, and description of desired IP and IP rights are excellent first steps to achieve successful negotiations.

Guidance about DFARS rules of engagement and evaluation of IP in DFARS source selection are not directly applicable to non-FAR agreements. So, while that guidance may be informative,

it should NOT simply be used verbatim in a non-FAR situation. Evaluation for non-FAR agreements can be approached as a determination of best value for the Government. Agency specific regulations and policies should also be consulted.

Competitive source selection evaluation of IP rights is often the best tool available to ensure that the Government can affordably obtain needed IP rights. However, "IP evaluation" can occur in many contexts, including non-competitive environment such as sole source negotiations, negotiations of special licenses, and even at an earlier stage in requirements development.

IP Evaluation was the primary subject and focus of the FY2020 NDAA Sec. 801 Pilot Program. The 801 Pilot Program explored novel, alternative, and commercial methodologies for IP valuation and evaluation. Based on the Pilot Program, one of the key takeaways was that the DoD can and should evaluate IP in its competitive source selections and include IP in its negotiation objectives in sole source awards.[67]

TD rights evaluation criteria can be crafted and used to support the source selection process. When using source selection to acquire IP, data and license rights, requirements should be directed at the data that supports short and long-term objectives of the program. Caution should be exercised to avoid asking for broad IP and associated rights at the system level as a source selection objective. For example, seeking Government Purpose Rights for entire systems as a source selection factor may be overreach, and in most cases is unwarranted. The VATEP approach based on IP and rights use cases evaluated in accordance with DFARS 227.7103-10(a)(5) and 227.7203-10(a)(5) is recommended when the size and importance of the acquisition warrants the time and effort necessary to execute such an approach.

Current DoD policy and regulations permit considering the effects of contractor IP rights restrictions on meeting the Government's objectives.[68] The ability to consider the effects of IP rights on meeting Government mission objectives in source selection can be a powerful signal and motivator to offerors as to what is most important for the Government and what the Government would like to see proposed for any given contract. Source selection criteria have long served this function generally but perfecting this tool with respect to IP is still a work in progress.

### 5.4.3 Request feedback from industry and issue final RFP.

A pre-solicitation best practice is to issue a draft RFP for feedback from industry. From an IP perspective, this feedback will help ascertain the likelihood of receiving what was requested and any potential risk areas.

This approach is particularly important to prepare for effective interest-based negotiations regarding IP issues. The feedback will provide insight into industry's interests and objectives and help the program understand primary opportunities for compromise. These communications may be viewed as the opening round of dialogue and engagement with industry on IP issues leading to negotiation of special license terms.

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[67] *See* Appendix A – Key References (e.g., "Report to Congress on Pilot Program on IP Evaluation for Acquisition Programs for FY 2023, Pursuant to Sec. 801 of the NDAA for FY 2020 (P.L.116-92); Sec. 6. Enclosure 3) FY23 [Government Data Call] on IP Evaluation & Valuation – List of Figures and Tables; and Figure 2-5: TTPs Used by FY23 Respondents and Corresponding Impact on Mission Goals.)".

[68] *See e.g.,* DoDI 5010.44, *supra* note 2, at 6; *see also* DFARS 227.7103 (2025); DFARS 227.7203 (2025).

## 5.5. Evaluate IP and Data Rights in Proposals (Source Selection).

As noted previously, the evaluation of IP is not only for competitive source selections, but due to their priority and complexity, this section will focus on IP Evaluation in a FAR Part 15 Source Selection. DFARS PGI 215.300 makes the DoD Source Selection Procedures (SSP) mandatory "when conducting negotiated, competitive acquisitions utilizing FAR part 15 procedures".

The SSPs set out detailed procedures for conducting competitive source selections using several evaluation factors in accordance with FAR 15.304. Factors to be evaluated must always include cost or price to the Government. Other factors include technical factors, past performance, and small business participation.

The SSPs do not mention IP or data rights as an independent factor so IP needs to be considered through use of other factors, such as technical factors or cost or price. The SSPs include an Appendix E[69] regarding evaluation of IP in source selection.

### 5.5.1 Methods for IP evaluation.

This guidebook will highlight two best practices for IP Evaluation Methods: use cases and VATEP.

1) **IP- Evaluation Factors based on Government Use Cases**:

IP-related technical evaluation factors may allow the Government to assess proposals (or approaches provided in proposals) based on impacts on use cases of mission readiness, competition, obsolescence risk, and long-term license fees. Such evaluations allow programs to have a comprehensive understanding of an offeror's proposal, including how the Department can execute its long-term sustainment goals, facilitate competition, and manage program risks.

Offerors may be given a strength or a weakness in an IP-related evaluation factor (or subfactor) based on whether the proposal of approach supports a particular goal, such as competitive procurement goals, MOSA implementation goals, or cost avoidance savings for commercial licenses. For example:

- The offeror's proposal may be given a strength for a proposed approach that permits the Government to competitively procure hardware from third parties using acquired IP and associated rights, and a strength for a proposed approach that permits the Government to competitively procure hardware maintenance and sustainment services from third parties.
- The offeror's proposal may be given a weakness for a proposed approach that does not permit the Government to competitively procure hardware from third parties, and a weakness for a proposed approach that does not permit the Government to competitively procure hardware maintenance and sustainment services from third parties.

In accordance with 10 U.S.C. § 3771 and DFARS 227.7103-1, offerors would not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government rights in TD related to items, components or processes

[69] DFARS PGI 215.3 Source Selection Procedures, 2 (20 Aug. 2022) [hereinafter PGI 215.3].

developed exclusively at private expense except for the data, CS, and rights identified at DFARS 227.7103-5(a)(2) and (a)(4) through (9).

An offeror that does not propose to sell or otherwise relinquish any additional rights in TD related to items, components or process developed exclusively at private expense would still be considered responsive.

2) **IP Evaluation using VATEP**:

VATEP is a "tradeoff source selection process with adjustments to an offeror's evaluated price to reflect the value of certain enhanced performance characteristics."[70] The VATEP Technique "monetizes different levels of performance that may correspond to the traditional requirements process of defining both threshold (minimum) and objective (maximum) performance and capabilities."[71] The Government must then determine if a higher rated technical offer is "worth" the additional cost to the Government.

**REMEMBER**: During the IP Strategy development phase, the program should have determined the value of the IP requirements for the program based on a combination of use cases, priority, likelihood of need, consequence of not receiving the IP, etc. With a VATEP approach, value is understood as the intersection of capability acquired versus cost.

The description of VATEP in the SSPs is especially relevant: "Value and cost are separate concepts that VATEP links in the RFP to inform industry decisions on what to offer to gain a competitive advantage. As described herein, VATEP is merely a structured technique for objectivizing how some (or all) of the requirements would be treated in the tradeoff process and then communicating that to offerors via the RFP."[72]

There are four core building blocks for applying the VATEP approach to IP Evaluation:

- Use cases: Identify purposes or uses for all TD, CS, and other information needed to support all program needs in the near term and long term.
- What Price to Adjust: Identifying requirements which could incentivize an additional grant of rights from the IP owner for an adjustment in proposal price based on the "value" placed on better performance.
- Application: assess the extent to which the offered IP rights enable the various use cases with incremental VATEP credit per enabled use case to come up with an overall VATEP adjustment.
- Variations/Best Practices.

[70] *Id.*
[71] DEF. ACQUISITION UNIV., VALUE ADJUSTED TOTAL EVALUATED PRICE (VATEP) (2025), https://www.dau.edu/acquipedia -article/value-adjusted-total-evaluated-price-vatep.
[72] PGI 215.3, *supra* note 69, at App. B.2.

**Additional resourcing on conducting VATEP can be found through the DAU website (see Appendix E for Resources and Tools).**

### 5.5.2 Negotiating for IP.

IP acquisition can be as simple as identifying needed data, CS, and rights, following the procedures to implement these in a contract or agreement, getting a reasonable price and executing the contract. However, sometimes a contractor's business objectives may not readily align with that. Therefore, it is important for acquiring activities to understand other tools to incentivize proposals regarding data and IP rights that better align the mutual interests of DoD and industry. Other than simply cash, the primary tool available to acquiring activities is evaluation of IP rights in competitive source selection.

To effectively plan for IP negotiations, Government personnel need to identify and articulate IP needs, objectives, and interests and any desired IP rights to contractors. Successful negotiations will require effective communication or coordination both within the Government acquisition team and with contractors. The IP Evaluation Pilot Program data clearly demonstrated that the best time to conduct negotiations for IP-related license rights is prior to contract award.[73]

**Figure 19. Important Information for Negotiations**

- **Data requirements to achieve capability and program objectives.**
- **Understanding of the financial investment from both parties & expected ROI.**
- **Prioritization of use cases based on risk and opportunity analysis.**
- **IP Valuation for government and industry based on independent IP Valuation and market research.**
- **IP Evaluation approach based on contract strategy and program objectives.**

**Considerations for SNLs:** As noted in the introduction, there is a DoD policy preference for specially negotiated IP licenses rooted in statute.[74] Such special licenses may be incorporated in contract addenda (including access agreements[75]), public-private partnership agreements, patent and trademark licenses, and authorization to use Government-furnished TD or software under a Government contract.

A good special license departs from any applicable standard or default terms because doing so is in the better interests of both parties to the license; creativity for the sake of creativity is not desirable. In fact, there are usually extra administrative costs to the Government for managing

[73] *See* Appendix A – Key References (e.g., "Report to Congress on Pilot Program on IP Evaluation for Acquisition Programs for FY 2023, Pursuant to Sec. 801 of the NDAA for FY 2020 (P.L.116-92); Sec. 3.3.2 'Detailed Data Analysis' and Sec. 3.3.2.5.6 'Program Schedule Impacts Associated with Negotiated Licenses related to Technical Data and/or Software;' and Enclosure 3 ), Figure 5-7(b).'Timing of Negotiations Conducted for IP-Related LRs & Impacts to Program Schedules, By Comparable FY21 & FY23 Respondent Percentages.')"

