

Who's Killing the Goose?¹

George O. Winborne, Jr.²
U.S. Army Aviation & Missile
Life Cycle Management Command Legal Office

Presented at the American Bar Association Section of Public Contract Law Program
Intellectual Property in Government Contracts—What You Didn't Learn in Kindergarten
November 11-12, 2010
Seaport Hotel
Boston, Massachusetts

Introduction

We live in challenging economic times. The United States Federal budget is being asked to support a number of domestic economic stimulus efforts while also supporting the projection of military power around the globe. “‘We must be mindful of the difficult economic and fiscal situation facing our nation,’ [Defense Secretary] Gates told reporters at the Pentagon. The department can’t expect Congress ‘to approve budget increases each year unless we are doing a good job -- indeed, everything possible to make every dollar count.’”³ With this reality in mind, this paper considers the clash of two basic tenets of our economic system, competition and intellectual property as they apply particularly to Department of Defense acquisitions. As the description for this panel notes, some observers believe that there may be a pendulum swing

¹ The title is used with recognition to the authors of these articles for their titles: Ralph C. Nash, *New Data Rights Legislation: Killing The Goose?*, 21 No. 1 Nash & Cibinic Rep. ¶ 63 (2007); Christine C. Trend, *Killing the Goose that Laid the Golden Egg: Data Rights Law and Policy in Department of Defense Contracts*, 34 Pub. Cont. L.J. 287 (2005).

² The views express herein are those of the author and do not reflect official positions of the Army, Department of Defense or U.S. Government except as may be cited in official publications.

³ Viola Gienger, *Gates Says Defense Bureaucracy Swollen, Declares Cuts*, Bloomberg, (Aug 10, 2010 12:26 PM CT), <http://www.bloomberg.com/news/2010-08-09/gates-says-defense-bureaucracy-bloated-declares-cuts-in-contractor-jobs.html>.

taking place, perhaps on the spectrum between competition between contractors and respect for contractor intellectual property rights. It is the author's view that the perceived pendulum swing is taking place not so much in applicable laws and regulations but in policy and practice. This is taking place because leadership, management and rank and file members of the DOD acquisitions work force are coming to two realizations. One is that acquisition laws neither require nor prohibit what some have supposed. Another is that some policies implemented under the auspices of acquisition reform, especially commercial item acquisition procedures, may not make a great deal of sense when applied broadly to the development and acquisition of military systems with their often unique technology and service-life requirements.

This will be considered in two aspects. First, we will consider the effect of intellectual property rights on competition and mission execution generally in DOD with some historical examples and analysis. Then we will consider the extent to which statutory and regulatory limitations constrain or permit evaluation of intellectual property rights, particularly data rights, as a criterion in source selections.

Two Principles of Our Economic System: Competition & IP Incentives

In our free market system, the interaction of supply and demand is supposed to efficiently set prices between buyers and sellers. A basic premise is that in the absence of other constraints, competition among producers is supposed to yield lower prices as a result of offered prices being bid down by the producer market. On the other hand, another basic premise of our economy is that inventors, authors and other creators of intellectual properties will be incentivized to create more properties if they are granted some exclusivity in the sales of their IP.⁴ In other words, at least in the short run, the intellectual property system is based upon eliminating or delaying competition.⁵ Fundamentally then, these two basic tenets of our economic system are at odds. This struggle goes on vigorously in the world of DOD acquisitions.

⁴ See, e.g., U.S. Const. art. I, § 8, cl. 8 (Giving Congress power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”)

⁵ Certainly, in the long run, one can argue that greater overall creation of intellectual property can create more competition among alternative IP goods even if each good is entitled to some scope of monopoly power.

Pressure Has Been Growing for More Competition in Contracting

The preference for competition in Federal acquisitions is captured in the Competition in Contracting Act (CICA).⁶ Congress and the White House have expressed increasing concern in the last few years with the costs of Government contracts and obstacles to competition. In a 2009 Memorandum, the President noted:

Excessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) and cost-reimbursement contracts creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government or the interests of the American taxpayer.⁷

In 2009, Congress passed, unanimously and with relative speed, the Weapon Systems Acquisition Reform Act of 2009 (WSARA).⁸ Section 202 of WSARA requires acquisitions strategies for major defense acquisition programs (MDAPs) to include “measures to ensure competition, or the option of competition, at both the prime contract level and the subcontract level (at such tier or tiers as are appropriate) of such program throughout the life-cycle of such program as a means to improve contractor performance.”⁹ In § 202, Congress cited competition not for any salutary effect on pricing but as a means of improving contractor performance presumably because the prospect of competition might encourage an incumbent contractor to minimize waste and inefficiency if competition increased the possibility of being unseated from a contract for a MDAP. However, the Office of Management and Budget Director noted in a July 29, 2009 memorandum that “[n]on-competitive contracts present a risk because there is not a direct market mechanism for setting the contract price.”¹⁰

WSARA lists at least three “measures to ensure competition” that have a nexus to data rights.¹¹ These are: “[u]se of modular, open architectures to enable competition for upgrades,”¹²

⁶ 41 U.S.C. § 253 (1984).

