

More Major Changes in DoD Rights in Technical Data and Computer Software for Government Contractors

On New Year's Eve, President Obama signed the National Defense Authorization Act for Fiscal Year 2012, which included Section 815 that addressed several revisions to the rights the Government obtains in technical data and computer software developed by government contractors and subcontractors when performing their contracts.

The regulations to implement the statute are being drafted and an interim regulation may be issued as early as mid-March 2012.

In addition to the Department of Defense ("DoD"), the Department of Homeland Security and the intelligence agencies also apply the Defense Federal Acquisition Regulation Supplement ("DFARS") provisions and clauses relating to technical data and computer software.

Unfortunately, Congress has given the DoD direction to revise its regulations at least annually for the past four years, making it difficult for government contractors to put in place policies that can be relied upon to produce the expected result.

This topic is particularly complex and a short client alert should not serve as a substitute for professional advice applied to the relevant facts.

Below is a very brief description of the changes:

- Technical data and computer software developed at private expense may be disclosed by the government to persons outside the government if it is necessary for the segregation of an item or process form, or the reintegration of that item or process (or a physically or functionally equivalent item of process) with, other items or processes -- the recipient must agree to protect the information from further disclosure and the author must be notified of the release
- The government takes government purpose rights in any technical data or computer software developed with mixed funding except in the situations that are to be defined in the regulations
- The confusing language provided in the Fiscal Year 2011 Act that gave the government unlimited rights in certain technical data and computer software developed with Independent Research and Development ("IR&D" or "IRAD") or Bid and Proposals ("B&P") funds was deleted
- In addition to identified contract deliverables, the government may at any time require a contractor to deliver technical data and computer software that was generated or utilized

in the performance of the contract and pay the contractor only the cost to reproduce the data if:

- the technical data and computer software is needed to support the reprocurement, sustainment, modification, or upgrade of anything except a commercial item and
 - the technical data and computer software pertains to an item or process developed in whole or in part with federal funds or
 - is necessary for the segregation of an item or process form, or the reintegration of that item or process (or a physically or functionally equivalent item of process) with, other items or processes
- The government has six instead of three years to challenge a contractor's markings that assert the government gets less than unlimited rights in technical data or computer software
- The government's failure to challenge the contractor's markings on technical data and computer software that asserts the government gets unlimited rights within six years does not prevent the government from requiring its delivery

The manner in which the regulations are drafted could make a very big difference in how this statutory direction is implemented so readers are advised to look for further discussion of these changes when the regulations are released.

Should you have any questions about the contents of this alert, please feel free to contact Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261 or any member of our [Government Contracts Team](#).

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