[74] 3774, *supra* note 44.

[75] Access agreements permit the Government to view or access technical data or software in contractor-controlled repositories or facilities.

data with special or customized license terms. So, a special license that has the same effect as a standard license right but requires additional effort to understand or interpret is undesirable.

Additionally, the terms of special licenses are not just important at the time they are being negotiated and executed. Since those terms will govern Government handling and management of the licensed data often for years or even decades, the terms must be understandable and not create undue burdens on the Government or its employees, or third parties to whom the data may be provided.

The assessment of the SNL should be centered around the parties' interests, which may include ROI, mission needs, clarity and transparency, cost and ease of administration, compatibility with rights in similar data, etc. To determine whether the proposed license provides fair and reasonable value for each party, it is important to consider various aspects of the proposed license, including:

- The scope of the proposed license, including the scope of the TD and license rights provided under the proposed license compared to the scope of the standard license and to the Government's needs.
- The total amount of funding contributed or to be contributed by the Government for development, production, enhancement, refinement, or modification of the item or process to which the license pertains.
- The valuation of the IP and IP rights.
- Any other monetary and non-monetary consideration that the contractor will provide to the Government (including products, TD or software deliverables, lower prices, or broader license rights in other TD or software).

Understanding when a special license needs to be negotiated requires real understanding of the underlying foundational DFARS rights. To stay informed on evolving IP policies and tactics, DoD personnel need to review updates to DoD guidance, seeking DAU training opportunities, and consult dedicated IP SMEs (OSD IP Cadre, Service IP Cadres or local IP Legal SMEs).

In drafting and negotiating SNLs for noncommercial TD and CS, the DFARS specifies minimum required license rights — Limited Rights for TD[76] and Restricted Rights[77] for CS. Such special licenses may not go below these floors without approval of a DFARS deviation at the Office of the Secretary of Defense.[78] These rules on deviations from the FAR and DFARS do not apply to OTAs and other non-FAR agreements.

### 5.5.3 Award the contract.

At the completion of the solicitation process, the team should be confident that the program will receive the data, CS, and rights necessary not only to execute this phase of the program, but that the program is also postured to meet the life cycle capabilities required by the warfighter.

[76] *See* 7013, *supra* note 8, at (c)(4).
[77] *See* 7014, *supra* note 9, at (c)(4)(i).
[78] *See* DFARS 201.402(1)(ii) (2025); *see also,* for procedures DFARS 201.402(2) (2025).

A successful contract award is not measured simply as one that was awarded on time or on a pre-determined budget, but rather one that effectively meets the capability and program objectives, actively mitigates risk, creates opportunities, and allows flexibility for the dynamic needs of the mission.

As with all aspects of the contract, the IP portions require active management discussed in Section 6.

## SECTION 6: MANAGING/MAINTAINING THE IPS

This section provides guidance on how to execute the IPS post-contract award in the daily execution of the program including inspecting and accepting deliverables, verifying markings, managing/maintaining data rights, and invoking data rights challenge procedures.

### 6.1. INSPECTING AND ACCEPTING DATA DELIVERABLES.

This subsection emphasizes the importance of proper delivery, access, and securing of IP rights for the Government. It outlines the critical steps for managing and maintaining the quality, integrity, security, and usability of the data. It also details the verification process for data rights markings and the handling of nonconforming markings, advising on best practices for personnel receiving data deliveries.

#### 6.1.1 Acceptance of data.

To effectively use IP deliverables, it is critical that they are properly delivered, or sufficient access means are arranged, and that necessary IP rights are secured for the Government, usually by a license agreement. It is also critical that the program office ensures the acquired data and associated metadata are managed and maintained to preserve the quality, integrity, security, and usability of the data. This includes not just ensuring that the data is technically accessible, but also that the data is controlled based on licensing terms governing what data can be shared with whom and what must be kept confidential. Processes should be established to protect all data that contain critical technology information, as well as ensuring that limited distribution data, IP data or proprietary data are properly handled throughout the life cycle, whether the data are in hard-copy or digital format.

Designated data recipients should verify content, format, and quality of all contractually required data. Improper license rights markings are characterized as non-conforming or unjustified.[79] Before acceptance, designated data recipients should inspect contractually ordered data deliverables to ensure markings follow such requirements as:

- Data rights agreements, including DFARS clauses when applicable.
- Contractually imposed Government distribution statement instructions.
- Form DD-254 Security Agreement instructions (e.g., classification markings) or Controlled Unclassified Information (CUI) instructions.
- Export control marking requirements; and
- Marking instructions included in CDRLs and associated DIDs.

**See DoDM 5010.12 for more information on data inspection and acceptance.**

[79] *See* DFARS 227.7103-12 (2025) (technical data) [hereinafter 7103-12]; *see also* DFARS 227.7203-12 (2025) (computer software) [hereinafter 7203-12].

**Table 11. Characteristics of Improper Markings**

| | (a). Nonconforming Markings | (b). Unjustified Markings |
|---|---|---|
| ▪ **RIGHTS IN TD** (e.g., Other Than Commercial Products and Commercial Services) | (1) **Authorized markings** are identified in the clause at 252.227-7013[80], Rights in TD—Other Than Commercial Products and Commercial Services.<br>▪ All other markings that are directed to the Government's use and disclosure of the TD are **nonconforming markings**.<br>▪ An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at 252.227-7013[81] is also a **nonconforming marking**.<br>▪ See also, DFARS 227.7103-12(a)(2)[82]. | (1) An **unjustified marking** is an authorized marking that does not accurately reflect restrictions on the USG's use, modification, reproduction, release, performance, display, or disclosure of the marked TD, in accordance with the applicable data rights clause.<br>▪ For example, a Limited Rights legend placed on TD pertaining to items, components, or processes that were developed under a USG contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains Unlimited or Government Purpose Rights) is an **unjustified marking**.<br>▪ See also, DFARS 227.7103-12(b)(2)[83]. |
| ▪ **RIGHTS IN CS** (e.g., Other Than Commercial CS and Other Than Commercial CS Documentation) | (1) **Authorized markings** are identified in the clause at DFARS 252.227-7014[84], Rights in Other Than Commercial CS and Other Than Commercial CSD.<br>▪ All other markings that are directed at the Government's use and disclosure of the software are nonconforming markings.<br>▪ An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at 252.227-7014 is also a **nonconforming marking**.<br>▪ *See also*, DFARS 227.7203-12(a)(2)[85]. | (1) An **unjustified marking** is an authorized marking that does not accurately reflects restrictions on the USGs use, modification, reproduction, release, or disclosure of the marked CS or CSD, in accordance with the applicable software rights clause.<br>▪ For example, a Restricted Rights legend placed on CS developed under a government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains Unlimited or Government Purpose Rights) is an **unjustified marking**.<br>▪ *See also*, DFARS 227.7203-12(b)(2)[86]. |

### 6.1.2 Conformance of restrictive markings.

Acceptance of delivered data that are not marked consistent with the marking requirements in the contract may result in the Government losing the opportunity to leverage its legal rights to TD, CS, or other data under the contract. Noncommercial TD and software under DFARS contracts have specified markings or legends that must be used to indicate restrictions on the use or

[80] 7013, *supra* note 8, at (g)-(i).
[81] *Id.*
[82] 7103-12, *supra* note 79, at (a)(2).
[83] *Id.* at (b)(2).
[84] 7014, *supra* note 9, at (g)-(i).
[85] 7203-12, *supra* note 79, at (a)(2).
[86] *Id.* at (b)(2).

distribution of the data. See Section 6.3 for a discussion of challenge procedures for handling improper markings.

The titles of the permitted data rights markings under the DFARS for noncommercial TD and software to restrict the rights of the Government are Government Purpose Rights, Limited Rights, Restricted Rights, Special License Rights, and SBIR/STTR Data Rights.[87] Any markings to restrict the rights of the Government other than those specified or altered versions of the specified markings are said to be "nonconforming markings." However, markings to provide notice of copyright as prescribed under 17 U.S.C. §§ 401 or 402 are allowable.

The DFARS clauses provide comparatively expeditious procedures to remove nonconforming markings. For either TD or CS, a contracting officer may notify a contractor of nonconforming markings and if the contractor fails to remove or correct the nonconforming markings within sixty days, the Government may ignore or, at the contractor's expense, remove or correct any nonconforming markings.[88]

It is a best practice for personnel receiving deliveries of data, data managers, or other personnel using contractor data to notify the appropriate contracting officer or Contracting Officer Representative promptly upon the discovery of nonconforming markings to permit timely corrective action.

## 6.2. MAINTAINING DATA RIGHTS.

Continuous attention to the scope and accuracy of restrictive markings on data is necessary to protect the Government's rights. Potential legal liabilities and program execution frustrations can arise from lost opportunities to secure rights to data. See DoDM 5010.12 for additional guidance on management of contractor-prepared data.

### 6.2.1 Importance of managing data rights records.

Continuous and diligent attention to the scope and accuracy of restrictive markings on data acquired by the Government is necessary to protect the Government's rights during the life of a program and until data is retired from use. Failure to properly handle data can lead to legal liability for the Government or individual Government employees and costly, time-consuming litigation may frustrate program and mission execution.

It is particularly critical that the details of specially negotiated licensing terms are maintained, connected with covered data, reflected in training and handling guidance to the workforce, and implemented into data management systems. If records of special licenses are lost, it may be impossible to reconstruct such terms. For IP licensing terms that have a fixed expiration date, it is critical to track license duration for those fixed-term licenses along with disposition instructions at termination. For data licenses of perpetual duration, it is critical that records of the license terms are maintained and provided to users of the data for as long as the data exists in Government custody.