⁷ Memorandum on Government Contracting, 2009 Daily Comp. Pres. Doc. 123 (Mar. 4, 2009).

⁸ Pub. L. 111-23, 123 Stat. 1704.

⁹ *Id.*, Pub. L. 111-23, § 202(a), 123 Stat. 1704, 1720-21.

¹⁰ Office of Mgmt. & Budget, Exec. Office of the President, OMB Mem. No. 09-25, Improving Government Acquisition (2009) at 2.

¹¹ WSARA, Pub. L. 111-23, § 202(b), 123 Stat. 1704, 1721.

“[a]cquisition of complete technical data packages,”¹³ and “[l]icensing of additional suppliers.”¹⁴ The WSARA measure regarding open architecture seems to contemplate requirements for use of nonproprietary technology perhaps in conflict with the statutory prohibition on requiring a defense contract offeror to refrain from proposing proprietary technology.¹⁵ The measure related to acquisition of technical data packages (TDPs) seems to place a premium on acquisition of technical data but glosses over the underlying separate but related issues of acquiring technical data (or software) and acquiring the rights to use that data for competitive procurement. Not one of the data rights related statutes, regulations, or policies requires any specific data to be delivered.¹⁶ The measure relating to licensing of other suppliers expressly implicates the question of license rights but seems to beg the question. Clearly, the licenses would have to be granted by an incumbent holder of data rights. Under what circumstances or at what cost to the Government would such an incumbent license a competitor?

More recently, in the briefing accompanying his June 28, 2010 Memorandum to Acquisition Professionals, Under Secretary of Defense Dr. Ashton Carter discussed eight points for “Providing Incentives for Greater Efficiency in Industry.”¹⁷ His first point was: “LEVERAGING REAL COMPETITION: Avoid directed buys and other substitutes for real competition. Use technical data packages and open systems architectures to support a continuous competitive environment.” As with the WSARA “measures to ensure competition,” the emphasis on TDPs and open architectures does not address the underlying IP law context. Nonetheless, with all of the emphasis on competition and some understanding of the relationship of data rights to competition, the Government defense acquisition workforce is feeling increased pressure to make efforts to obtain more technical data and rights in that data.

¹² *Id.*, Pub. L. 111-23, § 202(b)(5), 123 Stat. 1704, 1721.

¹³ *Id.*, Pub. L. 111-23, § 202(b)(7), 123 Stat. 1704, 1721.

¹⁴ *Id.*, Pub. L. 111-23, § 202(b)(9), 123 Stat. 1704, 1721.

¹⁵ *See* 10 U.S.C. §2320(a)(2)(F)(ii) (2006).

¹⁶ *See* Defense Acquisition University, Defense Acquisition Guide (Aug. 5, 2010) at § 5.1.6.2.

¹⁷ Ashton B. Carter, Memorandum to Acquisition Professionals Subject: Better Buying Power: Mandate for Restoring Affordability and Productivity in Defense Spending 5 (2010), available at <https://acc.dau.mil/policy/Documents/Policy/Carter%20Memo%20on%20Defense%20Spending%2028%20Jun%202010.pdf>

GAO Has Been Reporting Data Rights Problems for Almost a Decade

Before turning to what might and might not be possible in those efforts, I will consider some more specific evidence of adverse effects from restrictions on use of technical data and difficulties in addressing these effects. While congressional and executive branch emphasis on addressing technical data rights problems may seem to be pushing the pendulum to an extreme, the push in the form of identification of adverse consequences of data rights policies and practices in DOD has been underway for many years. In a string of Government Accountability Office (GAO) reports over the past decade, lack of access to technical data and lack of rights in that data have been identified as a cause or contributing factor in higher costs and suboptimal response to defense requirements.

In a 2002 report on logistics support for military systems, GAO noted the limitations that lack of technical data had on the ability of the military to maintain timely and efficient maintenance of equipment.¹⁸ In a statement that is probably equally true today, the GAO stated that “some program offices do not have sufficient access to technical data because they believe that the prices being requested by the contractors that own the data are unaffordable.”¹⁹ In one example, GAO noted that when “the Army tried to buy technical data to develop in-house capability to repair its SPITFIRE radio terminals[, t]he manufacturer was willing to sell the data for \$100 million--almost as much as what the entire program cost (\$120 million) from 1996 through 2001.”²⁰ The 2002 report also noted that DOD officials cited a requirement for project offices to “ensure access to needed technical data,” but that “[i]f this does not occur as part of the initial acquisition process, the government will have less bargaining power in future negotiations for the data.”²¹

In a 2004 report on performance based logistics (PBL) support for weapons systems, GAO compared DOD policy favoring PBL with “the logistics contracting practices of 14 private-sector companies from the air carrier, maritime shipping, energy exploration, mining, and

¹⁸ U.S. Gov't Accountability Office, GAO-02-306, Defense Logistics: Opportunities to Improve the Army's and the Navy's Decision-making Process for Weapons Systems Support (2002) at 17-18.

