

**LEVERAGING TECHNICAL DATA AND  
COMPUTER SOFTWARE ASSETS  
UNDER THE 1995 DFARS FINAL RULE**

**NATIONAL CONTRACT MANAGEMENT ASSOCIATION**

**UPPER CHESAPEAKE CHAPTER MEETING  
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EDGEWOOD AREA, MD**

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# AGENDA

- I. OPENING REMARKS/INTRODUCTION
  
- II. TECHNICAL DATA & COMPUTER SOFTWARE REGULATIONS
  - A. FORMER DFARS/NEW DFARS/FAR RULE ANALYSIS
  - B. STRATEGIC VEHICLES
  
- III. QUESTIONS (SPIRITED DISCUSSION THROUGHOUT)

# MISSION STATEMENT

- NEW DFARS AND FAR COMMERCIAL PRESUMPTIONS PROVIDE MAJOR PROTECTION TO DEVELOPERS
- TECHNICAL DATA/COMPUTER SOFTWARE ARE FOUNDATION ASSETS FOR FUTURE PRODUCTS:
  - \*SCIENTIFIC -- IDEAS AND CONCEPTS
  - \*ENGINEERING -- DESIGN, ANALYSIS, AND TESTING
  - \*COMMERCIAL & NON-COMMERCIAL SOFTWARE
  - \*VIRTUAL PROTOTYPING -- (CAD)
  - \*M&PE -- PROCESSES, SEQUENCE, SUBCONTRACTOR “METAL BENDING” (CAM)
- IRON-CLAD CONTRACT IS VEHICLE TO PROTECT ASSETS, WHILE FACILITATING INTEGRATION AND SOFTWARE TECHNOLOGIES
- INTEGRATE FAR AND DFARS STRATEGIES INTO GLOBAL STRATEGY

## BASELINE

- “Limited Rights” in Technical Data “Developed Exclusively at Private Expense”
- “Restricted Rights” in Computer Software “Developed Exclusively at Private Expense”
- “Government Purpose Rights” in DoD Data/Software developed with “Mixed Funding” (old “GPLR”)
- “Unlimited Rights” in Data/Software “Developed Exclusively with Government Funds”
- “Specifically Negotiated License Rights” (FAR has rough equivalent)

(Note: Variations on Software Treatment “Piggybacked” on Technical Data Discussion)



# **TECHNICAL DATA AND COMPUTER SOFTWARE** **THREE SCENARIOS**

1. EXISTING DoD CONTRACTS WITH 1988 DFARS  
(MODS AFTER SEPT. 1995)
2. EXISTING AND FUTURE CIVILIAN CONTRACTS  
(FAR PART 27 AND FAR PART 12)
3. DoD RFPS ISSUED AFTER SEPT. 1995

# TECHNICAL DATA/COMPUTER SOFTWARE

## Standard License Rights

FORMER DFARS RULE	NEW DFARS RULE
<p>DFARS 227.402-72</p> <ul style="list-style-type: none"> <li>• <b>Determined by the development “source of funds”</b></li> <li>• Funds = Rights Private expense = Limited Rights <b>Mixed funding = GPLR</b> Government expense = Unlimited Rights</li> <li>• Provided limited and unlimited rights, but had different funding requirements for Government Purpose License Rights</li> <li>• <b>Unlimited rights were the <i>de facto</i> default standard</b></li> </ul>	<p>DFARS 227.7103-4, -5</p> <ul style="list-style-type: none"> <li>• <b>Determined by the development “source of funds”</b></li> <li>• Funds = Rights Private expense = Limited Rights <b>Mixed funding = GPR</b> Government expense = Unlimited Rights</li> <li>• New Government Purpose Rights (GPR) standard for mixed-funding situations (see below)</li> <li>• <b>Government obtains <u>license</u> rights, not title, from the contractor</b></li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• “Limited” Rights Technical Data and “Restricted” Rights Computer Software - Privately Developed</li> <li>• Unlimited Rights - “First Developed in Performance”</li> <li>• In civilian procurements, mixed funding often leads to unlimited rights in technical data or computer software required to be delivered under the contract (FAR 27.404(a)(4), (c))</li> </ul>	