[87] *See* 7013, *supra* note 8; 7014, *supra* note 9; 7018, *supra* note 18.
[88] *See* 7013, *supra* note 8, at (h)(2); 7014, *supra* note 9, at (h)(2); 7018, *supra* note 17, at (h)(2).

### 6.2.2 Preventing loss of rights in data.

Some programs have experienced the loss of Government rights to use data freely through intentional or inadvertent "capturing" of Government data as alleged contractor proprietary data. Anyone receiving deliverables and briefings from contractors should be on the looking for information provided as GFI that is submitted back to the Government marked as contractor proprietary information. These activities are typically when intentional or inadvertent "capturing" occurs.

Tolerance or acceptance of contractor claims to ownership of Government data or even publicly available information can establish precedents. They can also establish courses of dealing or create false impressions on the part of Government employees or support contractors regarding the source of data and who has rights to use or control it.

Maintenance of rights in data requires ongoing and continuous vigilance. Doing so is an essential practice for the Government to maintain its data rights and avoid any "capturing."

### 6.2.3 Complying with licensing obligations.

Complementary to maintaining Government rights in data is the necessity to comply with all agreed upon license obligations. Government license obligations are contractual obligations, which may substantially survive the contractor's period of performance. In fact, many licenses are perpetual in duration; meaning that any restrictive obligations must be tracked and enforced for as long as the data exists in Government hands and systems.

A lack of understanding about the types of IP license rights and how SNLs work can lead to frustration and breaching of contractual obligations.

When data subject to license restrictions is handled or distributed manually, handlers must be familiar with restrictive markings and all applicable license restrictions on the data. They must ensure that the information is only distributed to authorized recipients under authorized circumstances with proper safeguards.

When data subject to license restrictions is handled through automated information systems (e.g., databases systems and networks), it is important that the systems are properly configured. These systems and networks should be programmed to process metadata containing rights information, and to handle the data in accordance with the applicable restrictions.

SNLs and customized commercial licenses for software are often complicated and require workforce training, consultation, or both to properly implement the license restrictions in IT systems.

One special case is worthy of emphasis: namely, the case of Government Purpose Rights for noncommercial TD and software. A "Government Purpose" means any activity in which the Government is a party, including in cooperative agreements situations with international or multi-national defense organizations, or in situations involving sales or transfers by the

Government to foreign governments or international organizations.[89] Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose TD for commercial purposes, or authorize others to do so.[90] Before a contractor receives Government Purpose Rights data, it should be ensured that they will be using it for a Government purpose, not their own commercial purpose. Further, it should be ensured that the contractor has the applicable NDA in place.[91] Government Purpose Rights data should not be marked with Distribution Statement A, C, or D, which would authorize public release or distribution to contractors without checking for the necessary Government Purpose Rights conditions.[92]

### 6.3. Validating Restrictions And Data Rights Challenges.

Challenging, verifying, or validating asserted restrictions generally refers to a statutory and regulatory process available to the Government after the award of a contract in which the Government may question contractor asserted data rights restrictions (e.g., improper markings) and request proof of contractor funding of development.[93] In simpler terms, data rights challenges are a DFARS process for questioning the factual basis of contractor asserted restrictions on the Government's rights to use and distribute TD and software (other than commercial software).

Data rights challenges can take a long time due to the procedural rules and because challenges often involve analysis and arguments regarding complex accounting and technical issues, often requiring subject matter experts to help with these issues.

It is for these reasons that data rights challenge procedures may be invoked prior to contract award, but the DFARS advises the Government to "avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement."[94]

However, if IP will not be evaluated in a competitive source selection or if awarding a contract that will be sole source for any reason, but especially if the sole source award is premised upon a lack of necessary data rights for competition, the DFARS guidance about pre-award challenges should be considered very carefully.

The DFARS permits questions about the validity of asserted restrictions to be postponed to post-award, but it is also clear that the USG has more leverage and freedom to maneuver prior to awarding a contract.

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[89] *See* 7013, *supra* note 8, at (a); 7014, *supra* note 9, at (a); 7018, *supra* note 17, at (a).
[90] *Id.*
[91] *See* DFARS 252.227-7025 (2025); DFARS 227.7013-7 (2025).
[92] *See* U.S. DEP'T OF DEF. INSTR. 5230.24, DISTRIBUTION STATEMENTS ON DOD TECHNICAL INFORMATION, 11-14 (10 Jan. 2023).
[93] *See e.g.,* DFARS 227.7103-13 (2025) [hereinafter 7103-13]; DFARS 227.7203-13 (2025; DFARS 252.227-7019 (2025) [hereinafter 7019].
[94] 7103-13, *supra* note 93, at (b).

**Sample Scenario**

Suppose there are known and well-founded reasons to question the factual basis of asserted data rights restrictions such that a program and contracting officer firmly intend to initiate challenge procedures post-award. That means the USG is entering into a contractual relationship with a party knowing that it will be in a dispute with that party for what may be a substantial portion of the period of performance. Moreover, consider the possible outcomes of such a dispute. Challenge procedures are often protracted and end in compromise settlements without a clear answer to the question of whether development was performed at private expense. If a contractor fails to meet its burden of proving development at private expense at the end of the process, and the restrictions were part of the basis for the award, that means:

1. the contract was based on faulty premises;
2. the contractor still got the contract; and
3. the Government had to abide by the erroneous restrictions until the final unappealed decision.

If a contracting officer decision invalidating asserted restrictions is ultimately sustained, the markings shall be cancelled, corrected, or ignore, and the Government may be able to get reimbursement for costs of reviewing and challenging the restrictions.[95] However, if the contractor's asserted restrictions are validated, the Government's data rights position has not improved despite the administrative burden of the validation process. However, the Government does gain certainty with respect to its data rights, which may be valuable for the program.

Further, if a contracting officer decision invalidating asserted restrictions is ultimately not sustained, the Government will be bound by the asserted restrictions.

If the challenge is found not to have been made in good faith, the contractor may be able to get reimbursement for certain litigation costs if the decision was appealed.[96]

Accordingly, a decision on whether to try to challenge is important but suspect asserted restrictions pre-award and the risk of holding up a necessary contract or postponing any challenge of restrictions to post-award is often a choice between a "rock and a hard place." The answer will be very fact dependent. Program and contracting officials should consult with legal counsel and technical requirements SMEs.

The importance of getting a contract awarded for both the Government and the contractor and the consequences of delaying must be weighed against continued uncertainty, inability to fully utilize data consistent with the Government's view of development funding history, possible protracted litigation, and loss of leverage post-award.

When planning competitive awards, it is wise to consider avoiding difficult choices by properly using IP as an evaluation factor to obtain necessary IP rights without the challenge procedures. When in already sole source situations, this tough choice may well be unavoidable. In such cases, it should be an informed and thoughtful choice documented in contracting and program

[95] *See* 7019, *supra* note 93, at (h); *see also* DFARS 252.227-7037(h) (2025).
[96] *Id.*

records to mitigate later confusion or recriminations over earlier decisions that have substantial and long-term consequences.

## 6.4. REVIEWING AND UPDATING THE IPS.

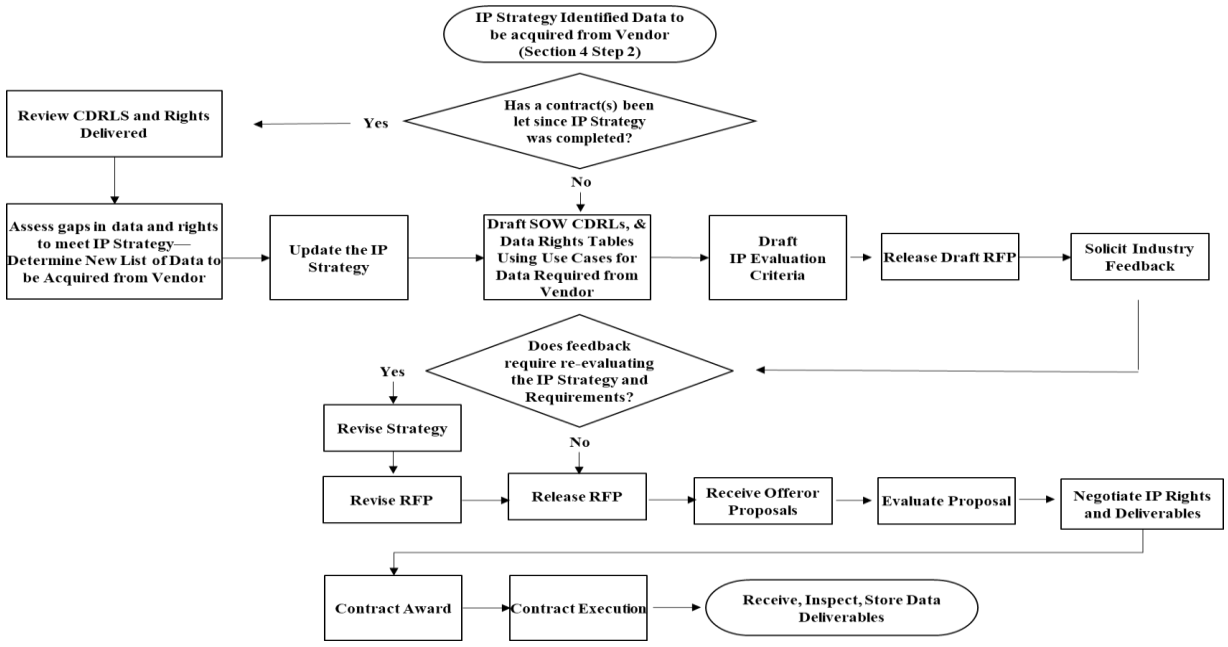
The IPS should be viewed as a living document and it should be reviewed and updated early and often over the course of the acquisition life cycle to reflect major program decisions, milestones, and direction, particularly when events and circumstances alter the assumptions in the strategy or produce results different from expected outcomes (e.g., IP negotiation does not produce the desired result). It should be continually referenced as a source of thorough program analysis to support decision making and mission objectives.

