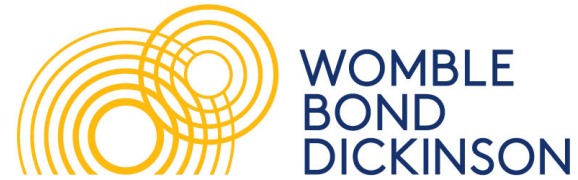
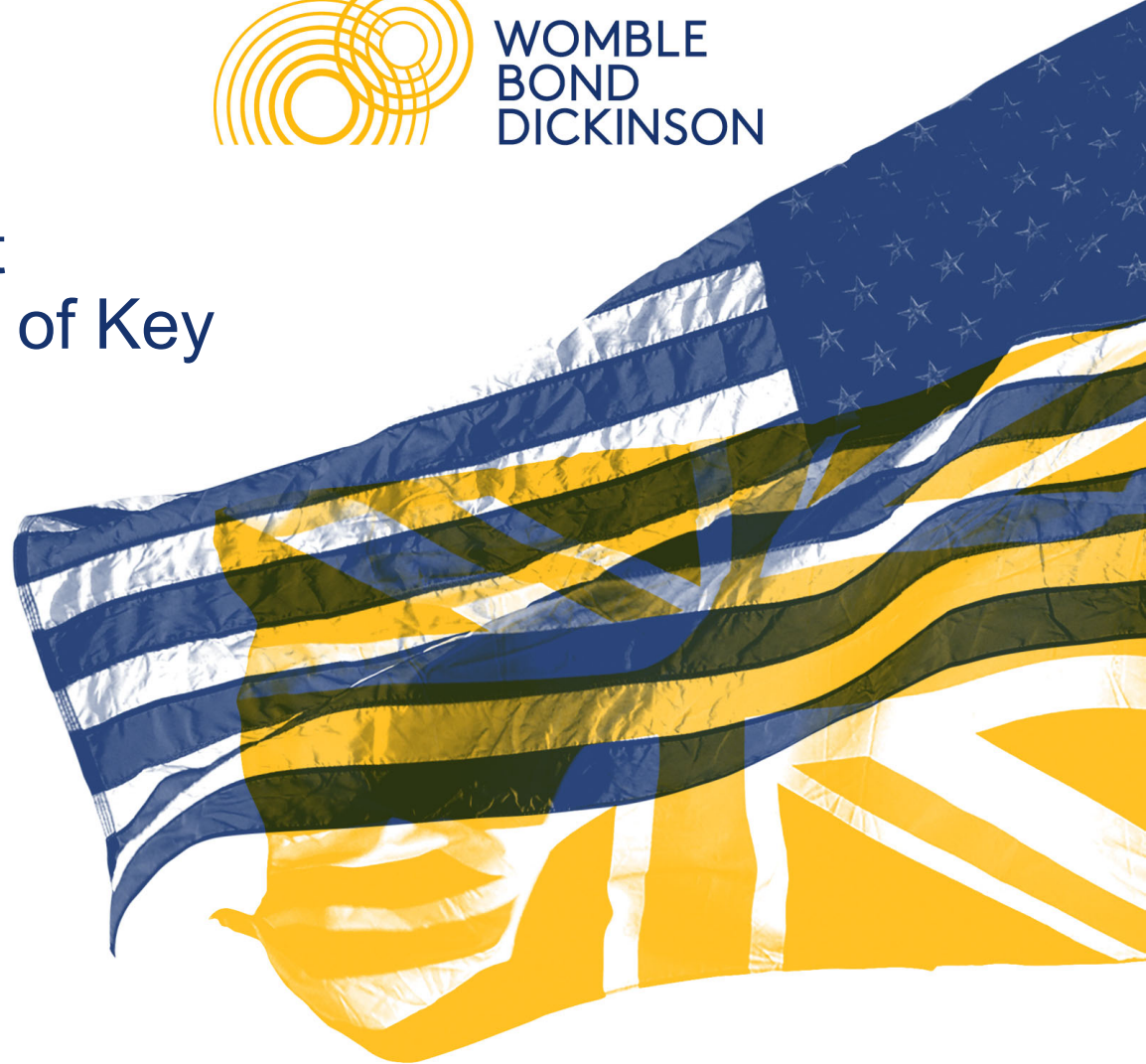