# TECHNICAL DATA/COMPUTER SOFTWARE

## Elimination of “Required for Performance” Criterion

FORMER DFARS RULE	NEW DFARS RULE
<p>DFARS 227.401(11), (16)</p> <ul style="list-style-type: none"> <li>• <b>Unlimited rights arose in all data “developed exclusively at government expense”</b></li> <li>• <b>“Developed exclusively at government expense” included all data “required for performance”</b></li> <li>• <b>Allowed DoD to claim Unlimited Rights in essentially all technical data and computer software “required for performance” regardless of the source of funding</b></li> </ul>	<p>DFARS 252.227-7013(a)(7), (b)(1)</p> <ul style="list-style-type: none"> <li>• <b>Government no longer obtains Unlimited Rights unless (1) directly funded; (2) specified as an element of performance; or (3) identified as a deliverable (except software)</b></li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• Unlimited rights obtained if: (1) data “first developed in performance” of a contract; (2) FFF; data manuals or instructional and training material for installation, operation, or routine maintenance and repair; and (3) all other residual delivered data not identified with a limited or restricted rights legend</li> <li>• Government “requests” that contractor identify limited rights data or restricted software “to extent feasible” in proposal (FAR 27.404(d)(2)) (No harsh “list it or lose it” trap)</li> </ul>	

# TECHNICAL DATA/COMPUTER SOFTWARE

## Only Direct Costs Trigger Unlimited Rights

FORMER DFARS RULE	NEW DFARS RULE
<p>Interpretation of FAR 31.203</p> <p style="text-align: center;"><b>Favored by DoD And Non-Developers</b></p> <ul style="list-style-type: none"> <li>DoD captured unlimited rights in all data whether developed at direct cost or indirect cost (<u>except</u> expressly identified IR&amp;D or B&amp;P)</li> </ul>	<p>Interpretation of FAR 31.203</p> <p style="text-align: center;"><b>Favored by Developers</b></p> <ul style="list-style-type: none"> <li><b>Developers now retain rights in data funded with indirect, as well as, company funds</b></li> <li>Development charged to all indirect cost pools, including, but not limited to, IR&amp;D and B&amp;P, is expressly deemed as “developed exclusively at private expense”; thus, the government only receives limited/restricted rights</li> <li>FAR Part 31, CAS, and increased DCAA scrutiny protect against potential contractor abuses (<b>fear of “cherry picking”</b>)</li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>Silent as to whether indirect funding constitutes development at private expense</li> <li>Technical Data: Source of funding irrelevant for data “first developed in performance”</li> <li>Computer Software: Software itself is usually the relevant product, and how its development was funded determines the eligibility for protection</li> </ul>	

# TECHNICAL DATA/ COMPUTER SOFTWARE

## Segregation Now Allowed to Lowest Level

FORMER DFARS RULE	NEW DFARS RULE
<p>See “Required for Performance” discussion -- DFARS 227.401(11)</p> <ul style="list-style-type: none"> <li>• Government argued it should receive unlimited rights to the <b>entire end-item</b> because the only item being procured was the end-item rather than specific sub-items and sub-components</li> <li>• <b>So long as there was at least some direct funding, government captured privately developed components with at least GPLR</b></li> </ul>	<p>DFARS 227.7103(4)(b)/252.227-7013(a)(7)(i), (k)</p> <ul style="list-style-type: none"> <li>• <b>Private expense determinations shall now be made at the “lowest practicable level”</b></li> <li>• <b>Government can assert only limited rights in those segregable sub-items, sub-components or subprocesses “developed exclusively at private expense” (subroutines for software)</b></li> <li>• As noted above, there are three options:  Private expense = Limited Rights (Restricted Rights Software);  Mixed funding = GPR; and  Government expense = Unlimited Rights</li> </ul> <p><b>Mandatory flow-down to all subcontractors (even if prime contract not “commercial item”)</b></p>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• <u>“Co-sponsored R&amp;D” and copyright create equivalent of poor-man’s “GPR.”</u> No specific GPR clause prescribed. Contractor can assert limited or restricted rights to “readily segregable” privately-funded portions of items</li> <li>• CO “should normally not require” that contractors provide -- “as a condition of the procurement” -- unlimited rights (FAR 27.406 (a)(3)); DFARS -- Stronger restriction</li> </ul>	