Events that may initiate reconsideration of an IPS can include:

- Receipt of data rights assertions contrary to expectations.
- Failure to receive and secure data deliveries in contract performance with expected rights.
- A change in mission or technical requirements that alters the needs for data and associated IP rights.
- Market changes that alter assumptions regarding the technical offerings or IP positions of prospective offerors in future contracts.
- Funding, appropriation, or other changes affecting a program that may alter ability or willingness to purchase data or IP rights.

Figure 2 represents the timing of IPS updates as they occur over the life cycle.

**Figure 21. Implementing the IPS Through Contracts**



## SECTION 7: CONCLUSION

The effective management of IP is crucial for the DoD to maintain technological superiority and achieve its mission objectives. This guidebook outlined the fundamental concepts, strategies, and best practices for acquiring, managing, and utilizing IP within the DoD.

Key Takeaways:

- IP is critical to fostering innovation, competition, and collaboration with industry partners.
- The development of robust IP strategies ensures the DoD can secure the necessary data, CS, and rights to support its programs throughout their life cycle.
- Programs should continuously evaluate and adapt their IP strategies. As technology and market conditions evolve, so too must the DoD's approach to IP management. Regular reviews and updates to the IPS will help mitigate risks and capitalize on new opportunities.
- The successful implementation of IP strategies requires collaboration across various departments and stakeholders. By fostering a culture of communication and cooperation, the DoD can effectively leverage IP to enhance its capabilities and achieve its strategic goals.

In summary, the proactive and strategic management of IP is vital for the DoD's success. By adhering to the guidelines and best practices outlined in this guidebook, the DoD can navigate the complexities of IP management and secure a competitive advantage in the ever-evolving technological landscape.

## SECTION 8: GLOSSARY

| Term | Definition |
|---|---|
| **Acquisition** | The conceptualization, initiation, design, development, test, contracting, production, deployment, logistics support (LS), modification, and disposal of weapons and other systems, supplies, or services (including construction) to satisfy DoD needs, intended for use in, or in support of, military missions. Source: DAU Glossary |
| **Acquisition Strategy (AS)** | A business and technical management approach designed to achieve program objectives within the resource constraints imposed. It is the framework for planning, directing, contracting for, and managing a program. It provides a master schedule for research, development, test, production, fielding, modification, post-production management, and other activities essential for program success. The AS is the basis for formulating functional plans and strategies (e.g., Test and Evaluation Master Plan (TEMP), Acquisition Plan (AP), competition, Systems Engineering Plan (SEP), etc.). Source: DAU Glossary |
| **Black Box** | A system or process that takes inputs, performs a function, and generates outputs, but the inner operations of the system or process are unknown to the user. |
| **Commercial** | (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than Governmental purposes, and—<br>(i) Has been sold, leased, or licensed to the general public; or<br>(ii) Has been offered for sale, lease, or license to the general public.<br>*(abridged definition) Complete definition at* FAR Definitions |
| **Competition** | "An AS whereby more than one contractor is sought to bid on a service or function; the winner is selected based on criteria established by the activity for which the work is to be performed." Source: DAU Glossary |
| **Competition in Contracting Act** | 1984 Federal law requiring the use of competition for Government acquisitions. Source: Federation of American Scientists (fas.org) presentation: Competition in Federal Contracting: An Overview of the Legal Requirements,<br>DPAP Memo (27 Apr 11): Improving Competition in Defense Procurements - Amplifying Guidance |
| **Computer Software (CS)** | Information consisting of "…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. CS does not include computer databases or CSD." Sources: DFARS 227.72, 252.227-7013, -7014, -7015, and -7018 |
| **Computer Software Documentation (CSD)** | "...owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the CS or provide instructions for using the software." Source: DFARS 252.227 - 7014 |
| **Configuration** | The functional and physical characteristics of existing or planned hardware, firmware, software or a combination thereof, as detailed in requirements and technical documentation and ultimately achieved in a product. Source: MIL-STD-3046 |
| **Configuration Management (CM)** | A process for establishing and maintaining consistency of a product's performance, functional and physical attributes with its requirements, design and operational |

| Term | Definition |
|---|---|
| | information throughout its life. The five elements of Configuration Management and their descriptions are listed below.<br>**Configuration Management Planning** - The planning and preparation for all CM activities to be performed for the program.<br>**Configuration Identification** - The selection and identification of Configuration Items and the associated documentation and data that describes the item configuration.<br>**Configuration Change Control** - The control of changes to the configuration of an item to assure that only beneficial changes are made, and that all associated documentation is also changed accordingly to reflect the actual item configuration change.<br>**Configuration Audits** - Verification that the item meets its performance requirements and that the associated documentation and data matches the item configuration.<br>**Configuration Status Accounting** - The historical record of the original product configuration and all approved changes that have occurred since. Source: MIL-HDBK-61A(SE) Configuration Management Guidance |
| **Contract Clause** | "Contract clause" or "clause" means a term or condition used in contracts or in both solicitations and contracts and applying after contract award or both before and after award. FAR 2.101 Definitions |
| **Contract Data Requirements List (CDRL)** | A list of contract data requirements using DD Form 1423 that are authorized for a specific acquisition and made a part of the contract. Source: DAU Glossary |
| **Cooperative Research and Development Agreement (CRADA)** | An agreement between one or more Federal laboratories and/or technical activities and one or more non-Federal parties. Under a CRADA, the Government laboratories and/or technical activities shall provide personnel, services, facilities, equipment, or other resources with or without reimbursement (but not funds to the non-Federal parties). CRADAs are instruments that may be used in all aspects of a product and/or system life cycle where RDT&E activities occur. The non-Federal parties shall provide funds, personnel, services, facilities, equipment, or other resources toward the conduct of specified R&D efforts that are consistent with the missions of the laboratory. The CRADA partners shall share in the IP developed under the effort. Source: DAU Glossary |
| **Data** | Recorded information, regardless of form or the media on which it may be recorded. The term includes TD and CS.<br>The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information. Source: FAR 52.227-14 |
| **Data Item Description (DID)** | A completed document that defines the data required of a contractor. The document specifically defines the data content, format, and intended use. Source: MIL-STD-963 |
| **Defense Federal Acquisition Regulation Supplement (DFARS)** | DoD supplement to FAR. Contains additional regulations specific to DoD acquisition needs. Source: D&DR Guide FAR and DFARS Overview |
| **Federal Acquisition Regulation (FAR)** | The principal set of rules governing Federal acquisitions of supplies and services. It contains 53 parts, and more than 1,800 pages of standardized policies and procedures used or referenced in federal contracts. Source: D&DR Guide FAR and DFARS Overview |

| Term | Definition |
|---|---|
| **Form, Fit, and Function Data (FFF)** | Information that describes "...the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items." Sources: DFARS 252.227-7013, -7014, -7015, -7018 |
| **Framing Assumptions** | Fundamental beliefs about program conditions that we expect to be true in the future. These are items that will cause program failure if they turn out to be false. |
| **Intellectual Property (IP)** | Information, products, or services that are protected by law as a type of intangible property, including data (e.g., TD and CS), technical know-how, inventions, creative works of expression, trade names. |
| **IP Acquisition** | IP in DoD acquisitions is critical for ensuring return on technology investment, promoting technical innovation, and enhancing competition, supportability, technical refresh, and affordability. Acquiring and licensing the appropriate IP is vital for ensuring the systems will remain functional, sustainable, upgradable and affordable. |
| **IP Deliverables** | Products or services (including information products and services) that are required to be delivered or provided to the USG by contract or another legal instrument and that include or embody IP (e.g., TD and CS). |
| **IP Rights** | The legal rights governing IP, including ownership as well as license or other authorization to engage in activities with IP (e.g., make, use, sell, import, reproduce, distribute, modify, prepare derivative works, release, disclose, perform, or display IP). When the IP involves access to classified information, DoD Directive 5535.02, DoDI 2000.03, and Volume 2 of DoDM 5220.22 may apply. |
| **IP Strategy (IPS)** | Strategy to identify and manage the full spectrum of IP (e.g., TD and CS deliverables, patented technologies, and appropriate license rights) from program inception and throughout the life cycle. The IPS will describe how program office will assess program needs for, and acquire competitively, when possible, IP deliverables and associated license rights needed for competitive, affordable acquisition and sustainment over the life cycle. The IPS is updated throughout the life cycle, summarized in the AS, and in the LCSP during the Operations and Support Phase. The PM is responsible for evaluating and implementing open systems architectures, where cost effective, and implementing a consistent IPS. This approach integrates technical requirements, contracting mechanisms, and legal considerations to support continuous multiple competitive alternatives throughout the life cycle. Source: DAU Glossary |
| **TD necessary for Operation, Maintenance, Installation and Training Data (OMIT)** | Information that is "necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data)." Sources: DFARS 252.227-7013, -7014, -7015, and -7018 |