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Data Rights in Government Contracting: A Case Study of Key Considerations

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Panelists

- **Andrea Vavonese**, Deputy General Counsel, Peraton
- **Sarah Maguire**, Senior Counsel for BAE Systems Intelligence & Security
- **Chris Lockwood**, Partner, Government Contracts, Womble Bond Dickinson (Chris.Lockwood@wbd-us.com; 256-864-5547)
- **Nanda Alapati**, Partner, Intellectual Property, Womble Bond Dickinson (Nanda.Alapati@wbd-us.com; 703-394-2216)

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Case Study

Panelists' Roles

- **Andrea Vavonese**, Deputy General Counsel, Peraton (“Prime”)
- **Sarah Maguire**, Senior Counsel for BAE Systems Intelligence & Security (“Sub-Contractor”)
- **Chris Lockwood**, Partner, Government Contracts, Womble Bond Dickinson (“Gov’t Contracting Officer”)
- **Nanda Alapati**, Partner, Intellectual Property, Womble Bond Dickinson (Moderator)

Licenses to Data Rights at Stake

- Data
 - Technical, Computer Software, Databases, Computer Software Documentation
- Data Rights
 - Unlimited – 100% gov't funded, FFF, OMIT
 - Government Purpose – DOD only; mixed funding
 - Limited – Civ & DOD; gov't use only; cannot release to contractors; no additional manufacturing
 - Restricted – computer software developed solely at private expense, single copy; must uninstall copy if gov't wants to put on a different computer
 - Special Purpose – Negotiated “outside the box” rights

Case Study – fact pattern

- Prime develops and manufactures flight recording devices. These devices are commercial items that have been developed at private expense and are sold commercially.
- Prime has entered into a teaming agreement with Subcontractor who develops and manufactures flight instrumentation products and software
- Both companies have been expending Independent Research & Development (IR&D) money in developing the next generation of their respective products, as well as a new system because they believe that there is a Government market for a new, combined instrumentation and recording device product.

Case Study – fact pattern (cont'd)

- This new system would consist of (1) recording devices, with minor modifications; (2) flight instruments, with minor modifications; (3) new software to interface between the two; and (4) software for computers to monitor in real time on the ground.
- The Team has been approached by a DoD Agency to develop this new system for fighter jets.
- The Team is negotiating a sole source contract with DoD, and data rights questions have arisen.

Case Study – fact pattern (cont'd)

Deliverables under the contract will include:

- Recording devices
- Flight instruments
- Interface software
- Monitoring software for ground-based computers

Case Study – fact pattern (cont'd)

CDRLs under the contract will include:

- Technical data including specifications, drawings and Bill of Materials (BOM) for Recording Devices
- Technical data including specifications, drawings and BOM for instrument panel
- Source Code for interface software
- Source Code for monitor software
- Software documentation for both

Gov't Interests Pertaining to Data Rights

- Deliverables – Objects of the Contract
 - Recording devices, Flight instruments, Interface software, Monitor software; can include technical data & even source code
- Data Rights – Technical data & Computer software
 - Want “Unlimited rights” since we paid for it. Want rights to provide information to third party, without restriction and for any purpose, including replacing the original Contractor(s)
 - Might have to settle for lesser data rights for some things, primarily driven by who paid for it (IRAD expenditures), terms of the negotiated contract

Prime's Interests Pertaining to Data Rights

- Prime
 - Retain as many data rights as possible vis-à-vis the government
 - Obtain as many data rights as possible from the subcontractor
 - Goal: Positioning for future contracts with same or other gov't agencies; prevent competitors from using the technical information and software; commercial exploitation

Subcontractor Interests Pertaining to Data Rights

- Subcontractor
 - Retain as many data rights as possible vis-à-vis both the government and the Prime
 - Goal: Enhance likelihood Prime will continue to rely on Subcontractor; Leverage in future contracts and subcontracts; commercial exploitation

Discussion – Gov't CO

Rights DoD feels entitled to in the following:

- **Recording Device**
 - Commercial Item with modifications developed with IR&D -- what FAR/DFAR applies?
- **Instrumentation Panel**
 - Commercial item with minor modifications – what FAR/DFAR applies?