## TECHNICAL DATA

### Definition of “Developed” Still Requires “Existence” and “Workability”

FORMER DFARS RULE	NEW DFARS RULE
<p><b>DFARS 227.401(10)</b></p> <ul style="list-style-type: none"> <li>• <b>“Existence and workability” test</b></li> <li>• The government acquired unlimited or GPLR rights in unsegregable portions of an item where the item was funded at direct cost, or if the first prototype did not come into existence until performance of a government contract</li> <li>• <b>The government obtained these rights, even if the contractor had functionally developed the item or process, via “CAD” <u>without a prototype</u>, prior to contract performance (Boeing 777 CAD design would be unlimited rights)</b></li> </ul>	<p><b>DFARS 252.227-7013(a)(6)</b></p> <ul style="list-style-type: none"> <li>• <b>No significant change from the old rule</b></li> <li>• Ascertain whether existing data can fall under <b>DFARS 252.227-705(a)</b>, so as to invoke “commercial presumption” of development at private expense</li> <li>• <b>Requires “high probability” item or process will function as intended</b></li> <li>• But not to patent “reduction to practice” standard</li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• The FAR does not define the term “developed”</li> </ul>	

# COMPUTER SOFTWARE

## Definition of “Developed” is a Lower Standard Than That for Technical Data

FORMER DFARS RULE	NEW DFARS RULE
<p data-bbox="176 521 1079 560"><b>DFARS 227.401(10)</b></p> <ul data-bbox="176 602 1079 716" style="list-style-type: none"><li data-bbox="176 602 1079 716">• Technical Data is “developed” only after there was “high probability” to persons skilled in the art that it will successfully operate as intended, i.e. it “exists” and is “workable”</li></ul>	<p data-bbox="1079 521 1915 560"><b>DFARS 252.227-7014</b></p> <ul data-bbox="1079 602 1915 951" style="list-style-type: none"><li data-bbox="1079 602 1915 641">• Lower standard for definition of “developed”</li><li data-bbox="1079 680 1915 794">• <b>Software must be tested or analyzed to demonstrate that it “can reasonably be expected to perform to its intended purpose”</b></li><li data-bbox="1079 833 1915 951">• <b>Computer software documentation is considered developed if it is written in sufficient detail to comply with the contract requirements</b></li></ul>
<b>FAR</b>	
<ul data-bbox="176 1114 1915 1146" style="list-style-type: none"><li data-bbox="176 1114 1915 1146">• “Developed” is not defined in the FAR</li></ul>	

# COMPUTER SOFTWARE

## Definitions of Computer Software and Computer Software Documentation Have Been Clarified

FORMER DFARS RULE	NEW DFARS RULE
See generally DFARS 227.401	<p>DFARS 227.7203; 252.227-7014</p> <ul style="list-style-type: none"> <li>• Software is presumed to have been “developed exclusively at private expense.” DoD can acquire unlimited rights only if: (1) developed at direct cost; (2) obtained under another contract; (3) DoD specifically negotiated greater rights for consideration; (4) was already publicly available; (5) was delivered without restrictive legends; or (6) was derived from expired GPLR or GPR. As such, <u>DoD cannot acquire unlimited rights merely by specifying as element of performance or designating it as a deliverable</u></li> <li>• DoD expressly prohibited from directly or indirectly reverse engineering, decompiling, or disassembling</li> <li>• Commercial software does not even have DFARS Clause (DoD takes commercial license)</li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• Government obtains restricted rights in software: (1) developed at private expense and trade secret; (2) commercial or financial and confidential and privileged; (3) or published/copyrighted (<b>FAR 27.401; 52.227-14 (a)</b>)</li> <li>• Contractor can protect assets by: (1) limiting distribution; (2) restricting the use of source code and documentation; (3) using copyright notices; and (4) negotiating special license rights</li> </ul>	

## TECHNICAL DATA/COMPUTER SOFTWARE

### “Government Purpose License Rights” Is Restructured Into “GPR”

FORMER DFARS RULE	NEW DFARS RULE
<p><b>DFARS 227.402-72(a)(2), (b)(2)</b></p> <ul style="list-style-type: none"> <li>• GPLR were the only negotiable mixed-funding rights under the former regulations. However, <b>use was significantly restricted because GPLR was prohibited where there was potential need for competitive procurement data</b></li> <li>• Developers shared a perception that there was little incentive to provide wholly-funded R&amp;D for contracts</li> </ul>	<p><b>DFARS 227.7103-5(b)/ 252.227.7013(a)(11), (12)</b></p> <ul style="list-style-type: none"> <li>• <b>GPR are the evolved standard for mixed-funding situations after funding has been segregated to lowest level</b></li> <li>• Government receives rights in data for “government purpose” (procurement), while Developers retain rights to the data for commercial use</li> <li>• <b>Government purposes include Foreign Military Sales and FRP procurement</b></li> <li>• <b>GPR are subject to a negotiable (nominal 5 yr.) period, at the end of which the Government obtains unlimited rights</b></li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• The FAR does not expressly address mixed funding, but co-sponsored R&amp;D clause, <b>FAR 27.408</b>, is roughly analogous</li> <li>• Copyright to data “first developed in performance” is “poor man’s” GPR (<b>FAR 27.404(f)(1)</b>)</li> </ul>	