# APPENDIX A: REFERENCES

## Statutes

| Statute Number | Statute Title | Link |
|---|---|---|
| 10 U.S.C. § 3771 | Rights in TD: Regulations | 10 U.S.C. § 3771 |
| 10 U.S.C. § 3772 | Rights in TD: Provisions Required in Contracts | 10 U.S.C. § 3772 |
| 10 U.S.C. § 3774 | Major Weapon Systems and Subsystems: Long-term TD Needs | 10 U.S.C. § 3774 |
| 10 U.S.C. § 3781 | TD: contractor justification for restrictions; review of restrictions | 10 U.S.C. § 3781 |
| 10 U.S.C. § 3791 | Management of IP Matters Within the DoD | 10 U.S.C. § 3791 |
| 10 U.S.C. § 1707 | Cadre of IP experts | 10 U.S.C. § 1707 |
| 10 U.S.C. § 2464 | Core Logistics Capabilities | 10 U.S.C. § 2464 |
| 10 U.S.C. § 4211 | AS | 10 U.S.C. § 4211 |
| 10 U.S.C. § 4324 | Life Cycle Management and PS | 10 U.S.C. § 4324 |
| 10 U.S.C. § 4236 | Negotiation of price for TD before development, production, or sustainment of major weapon systems | 10 U.S.C. § 4236 |
| 10 U.S.C. § 4401 | Requirement for MOSA in major defense acquisition programs; definitions | 10 U.S.C. § 4401 |
| 10 U.S.C. § 4576 | Requirement for consideration of certain matters during acquisition of noncommercial CS | 10 U.S.C. § 4576 |
| 35 U.S.C. §§ 201-204 | Bayh-Dole Act | 35 U.S.C. §§ 201-204 |

## Policy and Regulations

| Policy or Regulation Number | Description | Link |
|---|---|---|
| DoDI 5010.44 | IP Acquisition and Licensing. Establishes policy, assigns responsibilities, and prescribes procedures for the acquisition, licensing, and management of IP | DoDI 5010.44 |
| DoDM 5010.12-M | Procedures for the Acquisition and management of TD | DoDM 5010.12-M |
| DFARS 252.227-7013 | Rights in TD - Other Than Commercial Products and Commercial Services | DFARS 252.227-7013 |
| DFARS 252.227-7014 | Rights in Other Than Commercial CS and Other Than Commercial CSD | DFARS 252.227-7014 |
| DFARS 252.227-7015 | TD – Commercial Products and Commercial Services | DFARS 252.227-7015 |

| | | |
|---|---|---|
| DFARS 227.7202-1, -3, and -4 | Commercial CS and Commercial CSD. No specific clause prescribed, policy prefers use of commercial license, adapted by negotiation if/as necessary | 227.7202-1<br>227.7202-3<br>227.7202-4 |
| DFARS 252.227-7018 | Rights in Other Than Commercial TD and CS—Small Business Innovation Research Program and Small Business Technology Transfer Program | DFARS 252.227-7018 |
| DFARS 252.227-7104 | Contracts Under the Small Business Innovation Research Program and Small Business Technology Transfer Program | DFARS 252.227-7104 |
| DFARS 252.227-2017 | Identification and Assertion of Use, Release, or Disclosure Restrictions | DFARS 252.227-2017 |
| DFARS 252.227-7019 | Validation of Asserted Restrictions – CS | DFARS 252.227-7019 |
| DFARS 252.227-7037 | Validation of Asserted Restrictions on TD | DFARS 252.227-7037 |
| DFARS 252.227-7026 | Deferred Delivery of TD or CS | DFARS 252.227-7026 |
| DFARS 252.227-7027 | Deferred Ordering of TD or CS | DFARS 252.227-7027 |

## Regulatory Reform

| DFARS Case | Description & Status | Links |
|---|---|---|
| DFARS 2019-D069, Validation of Proprietary and TD | Streamlined Challenges/Validation for Commercial Tech Data – Final Rule | DFARS Case No. 2019-D069 |
| DFARS 2018-D018, Noncommercial CS | Ensuring Needed Software Delivery During Program Life Cycle – Final Rule | DFARS Case No. 2018-D018 |
| DFARS 2021-D005, MOSAs | Enabling MOSA – Proposed Rule | DFARS Case No. 2021-D005 |
| DFARS 2019-D044, Rights in TD | Enhanced Deferred Ordering for Tech Data & Software – Proposed Rule | DFARS Case No. 2019-D044 |
| DFARS 2019-D043, Small Business Innovation Research Program Data Rights | Full Implementation SBIR/STTR Data Rights Policy Updates – Final Rule | DFARS Case No. 2019-D043 |
| DFARS 2018-D071, Negotiation of Price for TD and Preference for SNLs | Flexible, tailored, business-case supported Negotiations for IP – Proposed Rule | DFARS Case No. 2018-D071 |
| DFARS 2022-D016, Update of Challenge Period for Validation of Asserted Restrictions on TD and CS | Doubling the Challenge Period (from 3 to 6 years) for DR Validations – Final Rule (awaiting publication) | DFARS Case No. 2022-D016 |

## Key References

| Reference | Description | Link |
|---|---|---|
| DoD Other Transactions Guide | Introduces all three OTAs (research, prototype, and production) and strategy for planning, execution, and administration of them. | DoD Other Transactions Guide |
| DoD MOSA Implementation Guidebook | Provides comprehensive guidance on implementing MOSA principles across the DoD acquisition life cycle. It emphasizes using modular design, open standards, and widely supported interfaces to develop and acquire affordable, adaptable, and evolvable systems. | DoD MOSA Implementation Guidebook |
| Sec. 813 Report | Government-Industry advisory panel on TD rights, (Nov 2018) | Sec. 813 Report |
| Sec. 875 Report | DoD access to IP for weapon systems sustainment, (May 2017) | Sec. 875 Report |
| DoD Response to Sec. 813 & 875 Reports from USD(A&S) | Response to Sec. 813 & 875 Reports from USD(A&S), (Feb 2019) | USD(A&S) Response to Sec. 813 & 875 |
| Sec. 801 Report FY20 | First Annual Report to Congress on Pilot Program on IP Evaluation for Acquisition Programs Section 801 of FY20 NDAA (March 2021) | First Annual Sec. 801 Report |
| Sec. 801 Report FY21 | Second Annual Report to Congress on Pilot Program on IP Evaluation for Acquisition Programs Section 801 of FY20 NDAA (Feb 2022) | Second Annual Sec. 801 Report |
| Sec. 801 Report FY22 | Third Annual Report to Congress on Pilot Program on IP Evaluation for Acquisition Programs Section 801 of FY20 NDAA (Nov 2022) | Third Annual Sec. 801 Report |
| Sec. 801 Report FY23 | Fourth Annual Report to Congress on Pilot Program on IP Evaluation for Acquisition Programs Section 801 of FY20 NDAA (Nov 2023) | Fourth Annual Sec. 801 Report |
| Additional Congressional Reports | Significant IP & Sustainment-planning content in both DoD Reports to the White House Competition Council, required by Section 5 of Executive Order 14036, Promoting Competition in the American Economy (09 Jul 2021) | "State of Competition within the Defense Industrial Base" (15 Feb 2022)<br>"DoD Life cycle Sustainment Efforts in Support of Organic Repair" (25 June 2023) |
| OSD IP Cadre Website | Provides the focus and structure of the OSD IP Cadre as well as additional inks and references relevant to IP in DoD acquisitions. | IP Cadre Website |

## APPENDIX B: TOOLS AND RESOURCES

| Tools and Resources | Web Link |
|---|---|
| ▪ Foundational IP Credential | ▪ https://www.dau.edu/credentials/cacq-008 |
| ▪ The IP & Data Rights (DR) Community of Practice | ▪ https://www.dau.edu/cop/IPDR |
| ▪ DAU IPDR CoP Sub-Page: The IP Cadre | ▪ https://media.dau.edu/channel/Contracting/62925211 |
| ▪ Online DAU Training Videos | ▪ https://www.dau.edu/cop/IPDR/Pages/Topics/IPDR-Cadre.aspx |
| ▪ DFARS Procedures, Guidance and Information (PGI) | ▪ https://www.ecfr.gov/ |
| ▪ Life Cycle PS Planning: IP for PS Toolkit | ▪ https://www.dau.edu/tools/intellectual-property-ip-product-support-ps-toolkit |
| ▪ OSD IP Cadre Website | ▪ https://www.acq.osd.mil/asda/dpc/api/ip-cadre.html |
| ▪ LCSP Version 3.0, Figure 2-2: PSS for Reference Design Concept | ▪ https://www.dau.edu/sites/default/files/Migrated/ToolAttachments/LCSP%20Outline%20Version%203.0%2013_October_2022%20v1.pdf |
| ▪ IP: Navigating Through Commercial Waters (This guidebook replaces and supersedes "Navigating Through Commercial Waters") | ▪ https://www.dau.edu/sites/default/files/Migrated/CopDocuments/Intellectual%20Property-Navigating%20through%20Commercial%20Waters.PDF |

ARMED SERVICES BOARD OF CONTRACT APPEALS

| | | |
|---|---|---|
| Appeal of -- | ) | |
| | ) | |
| Computer Sciences Corporation | ) | ASBCA No. 56175 |
| | ) | |
| Under Contract No. DAAB07-00-D-E252 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This is one of 15 consolidated appeals docketed as ASBCA Nos. 56162 – 56176. The Army has moved for summary judgment; Computer Sciences Corporation (CSC) opposes the motion. At issue is a matter of contract interpretation relating to the payment of $35 million to CSC for intellectual property developed in conjunction with its contract performance. The issue has been extensively briefed. We deny the Army's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Contract No. DAAB07-00-D-E252 was awarded to CSC on 29 December 1999 for the Army's Wholesale Logistics Modernization Program (WLMP or LMP contract) for the estimated cost of $680,668,576.00 (R4, tabs 12 to 25). The contract was a firm, fixed-price, multi-year services contract. Contract Section H-13, "RIGHTS IN CERTAIN DELIVERABLES," gave the Army Special Purpose License Rights (SPLRs) to intellectual property (IP) developed by CSC for six specified deliveries:

> (1) Status reports in accordance with the WLMP [Statement of Work] SOW, Paragraph 1.6.

(2) Documentation resulting from Replication, Distribution, Installation and Training (RDIT) in accordance with the WLMP SOW, Paragraph 5.1.