Discussion – Gov't CO

Rights DoD feels entitled to in the following:

- **Interface Software**
 - Jointly developed by Prime and Sub using IR&D developments as well as under this DoD contract with DoD funds – what FAR/DFAR applies?
- **Monitoring Software**
 - Developed by subcontractor at private expense – what FAR/DFAR applies?

Discussion – Prime & Sub

What Rights is each company willing to grant to the Government?

- What are the bases for asserting less than unlimited rights?
 - Government Purpose Rights
 - Restricted Rights
 - Unlimited Rights
 - Specially-negotiated Rights

Discussion – Prime & Sub

- The Hardware
 - Prime to Government?
 - Sub to Government?
- The Software
 - Prime to Government?
 - Sub to Government?

Discussion – Prime & Sub

What Rights are each company willing to grant each other?

- Between each party – parties need to negotiate and understand data rights in the Subcontract in order for the Prime to protect itself when negotiating the prime contract
 - What rights does Prime get in the Instrumental Panel?
 - What rights does each party get in the Jointly Developed Software?
 - What rights does Prime get in the Monitoring Software?

Discussion – Prime

How does the Prime negotiate & assert these rights?

Technical Data or Computer Software to be Furnished with Restrictions	Basis for Assertion	Asserted Rights Category	Name of Person Asserting Restrictions
Recording Device			
Instrument Panel			
Interface Software			
Monitoring Software			

Discussion – Deliverables & Data Rights

Contract Delivery

- Deliverables
- Marking upon delivery
- Government requests to remove markings

Other Issues

- Section H clauses (special contract requirements)
- Deferred Delivery & Ordering Clauses (DFAR 252.227-7026, -7027)

Discussion – Disputes between Gov't & Contractors over Data Rights & Marking

- What types of data rights & marking disputes might arise?
- When are they likely to arise?
- How would these be addressed?
- Venues & procedures for appeal
- Issues specific to disputes between Gov't & Prime?
- Issues specific to disputes between Gov't & Sub?

Discussion – Disputes between Prime & Sub

- Under what conditions can the Sub deal directly with the Gov't over Data Rights?
- Data Rights Disputes between Prime & Sub arising during contract performance
- Termination of Sub by Prime - what happens to Data Rights in work done by Sub thus far?

Government Perspectives in Data Rights Contracting

Government Principles in Data Rights Contracting DOD's "Intellectual Property: Navigating Through Commercial Waters"

- Integrate IP considerations fully into acquisition strategies for advanced technologies in order to protect core DoD interests
- Respect and protect privately developed IP
- Resolve issues prior to award by clearly identifying and distinguishing the IP deliverables from the license rights in those deliverables
- Negotiate specialized IP provisions whenever the customary deliverables or standard license rights do not adequately balance the interests of the contractor and the Government
- Seek flexible and creative solutions to IP issues, focusing on acquiring only those deliverables and license rights necessary to accomplish the acquisition strategy

Government Directives to Contracting Officers

- Require Offerors to assert all restrictions on deliverable technical data and computer software (both commercial and noncommercial) up front, in their proposals
- Evaluate the data and data rights packages being offered
- Negotiate for mutually agreeable specialized license rights whenever the standard license categories do not meet both parties' needs
- Challenge asserted restrictions if necessary to account for Government investments

Government Directives to Contracting Officers (cont'd)

- Spell out the allocation of data rights during all stages of procurement from solicitation to award, to delivery through Broad Agency Announcement (BAA), Request for Proposals (RFP), Statement of Work (SOW) and Contract Data Requirements List (CDRL)
- Incorporate the appropriate data rights clauses in the contract. Specify: content, recording/storage format, delivery medium, markings(classification, distribution statements, legends, warnings), primary distribution, recording/storage format (paper, digital, application, PDF) and delivery schedule in the SOW”, CDRL and “Solicitation, Offer and Award
- Review all deliverables prior to acceptance to determine whether they include restrictive and nonconforming markings or other limitations limiting the agency’s data rights license
- Deliverables containing unacceptable restrictive markings should not be accepted and legal counsel should be consulted for advice

Protecting the Interests of Primes & Sub-Contractors

Framework for Contractors

- Is the Contract with a Civilian Agency or DOD?
 - FAR vs DFAR
- What is the Nature of the Data?
 - Technical Data vs Computer Software
- What Type of Rights are at Issue?
 - Unlimited Rights, Limited Rights, Restricted Rights, Government Purpose Rights, Special Rights
- Who paid for developing the Data?
 - Private Expense, Gov't Expense, Mixed