## TECHNICAL DATA/COMPUTER SOFTWARE

### “Specifically Negotiated License Rights”

FORMER DFARS RULE	NEW DFARS RULE
N/A	<p data-bbox="554 561 835 589"><b>DFARS 227.7103-5</b></p> <ul data-bbox="554 643 1915 1019" style="list-style-type: none"><li data-bbox="554 643 1915 711">• Special licenses may be negotiated where standard licenses do not satisfy the government’s needs</li><li data-bbox="554 756 1915 824">• Allows the government unilateral option to compel surrender of additional rights <b>after</b> contract award, (<u>including threat of reverse engineering Technical Data</u>)</li><li data-bbox="554 870 1915 1019">• To mitigate risk of post-award demand for increased rights, developers should (1) take these factors into account when formulating their negotiating strategy and preparing proposals; or (2) pre-empt the government by contingently licensing to a second source (<b>DFARS 252.227-7025(c)(2)</b>)</li></ul>
<b>FAR</b>	
<ul data-bbox="191 1182 1575 1214" style="list-style-type: none"><li data-bbox="191 1182 1575 1214">• Government must give contractor consideration if it requires additional rights (<b>FAR 27.4006(a)(3)</b>)</li></ul>	

# TECHNICAL DATA/COMPUTER SOFTWARE (NON-COMMERCIAL ITEMS)

## Failure to Disclose Pre-Existing GPLR or Unlimited Rights

FORMER DFARS RULE	NEW DFARS RULE
N/A	<p><b>DFARS 227.7103-2(c); 6(d)</b></p> <ul style="list-style-type: none"> <li>• Numerous “list it or lose it traps” require pre-award assertion of limited/restricted rights (waiver of all rights unless “inadvertent” of “new information”)</li> <li>• In conjunction with “<b><u>list it or lose it requirement</u></b>,” developers must identify <b>all</b> technical data and computer software prior to award that is “identical or substantially similar” to data “produced for,” “delivered to,” or “to be delivered,” to the government under <b>any</b> Federal contract or subcontract</li> <li>• <b>Potential liability under the Civil and Criminal False Claims Acts, the False Statements Act, and the Truth in Negotiations Act if a contractor fails to comply with requirement</b></li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• <b>FAR 27.406(a)</b> <u>No FAR “List-or-Lose It” requirement</u></li> <li>• Minimum list of data requirements, and “requested” contractor pre-award identification of limited or restricted rights only to the “extent feasible.” <u>Focus on incremental performance identification (FAR 27.406 (a)(1))</u></li> <li>• Failure to mark under FAR = DFARS; however, <u>withholding and incremental performance notice is permissible (FAR 27.404 (I))</u></li> </ul>	

# TECHNICAL DATA/SOFTWARE

## DoD Improper Disclosure to Third-Parties is Actionable

FORMER DFARS RULE	NEW DFARS RULE
N/A	<p><b>DFARS 227.7103</b></p> <ul style="list-style-type: none"> <li>• <b>Government cannot release non-commercial technical data and computer software to third parties as government-furnished information (GFI) without the developer’s prior written authorization, except for emergency repairs and overhauls</b></li> <li>• The government licenses only those rights as customarily provided to commercial purchasers, except for: (1) the traditional exception for <b>“form, fit, and function”</b> data; (2) data necessary for <b>operation, maintenance, installation, and training</b>; and (3) <b>modifications</b> to a commercial item or process, funded at direct cost, to meet government specifications</li> <li>• <b>Non-Disclosure Agreement gives developer “third party beneficiary” standing to sue rogue contractor, but exempts DoD for liability</b></li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• No specific clause required for commercial software, but contract must specify Government’s right to use software to fulfill Government’s need for which software is acquired (<b>FAR 27.405(b)(2)</b>)</li> </ul>	