(3) Business Process Re-engineering and Analysis Reports in accordance with the WLMP SOW, Paragraph 4.1.

(4) Description Documents in accordance with the WLMP SOW, Paragraph 4.3.

(5) Implementation Plans in accordance with the WLMP SOW, Paragraph 4.4.

(6) ERP [Enterprise Resource Planning] Selection, The Solution Demonstration Lab and Release Descriptions, in accordance with the WLMP SOW, Paragraph 4.2.

(R4, tab 12 at 2354-55)

In 2004, CSC and the Army began Integrated Program Review (IPR) negotiations to reform and restructure the LMP Contract. On 18 October 2004, CSC and the Army executed a Memorandum of Agreement (MOA) relating to expanded rights to the IP developed by CSC which provided in relevant part:

1. The Army wishes to obtain Special Purpose License Rights to certain Intellectual Property ("IP") developed by CSC and used by it for delivery of services under the Logistics Modernization Program ("LMP") contract No. DAAB07-00-D-E252 (the "Contract") using a phased approach, the initial phase of which is a limited license;

2. the Army acknowledges that CSC has made investments in the development of the LMP IP;

3. the parties have agreed that the IP to which the Army wishes to acquire Special Purpose License Rights is generally within the scope of the categories listed in Attachment 1;

4. the parties have agreed to negotiate the terms of the limited licensing of the IP by October 26, 2004;

5. the parties recognize that adequate and fair consideration is to be made to CSC for the IP. Consideration could include any monetary or non-monetary compensation that is not prohibited by law or DoD regulation; and

6. the parties have entered into discussions to resolve all potential requests for equitable adjustment; discussions may include restructure of the Contract, and

7. the parties will enter into good faith negotiations to accomplish the foregoing immediately.

(R4, tab 397 at 10144)

Attachment 1 provided:

INTELLECTUAL PROPERTY

1. End user application software including configurations, settings, user exits, and supporting documentation. This includes the Question Answer Data Base, CI Template, and Business Process Master List (BPML), and the ERP Configuration with SAP Transaction Setting (IMG) and Technical Objects as well as developed code and configuration settings/documentation for *all* components of the LMP solution (e.g., Business Warehouse (BW), Advanced Planning and Optimizer (APO), etc.).

2. Data base designs, structures, data translations, data conversion, and data loading software

3. Enhanced/custom reports to include, but not limited to, coding/configuration settings and documentation to include both functional and technical specifications

4. All LMP Hierarchy, including, but not limited to Organization and Plan structures (e.g., master data structures, financial structure, etc.)

5. Tools, process and methodologies utilized to support the solution lifecycle

6. Interface software, including technical documentation and interface functional and technical specifications

7. SAP configuration and documentation

8. Software, including that provided by third parties, developed to support development and testing of application software upgrades and releases, release procedures, test cases, and documentation

9. Infrastructure documentation including the Technical Architecture and Logical and Physical Infrastructure lay-out

10. Enterprise Architecture Integration (EAI) software solutions

(R4, tab 397 at 10145)

On 1 November 2004, CSC and the Army executed another MOA relating to Specifically Negotiated License Rights (SNLRs) to IP developed by CSC. The November MOA provided in relevant part:

1. The Army wishes to obtain Specifically Negotiated License Rights to certain IP, as that term is defined in Attachment 1, developed by CSC and used by it for delivery of services under the Logistics Modernization Program ("LMP") contract No. DAAB07-00-D-E252 (the "Contract"). The Specifically Negotiated License Rights are set forth in Attachment 1.

2. Consideration for these license rights will be part of the global settlement contemplated by the Memorandum of Agreement signed 18 October 2004 and this Agreement.

3. Should the parties fail to reach agreement on the global settlement and the [Single Arm Logistics Enterprise] SALE Technical Exchange Workshops have been conducted, the Contract will be modified to add the following:

a. Subject to a mutually agreed payment schedule, [REDACTED] for Contract Year 7 and [REDACTED] per year for Contract Years 8, 9, 10, 11, and 12 will be added to the LMP contract.

b. The Installation Fixed Base [IFB] effort, including fielding to all sites and the subsequent sustainment, will be added to the Requirements portion (Subsection H-7A) of the Contract. The IFB effort will maximize utilization of blueprinting already completed in Global Combat Support System — Army (GCSS-Army).

4. Subject to the availability of funds, a time-and-materials delivery order for SALE Technical Exchange Workshops will be awarded no later than 15 November 2004. The effective date of this delivery order shall be the date of execution of this MOA. The workshop content will be in accordance with Attachment 2.

5. The parties will continue good faith negotiations to establish the terms of the global settlement by 19 November 2004. Both parties will make best efforts to obtain all necessary approvals to fully implement the Contract modification memorializing this global settlement.

(R4, tab 402 at 10183) It appears from Attachment 1 that the list of expanded categories of IP to which the Army would have access was similar to that listed in Attachment 1 to the October MOA. However, it also appears from paragraph A of Attachment 1 that, while the scope of the license rights was expanded, it was limited —strictly to the SALE *as currently constituted* using the generic definition" (app. opp'n at 31, ex. H).

Appellant requested, and the Board now grants, leave to supplement its opposition with evidence obtained during discovery after the Army's motion had been briefed and was at issue. Included among the documents provided is an e-mail dated 9 November 2004 authored by the contracting officer that describes the MOA as including —Access to LMP Intellectual Property" for use in support of SALE workshops (app. supp. opp'n, ex. A). The e-mail is consistent with evidence included in slides reflecting the Army's —Wants/Desires" as indicated in —LMP Integrated Program Review" initial discussion slides dated 14 October 2004 (*id*., ex. B) and other documents related to the 1 November 2004 MOA which appear to reflect the Army's desire to keep expanded IP licenses as part


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of restructuring the LMP contract (*id*., exs. C, D, E). There also is deposition evidence from government witnesses who acknowledged the [REDACTED] payment set forth in paragraph 3 of the November MOA was for limited access to the IP for use in the SALE workshop, with expanded IP licenses to be negotiated as part of the global settlement (Thomas Carroll dep. at 76-77, 80).

On 16 November 2004, the contracting officer issued Task Order 67 under the contract pursuant to paragraph 4 of the November 2004 MOA. Among other things, it obligated [REDACTED] for SALE Technical Exchange Workshops. (R4, tabs 405, 497) The workshops commenced on 12 January 2005 (R4, tab 417 at 10431-32).

On 15 December 2004, CSC and the Army executed a Memorandum of Understanding (MOU) regarding a "global settlement of issues arising under and related to the restructuring" of the LMP contract (R4, tab 410 at 10203). Paragraph 1 of the December 2004 MOU stated:

> 1. On October 18 and November 1, 2004, the Parties entered into related Memoranda of Agreement that resulted in a grant from CSC to the Army of Specifically Negotiated License Rights to certain intellectual property developed by CSC and used by CSC for delivery of services under the Contract. These Memoranda of Agreement also are in furtherance of the Parties' intent to settle outstanding issues arising under the Contract and intent to restructure the Contract.

The MOU was not executed by the contracting officer, but rather by an Army negotiator (*id.*). The Army's answer to CSC's Interrogatory 14.6 states that it did not acquire additional rights to CSC's LMP IP from either the 18 October or the 1 November 2004 MOAs (app. opp'n, ex. J).

On 2 May 2005, CSC and the Army executed a MOA documenting a global settlement subject to a number of listed events. The settlement agreement stated in relevant part:

> This Memorandum of Agreement ("MOA") documents the essential elements of the agreement between Computer Sciences Corporation ("CSC") and the United States Department of the Army ("Army") (collectively the "Parties") regarding the Global Settlement ("Global Settlement") of certain business, financial and contractual issues arising under

or related to the Logistics Modernization Program ("LMP") contract number DAAB07-00-D-E252 (the "Contract"):

1. As the result of negotiations conducted by the Parties' Joint Integrated Program Review team since October 2004, the Parties reached agreement on April 12, 2005, regarding certain aspects of a Global Settlement of issues arising under or related to the Contract. The Parties' Global Settlement is subject to:

    a. concurrence by the Command Counsel, U.S. Army Material Command ("AMC");

    b. applicable approvals by various U.S. Department of the Army and U.S. Department of Defense authorities;

    c. funding;

    d. restructure of the Contract;

    e. resolution of DCAA [Defense Contract Audit Agency] findings regarding verification of past and future costs to include February 2005 and March 2005 actuals;

    f. execution of a certificate of current cost and pricing data; and

    g. the mutual release of claims set forth in paragraph 2.c. herein.

The settlement agreement further provided in relevant part:

2. The essential elements of the Parties' agreement are as follows:

    ....

b. Contract extension


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i. Subject to required Government approvals, the Contract will be modified to include an award term of eight years which will extend performance to December 11, 2019. The nature of the award term will be deductive; meaning that the Army may reduce the duration of the Contract and do so in the event that it determines that CSC's performance has not met objective and measureable award term criteria to be negotiated by the Parties as part of the Global Settlement. A criterion that may lead to the deduction of the entire eight year extension is acceptance of Deployment 2.

c. Mutual release of claims for the period from December 29, 1999 through April 1, 2005:

i. In consideration of CSC's promise to forgo filing any claims arising under or related to the Contract during the period December 29, 1999 through April 1, 2005, the Army shall pay CSC [REDACTED] in accordance with the following payment schedule

1. on or before December 15, 2005, not less than [REDACTED]; and

2. on or before December 15, 2006, the unpaid balance of the [REDACTED].

ii. In consideration of the terms of the Global Settlement, the Army promises to forgo filing any claims against CSC arising under or related to the Contract that arose during the period December 29, 1999 through April 1, 2005.

iii. The Contract modification implementing this Global Settlement will also include this mutual release of claims.

d. Specifically Negotiated License Rights

i. The Contract will be modified on or about May 6, 2005, to incorporate the consideration and

associated clause for Specifically Negotiated License Rights for the Single Army Logistics Enterprise ("SALE") as specified in the Parties' November 1, 2004, Memorandum of Agreement and as expanded by paragraph d.ii.1 below.

ii. Upon acceptance by the Army of Deployment 2, the Army shall pay CSC $35M for the Specifically Negotiated License Rights.

