The Department of Defense Proposes New Rules for Commercial Software and Technical Data Acquisitions

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On September 27, 2010, the Department of Defense ("DOD") published a proposed rule that would significantly revise the Defense Federal Acquisition Regulation Supplement ("DFARS") Part 227, "Patents, Data, and Copyrights." 75 Fed. Reg. 59,412 (Sept. 27, 2010).

The Proposed rule includes many significant changes but those that specifically relate to commercial data entitle the DOD to the following:

1. Obtain unlimited rights in certain commercial technical data, including form, fit, and function data, and data necessary for "operation, maintenance, installation, or training." Proposed DFARS § 252.227-7015(b)(2);

2. "[A]ccess, use, modify, reproduce, release, perform, display, or disclose" commercial technical data, which includes computer software documentation, within the government if such an action is necessary for "emergency repair or overhaul," or to foreign governments for evaluation or informational purposes. Proposed DFARS§ 252.227-7015(b)(3);

3. Require contractors to identify and mark all commercial data provided to DOD with restrictions on use, release, disclosures, etc. Proposed DFARS § 252.227-7015(d);

4. Unilaterally determine if the software is improperly marked, and in "urgent and compelling circumstances access, use, modify, reproduce, release, perform, display or disclose computer software or technical data as necessary to address said urgent and compelling circumstances...." Proposed DFARS § 252.227-7037(f)(3)(ii); and

5. Order certain commercial data on a deferred basis for up to three years. Proposed DFARS§ 252.227-7027.

Clearly, these proposed changes are an expansion of DOD rights in commercial computer software and technical data. Currently, the DOD is required to purchase commercial data on the same terms that the software or data is licensed to the public. DFARS §227.7202-1(a). And while the Proposed DFARS purports to require the DOD to purchase commercial data using the commercial license, it also prohibits any commercial license terms that are

"inconsistent with Federal procurement law." Proposed DFARS § 252.227-7015(b)(1). In an attempt to alleviate any ambiguity from the prohibition on inconsistent terms, the proposed clause incorporates "severability" language, which explicitly strikes such terms from the license. Further, the clause envisions the parties negotiating "any issues raised by the elimination of license terms or conditions," which, presumably, may occur during performance of the contract.

An additional striking change to the traditional practice of most commercial vendors is the requirement in Proposed DFARS § 252.227-7015(d), which will require all commercial software and technical data to be marked, regardless of whether it is purchased pursuant to a commercial license. Not only must a prime contractor adjust its practices accordingly, but also such requirements must flow down to any subcontractors providing commercial software and technical data. Proposed DFARS § 252.227-7015(f).

Moreover, the revisions include a Proposed DFARS Deferred Ordering ,clause whose applicability to commercial items does not appear entirely clear. Specifically, the government's right to order technical data or computer software on a deferred basis for up to three years appears to be limited to "any technical data or computer software created or developed in the performance of this contract or any subcontract hereunder." Proposed § 252.227-7027(a). However, the clause goes on to state that the government's rights in such data will be subject to the appropriate data rights clause, including DFARS § 252.227–7015, Rights in Technical Data and Computer Software—Commercial. Proposed § 252.227-7027(d)(3). Application of the deferred ordering clause to commercial software and technical data delivered to the government from both a prime contractor and its subcontractors creates a novel requirement for commercial vendors that may be at odds with standard business practice. Further, this requirement has the potential to undercut a contractor's ability to protect commercial data, developed at private expense. Currently, the best way for a contractor to protect its data is to keep it trade secret. That means not delivering the source code to the government.

In sum, the Proposed DFARS provide an expansion of the rights that DOD receives when it acquires commercial computer software by effectively subjecting commercial software to DOD's current clause governing the acquisition of commercial "technical data." Proposed DFARS § 252.227-7015. Further, the government's ability to explicitly strike terms "inconsistent with Federal procurement law" may result in a contraction of data protection for commercial vendors of software or technical data to DOD.

Ultimately, the real implications of these proposed changes to the DFARS can only be surmised until government agencies and contracting officers begin to incorporate and implement them in the performance of contracts. However, the potential risk associated with dwindling protection for commercial software and technical data must be assessed as commercial contractors determine whether and how they intend to go about doing business with the federal government.

The time for submitting comments to the DOD on the proposed rule has recently been extended until December 27, 2010.

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