Keeping Accurate Records

- When was the data developed - before or during performance of the contract?
- How was the data development funded – private expense or government's expense?
- Keep careful records of and track the development of all efforts at the lowest possible useful/workable level
 - Stand-alone code that does something and can be repurposed

Legends and Markings

- Defense Federal Acquisition Regulation Supplement 252.227-7037
- Validation of Restrictive Markings on Technical Data
- Defense Federal Acquisition Regulation Supplement 252.227-7037
- Validation of Restrictive Markings on Computer Software
- Stick to the legends provided in the particular data rights clause in your contract
 - Unjustified Marking – Gov't can cancel or ignore
 - Nonconforming Markings – 60 days to correct

Internally Funded vs Government Funded

- Develop core components internally before government contract and with private funds
- If developed before government contract and financed without any direct government funding, then government with fewest rights:
 - Limited rights in Technical Data
 - Restricted rights in Software

Prime and Subcontractor Considerations

- If subcontractor has limited rights data, subcontractor can bypass prime and give data directly to government
- Prime should contract with subcontractor to use data to the extent necessary for the prime to perform the contract
- If subcontractor's efforts are used and privately funded, then prime should have separate subcontract agreement and include "works made for hire" provisions
 - N.B. – Prime cannot force a small business to agree to "works for hire"

Basics of Data Rights in Government Contracting

FAR vs DFAR

- Similar & Analogous, but not identical
- Civilian Contracts FAR 27.4, Rights in Data – General (52.227-14)
- Defense Contracts
 - DFAR 227.71, Rights in Technical Data – Noncommercial Items (252.227-7013)
 - DFAR 227.72, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation (252.227-7014)

Types of Data

- Technical Data
- Computer Software
 - Commercial Software
 - Non-Commercial Software
- Data Bases
- Computer Software Documentation

Technical Data

- Under FAR: means recorded information of a scientific or technical nature; does not include computer software or financial, administrative, cost or price, or management data (52.227-14(a))
- Under DFAR: means recorded information of scientific or technical nature (including computer software documentation); does not include computer software incidental to contract administration such as financial and/or management information (252.227-7013(a)(15))

Computer Software

- Computer program(s) comprising a series of instructions, rules, etc. that cause a computer to perform a specific task
- Includes executable code, source code, code listings, design details, processes, flow charts, and related material that would enable the software to be reproduced, recreated or recompiled
- Excludes databases and computer software documentation (52.227-14(a); and see 252.227-7014(a)(4))

Commercial Computer Software

- Software developed or regularly used for nongovernmental purposes which
 - Has been sold, leased or licensed to the public or offered for sale, lease, or license to the public;
 - Has not been offered, sold, leased or licensed to the public but will be available for commercial sale, lease or license in time to satisfy the delivery requirements of the contract; or
 - Satisfies one of the above and would require only minor modification to meet the requirements of this contract (252.227-7014(a)(1))

Types of Rights

- Unlimited Rights
- Limited Rights
- Government Purpose Rights
- Restricted Rights
- Special Purpose Rights

Unlimited Rights

- Applies to both civilian and defense contracts
- Applies to both technical data and software developed under government contract
- Government can do whatever it wants
 - “right(s) to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so”
- Contractor still retains ownership and can commercialize the Data

Unlimited Rights (cont'd)

- Government gets unlimited rights in...
 - Any data developed 100% with gov't funds
 - Form , fit & function (FFF) or Operation, maintenance, installation & training (OMIT) data delivered under contract
 - Computer software documentation, if specified to be deliverable under the contract
 - Corrections or changes to technical data furnished to the Contractor by the Government
- Exception – Data is marked by the Contractor saying otherwise (and gov't agrees to this during negotiation)

Limited Rights (Technical Data Only)

- Applies to both civilian and defense contracts
- Gov't may use, modify, release, perform, display, or disclose technical data, in whole or in part, within the government (252.227-7013(a)(14))
 - Cannot use the technical data to manufacture
 - Cannot release or disclose technical data outside the government
 - Exceptions for contractors, subs, emergency repair; must provide notification