1. CSC further agrees to extend the Specifically Negotiated License Rights to

a. the U.S. Army General Funds Enterprise Business Systems ("GFEBS") program, without regard to the identity of the awardee, and

b. any U.S Army or Department of Defense Enterprise Integration program for which CSC is the prime contractor.

e. Recovery of unpaid consideration

i. Should the Contract end for any reason, including termination of the Contract or the Army's failure to order its requirements in accordance with the requirements clause of the Contract, as modified, and CSC has not been paid the entire amount agreed to in paragraph 2.c. from December 29, 1999 through April 1, 2005 ([REDACTED]) and in paragraph 2.d.ii. consideration for Specifically Negotiated License Rights ($35M), those unpaid amounts will be due and payable to CSC.

f. Transition Development

i. Definition

1. —Transition" is the period between April 2, 2005 and Deployment 1 acceptance.

ii. The Parties will jointly prepare and, on or about June 15, 2005, agree to acceptance criteria, including a Post Deployment Operational Capability Assessment, the Program Baseline reflected in Solution Manager, the Integrated Program Master Schedule ("IPMS"), the Program Management processes and procedures, and the Organizational Change Management Plan, for Deployment 1.

iii. The Transition ends upon the acceptance of Deployment 1 by the Army using the mutually agreed acceptance criteria.

iv. Transition Development will be subject to the following terms:

1. CSC and the Army will share the cost of development during the Transition on an equal basis (50/50). The total cost of development to be shared by the Parties shall not exceed [REDACTED].

2. CSC shall be paid for its portion of the Transition development costs upon acceptance by the Army of Deployment 1.

3. Performance bonus activities will be suspended during Transition without degradation of services.

....

h. Sustainment (including program governance)

i. For the period April 2, 2005 through September 30, 2005

1. Firm fixed price of [REDACTED] to be paid in monthly installments of [REDACTED] starting at a time mutually agreeable to the parties but no later than 1 June 2005; and


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2. Previously unpaid performance bonus in the amount of $14,274,951.94 for the 18th through 21st Contract quarters to be paid on or before May 31, 2005.

3. Performance bonus activities will be suspended during this period without degradation of service.

ii. For the period October 1, 2005 through March 31, 2006

1. Firm fixed price of [REDACTED] to be paid in monthly installments of [REDACTED].

2. Performance bonus activities will be suspended during this period without degradation of service.

iii. For the period April 1, 2006 through March 31, 2007

1. Firm fixed price of [REDACTED] to be paid in monthly installments of [REDACTED].

2. Performance bonus activities will be suspended during this period without degradation of service.

iv. For the period April 1, 2007 through December 31, 2011

1. Firm fixed price of [REDACTED] annually to be paid in monthly installments of [REDACTED]

2. Available performance bonus during this period of [REDACTED] annually, the criteria and payment terms to be negotiated


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v. For the period January 1, 2012 through December 31, 2019

1. Firm fixed price of [REDACTED] annually to be paid in monthly installments of [REDACTED].

2. Available performance bonus during this period of [REDACTED] annually, the criteria and payment terms to be negotiated.

i. Additional Incentives

i. Expanded work

1. The Contract will be modified on or about May 6, 2005, to add the Installation Fixed Base efforts to the requirements portion of the Contract and the initial task will be awarded during Government Fiscal Year 2005; and

2. On or before June 30, 2005, a task order will be issued under the Contract for efforts associated with the PD-LMP support to the Product Lifecycle Management program.

ii. Future efforts

1. The Parties will continue to advocate opportunities under the ―Related Logistics Services" paragraph of the Statement of Work (Attachment No. 1 to the Contract).

(R4, tab 440 at 10564-70)

A ―MEMORANDUM FOR FILE" dated 5 May 2005 over the contracting officer's name relating to the basis for issuing Modification No. P00007 states that the 2 May 2005 MOA global settlement ―spells out the language and concepts that are to be incorporated into the global settlement modification" (R4, tab 442 at 10616). Excerpts from the depositions of government witnesses reflect their understandings that the parties reached agreement in the global settlement (Meis dep. at 114, Carroll dep. at 94).


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On 10 May 2005, CSC and the Army executed bilateral contract Modification No. P00007. Section A, "SUPPLEMENTAL INFORMATION," revised Clause H-7A to incorporate the IFB effort to the requirements portion of the contract as agreed to in paragraph 2.d. of the 2 May 2005 MOA. It also implemented sustainment payments for the period 2 April through 30 September 2005 consisting of $25 million via installment payments of $4,166,667 as agreed to in paragraph 2.h.i.1 and the $14,274,951.94 performance bonus agreed to in paragraph 2.h.i.2. Clause H-13, "RIGHTS IN LISTED TECHNICAL DATA, COMPUTER SOFTWARE AND OTHER INFORMATION," identified the scope of the LMP IP to be licensed and the scope of the government's use of it, together with specified exclusions. (R4, tab 445 at 10635-36) Paragraph B, "SCOPE OF IP TO BE LICENSED," restated the six IP items deliverable under the original contract. The balance of paragraph B provided as follows, subject to exclusions listed in paragraph C:

> B.2 IP ordered as deliverables under a task order or IP to which access is required pursuant to such task order are subject to this Clause H-13 unless rights in IP are specifically addressed in a specific task order.
>
> B.3 By way of this modification and in addition to the Contract deliverables set forth above, the Contractor will now make available to the U.S. Government and its Permitted Contractors the following categories of IP. At the time of the modification incorporating this clause in the Contract, the Parties agree that the categories set out in the following list are sufficiently broad to encompass all of the IP. Should the U.S. Government, in the future, request additional technical data, computer software, or other information that is not encompassed by any of the categories of IP listed below, but which both the Parties nonetheless reasonably agree is utilized in the configuration and implementation of the LMP solution, the Parties agree that the following list will be modified to add a category inclusive of such additional technical data, computer software, or other information without further consideration owing to the Contractor.
>
> 1) End user application software subject to the exclusions in paragraph C and associated configurations, settings, user exits and supporting documentation. This includes the Question Answer Data Base, CI Template, Business Process Procedure Documents (including blueprints), Process Scenarios,

Integrated Scenarios, Business Process Master List (BPML), Authorization Profiles and the ERP Configuration with SAP Transaction Settings (IMG) and Technical Objects as well as developed code, functional specifications, technical specifications and configuration settings/documentation for all components of the LMP solution (e.g., Business Warehouse (BW), Advanced Planning and Optimizer (APO)).

2) Data base designs, structures, data translation, data conversion, and data loading software and applicable technical documentation to include both functional and technical specifications.

3) Enhanced/custom reports to include, but not be limited to, coding/configuration settings and applicable documentation to include both functional and technical specifications.

4) All LMP Hierarchies, including, but not limited to, Organization and Plant structures (e.g., master data structures, financial structure).

5) Tools, processes and methodologies utilized to support the solution lifecycle (e.g., Cut Over Scorecard, Detailed Cut Over Plan, organizational role assignment process) subject to the exclusions in paragraph C.

6) Interface software subject to the exclusions in paragraph C, including applicable technical documentation to include both functional and technical specifications, SAP configuration and documentation.

7) SAP configuration and associated documentation.

8) Software, subject to the exclusions in paragraph C, developed to support development and testing of application software upgrades and releases, release procedures, test cases, and documentation.

9) Infrastructure documentation including the Technical Architecture and Logical and Physical Infrastructure lay-out.

> 10) Enterprise Architecture Integration (EAI) software solutions subject to the exclusions in paragraph C.

(R4 tab 445 at 10636-37)

Clause H-19, "Payment of Specifically Negotiated License Rights," of Modification No. P00007 stated:

> Upon acceptance of Deployment 2 (the acceptance criteria to be negotiated at a later date), the Government agrees to pay the Contractor the sum of thirty-five (35) million dollars for the Specifically Negotiated License Rights as described in the Section H clause H-13 Rights in Listed Technical Data, Computer Software and Other Information". This payment is subject to FAR 52.232-18 Availability of Funds.

(R4, tab 445 at 10638) Modification No. P00007 does not contain a release (R4, tab 445).

The parties agree that one or more of the conditions precedent to the 2 May 2005 MOA were not satisfied and that the global settlement in the MOA was not implemented. The Army reached the determination that implementation of the global settlement would not occur sometime in November 2005. (App. sur-reply, ex. A)

On 28 April 2006, CSC submitted its Request for Equitable Adjustment (REA) 14 to the contracting officer. The REA stated:

> REA 14 seeks compensation for the Government's access to and use of the highly-valuable and widely-applicable LMP IP that CSC developed to meet the Government's demands. CSC is entitled to an equitable adjustment because the Government (i) changed the LMP Contract by requiring CSC to develop and deliver the LMP IP, (ii) breached its agreement to compensate CSC for expanded license rights to the LMP IP, and (iii) violated CSC's Constitutional rights by acquiring access to and use of CSC's LMP IP without just compensation. CSC's outside expert has valued the LMP IP using two commonly-accepted valuation methodologies: the cost savings approach and the reasonable royalty approach. Under the former, CSC is entitled to an equitable adjustment in the amount of [REDACTED]; under the latter, CSC is entitled to an equitable adjustment in the amount of [REDACTED].


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....