# TECHNICAL DATA (COMMERCIAL ITEMS)

## Limited Rights to Commercial Items, Components, and Processes

FORMER DFARS RULE	NEW DFARS RULE
NO PRESUMPTION IN OLD RULE	<p><b>DFARS 227.7102; 252.227-7015</b></p> <ul style="list-style-type: none"> <li>• Establishes a presumption that commercial items are “developed exclusively at private expense”</li> <li>• Thus, technical data delivered with commercial items provide only “limited rights” to the specific acquiring activity for that contract</li> <li>• Dissuades contracting officers from challenging a contractor’s assertion that an item is commercial, unless the government can “produce credible evidence” that it contributed to the development</li> <li>• Contracting officers cannot deny an asserted restriction solely because of a lack of contractor response to a challenge notice under Validation Clause</li> <li>• DoD cannot capture unlimited rights by designating commercial technical data as: (1) element of performance; or (2) designated deliverable</li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• Government acquires only the data customarily provided to the public with a commercial item (<b>FAR 12.211, 12,212</b>)</li> <li>• Presumption exists that commercial items are “developed at private expense”</li> </ul>	



# COMPUTER SOFTWARE

## Transfer or Disclosure of Restricted Rights Software

FORMER DFARS RULE	NEW DFARS RULE
<p><b>DFARS 227.401(17)(i)</b></p> <ul style="list-style-type: none"> <li>• Computer program use was generally limited to the original computer on which it was installed</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Modernizes rights consistent with current commercial licensing practices by using commercial license</b></li> <li>• Allows the transfer of the program from any computer to any other computer or person, as long as only one back-up copy exists (excluding the original)</li> <li>• Use of programs by third-party contractors, or modifications to the software, is permissible in the military environment</li> <li>• <b>Prohibits support contractors from modifying, reverse engineering decompiling, or disassembling even for non-commercial software (DFARS 252.227-7014)</b></li> </ul>
<b>FAR</b>	
<ul style="list-style-type: none"> <li>• As in the DFARS, Government generally will obtain only the rights specified in the standard commercial license</li> <li>• Does not define either “commercial computer software” or “commercial computer software documentation” -- likely construed consistently with DFARS provisions</li> <li>• Government will “consider” not ordering “source codes, algorithms, processes, formulae, or flow charts” <b>(FAR 27.406 (b)(3))</b></li> <li>• Commercial software cannot be acquired with unlimited rights merely by designating it as a deliverable <b>(FAR 27.405(b)(2)(i))</b></li> <li>• Terms of Government contract govern inconsistencies in commercial terms and conditions. CO can accept greater</li> </ul>	

subcontract terms at his or her discretion **(FAR 27.405 (b)(2)(ii)(iii))**

# STRATEGIC VEHICLES

- Increased use of teaming agreements  
(risk from COTS subcontractors)
- Increasing subcontractor role
- Significant integration efforts
- Substantial amount of IDIQ contracts
- Technology Insertion via ECP
- Lead-time to trigger requirement at least 3 years in advance
- Blend commercial aspects into stringent DoD requirement  
(Pre-empt COTS & Offshore OEMs)
- Incestuous community breeds "technical leveling"

# STRATEGIC VEHICLES

- Existing Items, Components, and Processes (Pre-Award)

- Identify those items that contain the “Crown Jewels” that can be exploited in follow-on procurements, derivative sales, & licensing agreements (defeat “list it or lose it” traps)
- Front-load Intellectual Property Audit
  - Beware of the items developed under the 1988 DFARS
  - Follow the “Development Path”
- Select vehicles to legitimately capture assets (Block Changes, ECPs, VECs, unsolicited proposals, negotiation “chips”)

# **STRATEGIC VEHICLES**

- **Development of New Items, Components, Processes (During Performance)**
  - Document development of new technology (Minimum 3-year lead-times to evolve from IR&D, wholly-funded, RDT&E)
  - Centrally file all documents related to data development (“burden of proof” squarely on contractor)
  - Establish a corporate-level Data and Software Property Control function that will immediately forward all challenges and requests regarding rights to Legal

# STRATEGIC VEHICLES

- **Integration**

- COTS hardware & software acquired under specific, separate agreements for use on particular programs
- Contract & subcontract administrators = “Hand-in-Hand” coordination to ensure vigilant and maximum protection of critical assets, while. . .
  - Ensuring that acquires necessary rights/licenses from subcontractors
  - New DFARS coordinate flow-down to subcontractors

# DFARS STRATEGIES

**ISSUE:** “**Commercial items**” are presumed to be (1) “developed exclusively at private expense” and, (2) tendered with “limited” rights (“restricted” rights for software)