Restricted Rights

- Applies to both civilian and defense contracts
- Applies only to non-commercial computer software that was developed at private expense (not in performance of contract)
- Restrictions & Permissions
 - Only a single copy on a single computer
 - Transfer to another agency only if you destroy your copy and tell the contractor of the transfer
 - Limited rights to modify
 - Limited rights to have contractors & subs maintain/repair

Government Purpose Rights (DOD Contracts only)

- Applies to noncommercial technical data and computer software developed with mixed funding (funding source cannot be segregated)
- Government gets to...
 - Use, modify, reproduce, release, within the Government without restriction; and
 - Disclose technical data and license third parties to use, modify, reproduce, release, perform, display, or disclose for government purposes only.
 - Does not include the rights to use for commercial purposes or authorize others to do so.

One Difference in Rights between FAR and DFAR

- Mixed Funding used to develop Data
 - DFAR – government purpose rights
 - FAR – unlimited rights
- Caveat
 - If DOD agency gets GPR, you cannot resell same data to civilian agencies for value, since you already sold it once to the government

Special Purpose Rights

- Negotiated on a case-by-case basis
- License is “outside the box”; can include unconventional provisions
- Rights cannot be more restrictive than Limited Rights (for technical data) or Restrictive Rights (for software)

Case Summaries Involving Data Rights in Gov't Contracts

Ervin Associates v. U.S.

(No. 01-153C; COFC 2004)

- 1993 – HUD’s office of Multifamily Housing puts out RFP for processing Annual Financial Statement Forms
- 1994 – CPA firm Ervin wins contract, crunches data (deliverable) and develops and delivers data warehouse (not a contract deliverable)
- 1995 – HUD decides to create its own data warehouse. HUD asks Ervin for additional information to help do this. Ervin complies thinking that HUD will pick up contract option. Informs HUD orally and in writing that the data should not be provided to third parties. HUD lawyers agree
- HUD gives third parties (competitors) access to data warehouse; terminates contract with Ervin; Ervin sues
- COFC Decision: Despite "oral statements, letters, and e-mails" asserting proprietary data, failure to mark data with the "Limited Rights Notice" of 48 C.F.R. § 52.227-14 result to gov’t obtaining unlimited data rights
- Lesson : Must mark, regardless of what the parties agreed to

Xerxe Group v. U.S.

(Appeal No. 01-153C; COFC 2002)

- Xerxe Group submitted an unsolicited proposal to Patrick AFB (PAFB) for provision of electrical energy and services. Xerxe marks title page of proposal with marking required under section 15.609(a)
- Proposal was rejected. But then PAFB publishes an RFI containing Xerxe's proprietary information. for possible privatization of on-base utility systems
- Xerxe objects and brings claim for \$72M saying gov't used proprietary information disclosed in its unsolicited proposal
- CAFC Decision: While Xerxe complied with FAR 15.609(a), it did not comply with FAR 15.609(b) which requires that each page containing proprietary data. Xerxe loses
- Lesson: Must mark every page with appropriate legend

Sikorsky Aircraft Corporation

(GAO RB-416027; B-416027.2, 2018)

- RFP for helicopter to replace the UH-1N (“Huey”)
- Gov’t wants:
 - Technical data and computer software for OMIT (operation, maintenance, installation, training); without exception
 - GPR rights to technical data and software for replacement of all components (“interchangeable items”)
- Sikorsky interprets RFP as requiring rights in detailed manufacturing or process data (DMPD), including source code; files bid protest since these are not permitted under DFAR
- COFC: DMPD Deliverable (okay) vs. DPMP Data Rights (not okay); Also, DMPD is not source code
- Lesson: Gov’t can ask for anything as a deliverable; does not mean it gets data rights in all the deliverables

Boeing Co. v. Sec'y of Air Force

983 F.3d 1321 (Fed. Cir. 2020)

- Case Concerns markings made to warn third parties of Contractor's rights in Non-commercial Data
- DFAR 7013 – Rights in Noncommercial Technical Data. 7013(f) specifies language to restrict gov't purpose, limited & special purpose rights
- Boeing has two contracts which call for unlimited gov't rights. But Boeing puts its own “third party warning” markings: (1st attempt) “non-GC” label; (2nd attempt) GC UR label + third party warning”. Both are rejected
- Fed Cir: 7013(f) marking requirements only apply when Contractor is trying to limit gov't rights; has nothing to do with third party rights
- Lesson: DFAR marking requirements do not apply for a Contractor to notify third parties of Contractor's data rights in non-commercial data. So, Contractors may use restrictive marking to assert rights against third parties in technical data that is delivered to the government

Raytheon v. U.S.

