Secure your IP rights for data, software

The protection of your intellectual property rights in data and software from the government is a complex issue. Some basic principles can help you spot and avoid problems.

First, become intimately familiar with Part 12 of the Federal Acquisition Regulation, dealing with commercial items. If you sell a commercial item, you should reject any standard data and/or software rights clauses and insist on one tailored for commercial items.

Government Contracting
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Second, understand the four basic types of license rights the government can get. Although you will always "own" the data and software you develop, ownership rights can be severely limited by the license the government receives. The categories are:

Unlimited rights. This includes the right to use or disclose the data for any purpose and to permit others — including your competitors — to do so.

Limited rights license (for technical data) and restricted rights license (for software). Although these rights differ, the basic principle is the same, i.e., the data or software may only be used within the government, in most cases only by the government, and only for well-defined governmental purposes. Limited and restricted rights cannot be given to your competitors.

Government purpose rights. Available only under Department of Defense contracts, this license allows you to reserve the exclusive right to the commercial use of the resulting IP for five years. For government applications, however, the government's rights during that five-year period are the tantamount to unlimited rights.

Specifically negotiated rights. These are a product of your negotiating leverage.

Third, understand how the government acquires these rights:

■ If the development is required by your contract or if the government funds any of the development, it will acquire unlimited rights.

■ If the item, component or process is "developed wholly at private expense," you can assert limited or restricted rights protection.

■ If mixed funding supports the development, government purpose rights can be requested, but only under DoD contracts.

Fourth, understand the traps inherent in the standard data-rights clause:

■ Avoid low-dollar contracts to improve, adapt or "productize" your existing, privately developed item; the government will claim unlimited rights in the modified item.

■ Pre-notify the government during negotiations if you intend to deliver data or software with restrictive legends.

■ Insist on a limited or restricted rights license for any physically segregative part, component or module that was developed wholly at private expense and that will not be changed under the contract.

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