> Moreover, the modification of the LMP Contract to include P00007, by itself, does not adequately compensate CSC for the value of the LMP IP license rights. The amount of the IP payment was a compromise in consideration of all other terms of the failed May MOA and the Government cannot "cherry pick" only those terms of the May MOA that reflect its benefit of the bargain, while depriving CSC of the benefit of its full bargained-for consideration. Thus, the Government has breached the November MOA by refusing to modify the LMP Contract to include all agreed provision as part of a fully-implemented global settlement, of which the LMP IP was only a part.

(R4, tab 559 at 11806, 11848)

On 14 July 2006, CSC converted REA 14 into a Contract Disputes Act (CDA) claim (R4, tab 597). On 14 June 2007, the contracting officer denied the claim (R4, tab 647). A timely appeal followed and REA/Claim 14 was assigned ASBCA No. 56175.

Deployment 2 occurred on 14 May 2009 (gov't proposed finding of fact (PFF) ¶ 18 and app. resp.). It was accepted by the government on 13 November 2009 (gov't PFF ¶ 21 and app resp.).

On 6 August 2009, the contracting officer unilaterally issued Task Order Modification DAAB07-99-D-E252-010125 to provide $35 million for payment of SNLR in accordance with Clause H-19 of contract Modification No. P00007. The Task Order modification had originally been proposed as a bilateral modification to which CSC had objected. (Gov't PFF ¶ 20 and app. resp.) CSC submitted its invoice for the $35 million on 23 November 2009 and was paid on that amount on 23 December 2009 (gov't PFF ¶ 22 and app. resp.).

## DISCUSSION

The standards we are to apply in deciding the Army's motion are familiar. Summary judgment is appropriate where there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). As the moving party, the Army has the burden of "establishing the absence of any genuine issue of material fact." *Mingus*, 812 F.2d at 1390. We are to view the facts in the light most favorable to CSC, the


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non-moving party, accepting its version of the underlying facts as true and drawing all reasonable factual inferences in its favor. *See Liberty Lobby*, 477 U.S. at 255; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993).

At issue in this motion is the interpretation of clause H-19 of Modification No. P00007. Questions of contract interpretation are subject to summary disposition where the contract language is unambiguous. *Muniz v. United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). A contract provision is unambiguous if there is only one reasonable interpretation. *See C. Sanchez*, 6 F.3d at 1544. In contrast, contract terms that are susceptible to more than one reasonable interpretation are ambiguous. *See Lockheed Martin IR Imaging Systems, Inc. v. West,* 108 F.3d 319, 322 (Fed. Cir. 1997).

The Army first contends that the language of clause H-19 of Modification No. 00007 is clear and unambiguous and that the only reasonable interpretation of it is that CSC agreed to expanded rights in the LMP IP as defined in clause H-13 for the payment of $35 million upon acceptance of Deployment 2 (gov't mot. at 22-23). It is undisputed that Deployment 2 has been accepted and that CSC has been paid $35 million pursuant to a task order issued unilaterally after it objected to the issuance of a bilateral contract modification. CSC dismisses the Army's interpretation as unreasonable because it reads clause H-19 of Modification No. P00007 in isolation, rather than in the context of the contract as a whole and the underlying MOAs memorializing the negotiations leading up to Modification No. P00007.

We are not persuaded that one single sentence in clause H-19 of Modification No. P00007 can be read alone in isolation to provide the only reasonable interpretation of the parties' agreement regarding a $35 million payment for CSC's IP as the Army asserts. This was a multi-million dollar, multi-year contract for the Army's LMP. After five years of performance, the parties spent many months trying to restructure the contract with the apparent goal of reaching a global settlement that would include expanded contractual rights to IP developed by CSC and used for the delivery of contractual services. The negotiations produced three MOAs, one MOU and, ultimately, Modification No. P00007. Expansion of the Army's license rights to CSC's IP was addressed in each.

Thus, we believe it is necessary to consider the MOAs, MOU and other evidence identified by CSC relating to the actions of the parties before execution of Modification No. P00007 to provide context and meaning to its terms. *See Gibbs v. United States*, 358 F.2d 972, 979 (Ct. Cl. 1966); *Rio Construction Corp.*, ASBCA No. 54273, 04-1 BCA ¶ 32,534 at 160,912.

The Army contends that we should focus upon the three MOAs and the MOU and conclude that the 1 November 2004 MOA establishes that CSC agreed to payment of $35 million for its IP independent of implementation of a global settlement. Its premise is that

Modification No. P00007 was a stand-alone modification that formalized the earlier agreement reached in the 1 November 2004 MOA. According to the Army, the parties agreed in paragraph 1 of the 15 December 2004 MOU that the 18 October 2004 and 1 November 2004 MOAs resulted in an actual grant of CSC's IP to the Army. It asserts that the parties agreed to "adequate and fair consideration" for SPLR to CSC's IP in the October MOA and then to payment of $35 million consideration for the SNLR and the addition of the IFB effort to the Requirements portion of the contract in the November MOA, if the parties failed to reach agreement on the global settlement and the SALE Technical Exchange Workshops had been conducted. It is undisputed that the workshops were conducted.

The Army's argument continues that CSC would be paid $35 million if the parties were "unable to implement' a global settlement" and that the $35 million consideration reflected in the 1 November 2004 MOA was based upon the assumption global agreement would not be reached (gov't mot. at 24-25). It contends that the 2 May 2005 MOA was a conditional global settlement and was not implemented because the conditions were not satisfied.

The Army points out that the $35 million consideration recited in the 2 May 2005 global settlement MOA is the same amount agreed to in the 1 November 2004 MOA and that the other provisions of the global settlement did not specify a time frame for modifying the contract. It concludes that the November MOA was totally independent of the 2 May 2005 MOA and that Clause H-19 of Modification No. P00007 formalized the November agreement as an alternative to the global settlement as contemplated by the parties (gov't reply at 8-10).

CSC also disagrees with this interpretation. It correctly states that the 15 December 2004 MOU was not executed by the contracting officer, and it argues that, in any event, the 18 October and 1 November 2004 MOAs did not transfer any IP rights to the Army. CSC points out that the October MOA reflects the Army's understanding that CSC invested in the LMP IP and its agreement to pay "adequate and fair consideration" with monetary or nonmonetary compensation as part of a global settlement. It reads the November MOA as reinforcing the commitment to a global settlement and as intending the $35 million payment to be compensation for sharing its IP with the government and third parties in conjunction with the SALE Technical Exchange Workshops, rather than as compensation for IP license rights. Thus, if a global settlement was not reached, CSC would receive $35 million for having shared its IP, but the Army would not receive any additional rights to it.

Citing the 2 May 2005 MOA and other documents and deposition transcripts which we are to view in the light most favorable to it, CSC contends a global settlement was reached that included expanded IP license terms. It continues that the global

agreement included a number of interrelated agreements, all of which were to be incorporated into the contract. In particular, CSC points to an eight-year extension of the contract though 11 December 2019; a release of claims payment in the amount of [REDACTED]; addition of IFB efforts to the Requirements portion of the contract; a $35 million payment for its IP, as expanded; cost sharing arrangements during the transition period between 2 April 2005 and acceptance of Deployment 1; and payment of substantial amounts of money for unpaid performance bonuses. Thus, it asserts that the $35 million was only one component of the consideration for the SNLRs and it accepted payment in partial fulfillment of the Army's obligation to provide ~~a~~adequate and fair consideration." Finally, CSC considers the fact that Modification No. P00007 was issued bilaterally on 10 May 2005, only eight days after the global settlement, tracks the 2 May 2005 MOA and makes specific reference to it to be evidence that it was issued in furtherance of the MOA, and not as an independent stand-alone modification to disavow it. It was not until November 2005 that the Army determined that the global settlement would not be implemented.

CSC interprets Modification No. P00007 as establishing that CSC agreed to grant the Army expanded rights in its IP as an inextricable part of the global settlement embodied in the 2 May 2005 MOA and that the $35 million consideration recited in Modification No. P00007 for its IP cannot stand apart from the remainder of the May global settlement.

CSC also contends that there are genuine issues of material fact in dispute. For example, with respect to the Army's interpretation of the 15 December 2004 MOU as reflecting an agreement that the 18 October and 1 November 2004 MOAs granted IP rights to the Army, CSC points out that the Army's answer to its Interrogatory 14.6 states that it did not acquire additional rights to CSC's LMP IP from either of these MOAs. The Army attempted to explain the reason for its answer. CSC sees disagreement about the scope of the IP license rights identified in the 1 November 2004 MOA and those identified in clause H-13 of Modification No. P00007. CSC contends the SNLRs granted in clause H-13 of Modification No. P00007 are broader than those preliminarily identified in the October and November 2004 MOAs. The Army has a very different view of the matter. In any event, the IP identified in the 1 November 2004 and 2 May 2005 MOAs and clause H-13 has not been explained to the extent that the answer is clear. CSC also sees a dispute about whether agreement was reached in the May MOA, making the November MOA meaningless, or whether the failure to implement the May MOA constitutes a failure to reach agreement. We agree that these matters are disputed. Moreover, disagreements such as these are not amenable to resolution on a motion for summary judgment. *See General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 (our task is not to resolve factual disputes, but to ascertain whether material facts are in dispute).


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We are convinced that the record must be further developed if we are to understand the factual context in which Modification No. P00007 was issued and determine its intended meaning. *See Skanska US Building, Inc.*, ASBCA No. 56339, 10-1 BCA ¶ 34,392 at 169,833. The parties' intent is at the heart of the dispute over the interpretation of clause H-19 of Modification No. P00007. Accordingly, the Army's motion for summary judgment must be denied. *See, e.g., Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514 (controverted issues of intent preclude summary judgment).

CONCLUSION

For the reasons stated above, the Army's motion for summary judgment on Claim 14, ASBCA No. 56175, is denied.

Dated: 1 November 2010

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals


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I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56175, Appeal of Computer Sciences Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals


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