## **STRATEGY:**

- Submit minimal data in: (1) “FFF”; (2) Maintenance/Operations; (3) Installation Training; and (4) derivative Government requirements format with commercial items
- Withhold data/software until C.O. exercises the Deferred Ordering (up to 2 years after acceptance) and Deferred Delivery clauses (3 years)
- Re-characterize NDI items as “commercial items” (advances in technology and intent to commercialize)
- Protect against inadvertent disclosure in marketing information, letter contracts, responses to inquiries, RDT&E “buy-in,” and claim prosecution

# DFARS STRATEGIES

**ISSUE:** Elimination of “Required for Performance” criterion under the DFARS Final Rule grants unlimited rights only in such development that is (1) “specified as an element of performance,” or (2) exclusively funded at “direct cost”

Therefore, data and software assets are more protectable and valuable under the Final Rule

## **STRATEGY:**

- Cannibalize existing IR&D and B&P technology inventories while developing new items
- Privately or indirectly expense (e.g., IR&D, B&P, M&PE) new development (Review & modify IR&D Advance Agreements)
- Identify lucrative technologies early in the design cycle (Target 3 years before RFP issuance) and fund indirectly or at own expense

# DFARS STRATEGIES

**ISSUE:** The Final Rule makes clear that indirect cost development is considered “developed exclusively at private expense” and furnished to DoD only with limited rights (“restricted” rights in software)

## **STRATEGY:**

- Accelerate formation of preliminary technical solutions
- Ensure existing assets were developed solely either as IR&D, B&P, or contractor-funded R&D (**NOTE:** Government will attempt to “grandfather” rights by claiming that they were previously “required for performance” under 1988 DFARS)
- Develop critical portions under indirect cost accounts (IR&D, B&P, M&PE)
- Review previously released or disclosed data/software to ensure integrity

# DFARS STRATEGIES

**ISSUE:** "Segregate" items to the "lowest-practicable level" to demonstrate that segments were "developed exclusively at private expense"

## **STRATEGY:**

- Segregate items to ensure capture of top-level items (only 30% new technology in most RDT&E programs)
- Leverage existing "development" IR&D, via wholly-funded contractor R&D, for derivative manufacturing and production data
- Carefully craft items as "commercial" to invoke presumption of "development at private expense"
- Beware of "buy-in" on RDT&E contracts (1980's created FPIF-RDT&E)
- Subcontractors have mandatory rights and direct access to DoD

# DFARS STRATEGIES

**ISSUE:** An item is “developed” only after it “exists and is workable.” If an item is “developed” prior to performance, then it is presumed to have been funded “exclusively at private expense” and accorded limited rights (“restricted” for software)

## **STRATEGY:**

- Review all proprietary items to ensure that all are clearly “developed,” prior to their incorporation into technical solution
- “Scrub” segregability of data/software to ensure that those improvements made at direct cost yield GPR only to segregated improvements
- Ascertain whether existing, partial, and “undeveloped” data can qualify as “commercial items” under **DFARS 252.227-7015(a)**
- **NOTE:** DoD will assert GPR to data/software “first developed during performance”

# DFARS STRATEGIES

**ISSUE:** “Specifically negotiated license rights” must be monitored to preclude post-award coercion of data/software for downstream production and O&M competitions

## **STRATEGY:**

- Customer goodwill must be maintained
- Balance risk of pricing line-item against the risk of “pricing yourself out of the market”
- Preempt DoD from capturing data/software rights by contingently licensing to second source
- ACO cannot coerce non-commercial software because of the new prohibition against reverse engineering, decompiling, or dis-assembling
- Protect critical assets by creating a “passive” claim that permits customer to gracefully rectify the situation

# DFARS STRATEGIES

**ISSUE:** The vigilant pre-award identification of “identical or substantially similar” data avoids triggering civil and criminal allegations

## **STRATEGY:**

- Minimize exposure to potential civil/criminal liability by adopting following protocol:
  1. Review and document inventory that either has been previously delivered or is proposed for delivery;
  2. Confirm that proposed data has neither been previously delivered to the government, nor is obligated for delivery;
  3. Identify data that was previously, or will be, delivered with less than unlimited rights; and
  4. Distinguish all data that is “identical or substantially similar” to data that was previously, or will be, delivered to the government under other contract(s)

# CONCLUSION

## BOTTOM LINE CAPTURE

- Data/software are valuable assets and must be protected (“technical discriminators” or lowest-price M&PE)
- Most valuable assets should also be protected by patents and copyrights
- License use of algorithms and software to preserve rights and capture profit from third-party use

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