(No. 19-883C; COFC June 30, 2022)

- Issue: Is a Vendor List, required as a contract deliverable, “technical data”?
- Patriot Missile System Contract with Army. Raytheon required to provide Vendor list. Raytheon submits list with “limited rights” marking. Gov’t objects. Raytheon revises marking, stating the Vendor List is proprietary and exempt from FOIA requests
- Raytheon: Vendor list is “management data”, not “technical data”
- Army: “Technical data; Requires Raytheon to resubmit with GPR label”
- COFC: Vendor list is not technical data under DFARS 252.227-7013(a)(15)

The Boeing Company (ASBCA 60373, 2018)

- Issue: Rights to software developed under a Technology Investment Agreements (TIA – DOD Grant and Agreement Regulations)
- Boeing develops software under two TIAs, funded by the government. Gov't Officer agrees that TIAs are not a procurement contract or grant agreement subject to FAR
- Boeing later seeks determination that (1) Software developed under TIAs is “developed exclusively at private expense” as defined in DFAR DFARS 252.227-7014 (2) TIAs did not make a “blanket grant of GPR rights”
- DFARS 252.227-7014(a)(8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof
- ASBCA agrees with Boeing – (1) A TIA is a not a government contract; (2) Boeing's TIAs did not confer blanket government purpose rights, or greater rights, in the software, even though gov't paid for the work

Bitmanagement Software v. U.S. 989 F.3d 938 (Fed Cir 2021)

- Enterprise-wide Software License to 3-D Visualization software
- Navy buys 130 “seat licenses” through intermediary vendor; later gets platform-independent copy of software from Bitmanagement; Navy agrees to track number of simultaneous users using Flexara tool; loads software onto 35,000 computers; does not track number of users
- Bitmanagement sues for copyright infringement
- COFC rules for Navy (implied-in-fact license, Navy was authorized to load software on all computers)
- CAFC (reluctantly) affirms COFC’s findings (not “clearly erroneous”), but concludes that COFC breached terms of implied-in-fact license “while the Navy had an implied-in-fact license to copy BS Contact Geo onto its computers, the Navy's failure to abide by the Flexera condition of that license renders its copying of the program copyright infringement.”

Questions

Additional Issues/Questions

1. What should a contractor or a government officer do, when drafting and negotiating contracts to identify and resolve data and data rights issues prior to contract award?
2. Under what conditions would the Government and the contractor modify the standard licensing rights granted to the Government? Any examples?
3. Can a Prime or Subcontractor seek to modify the standard data rights granted to the Government without informing the other
4. If Gov't has unlimited rights to software source code, can Contractor still sell software commercially?
5. If the Government acquires a data rights license, who owns the copyright in technical data and computer software?
6. What are March in Rights? When would the Gov't exercise these?

Additional Issues/Questions (cont'd)

7. How can a Prime certify it has all rights if the Subcontractor actually holds some of those rights?
8. Under what conditions can a Subcontractor provide data directly to the Gov't instead of to the Prime?
9. If a Subcontractor has "limited rights" data, can the Subcontractor bypass the Prime, and give the data directly to the government? What if the Prime needs some of the data to perform the contract?
10. What can a Prime do to protect needed data rights in case the Subcontractor goes out of business?
11. Under what conditions would a "works for hire" provision be appropriate between a Prime and a subcontractor? Would the Gov't have any concerns about such side agreements between the Prime and Subcontractor?

Additional Issues/Questions (cont'd)

12. What all must a Prime or Subcontractor do, to ensure that any software and data developed under IRAD, if part of a deliverable, cannot be claimed by the government
13. What all types of records does a Contractor maintain to later assert its rights to data being provided under contract?
14. Is “private expense” limited to indirect cost pool (e.g., G & A) if asserting that Gov’t only gets limited rights?
15. If a contracting officer asks you to remove or change a marking, what steps do you take to assess the issue? Whose advice might you seek?
- 16 Under what conditions might you consider using a non-conforming marking?

The End