¹⁹ *Id.* at 17.

²⁰ *Id.* (footnote omitted).

²¹ *Id.*

entertainment industries.”²² These are “companies that use complex and costly equipment with life-cycle issues similar to those of military weapon systems and that are motivated by the desire to minimize costs and maximize profits to choose the most cost-effective option.”²³ Every such company interviewed by GAO stated “that when they purchase equipment they make sure to acquire the technical data necessary to support it, regardless of whether the company intends to support the equipment in-house or outsource some of its support operations.”²⁴ However, in perhaps a short-sightedness forced by budget constraints, the GAO noted that “[a]ccording to service competition advocate officials, program managers faced with limited acquisition dollars often make trade-off decisions to buy increased weapon system capability in lieu of technical data.”²⁵ Private company and Government officials both noted the importance of planning for and obtaining such technical data with the original purchase of equipment when the purchaser has more leverage.²⁶ As the GAO concluded: “Conversely, when the program office does not obtain the technical data at the time of purchase, the future costs for obtaining these data are not knowable and, without the leverage of the original package purchase, could be prohibitively expensive.”²⁷

In the DOD response to the 2004 GAO report, DOD first stated intentions to institute a requirement in DOD Directive 5000.1 and DOD Instruction 5000.2 for a “data management strategy that requires access to the minimum data necessary to sustain the fielded system, recompute or reconstitute sustainment if necessary, promote real time access vice delivery of the data, and provide for the availability of quality data at the point of need for the intended user.”²⁸ The data management strategy requirement was not implemented until after yet another GAO report and congressional action which will be discussed later. It should be noted that the emphasis on future delivery of data, especially through exercise of options may be susceptible to an argument made by a contractor that because an option is not a present requirement for delivery until exercised, the Defense Federal Acquisition Regulation Supplement (DFARS) rules

²² U.S. Gov't Accountability Office, GAO-04-715, Defense Management: Opportunities to Enhance the Implementation of Performance-Based Logistics (2004) at 2.

²³ *Id.*

²⁴ *Id.* at 16.

²⁵ *Id.*

²⁶ *Id.* at 16, 18.

²⁷ *Id.* at 18.

²⁸ *Id.* at 21.

requiring assertions of restrictions of Government rights in noncommercial technical data and software would not apply to data only identified in option requirements.²⁹ This is also discussed further below.

GAO returned to the subject of technical data rights in a 2006 report specifically about problems with access to technical data for weapons systems.³⁰³¹ The 2006 report identified seven weapons systems “where a lack of technical data rights affected the implementation of sustainment plans.”³² The effects on the seven systems can be categorized into four groups of which I elaborate on two. For the first category, some knowledge of our military depots is required.

DOD is required under 10 U.S.C. 2464 to identify and maintain within government-owned and government-operated facilities a core logistics capability, including the equipment, personnel, and technical competence identified as necessary for national defense emergencies and contingencies. Under 10 U.S.C. 2466, not more than 50 percent of the funds made available in a fiscal year to a military department or defense agency for depot-level repair and maintenance can be used to contract for performance by nonfederal personnel.³³

As of the 2006 report, the Air Force had reported that failure originally to obtain technical data rights and inability to purchase those rights had frustrated the Air Force’s ability to meet its statutory obligations to maintain core logistics capability for the C-17, F-22, and C-130J aircraft.³⁴

For the Army’s Stryker family of armored combat vehicles and the Air Force’s Airborne Warning and Control System (AWACS) aircraft, the problem reported was inability to purchase less expensive spare parts because the services did not possess the necessary technical data, and,

²⁹ See DFARS 252.227-7017, 252.227-7013(e), and 252.227-7014(e).

³⁰ U.S. Gov’t Accountability Office, GAO-06-839, Weapons Acquisition: DOD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems (2006).

³¹ I present these matters as reported publically by the GAO in 2006. Facts and circumstances for many of these systems may have evolved, and I cannot discuss any ongoing negotiations between the Government and industry on these specific matters.

³² *Id.* at 6.

³³ *Id.* at 5.

³⁴ *Id.* at 6-8.

for the Stryker, could not buy it (or the necessary rights) at a price that would realize any net savings.³⁵ For AWACS, while GAO noted that the contract allowed the Air Force to order technical drawings, it had problems getting the contractor to deliver all drawings due to the contractor's uncertainties regarding the Government's rights to use the drawings.³⁶

For the M4 carbine rifle, successor to the Vietnam era M16, the Army asserted that though the M4 shared an eighty percent commonality of parts with the M16, which the Army had been able to buy competitively, the M4 had a unit cost of twice as much as the M16.³⁷ Some years earlier, the M4 acquisition was the subject of a protest by a company that had previously produced M16s and which resulted in upholding of special license terms tracing back to the 1960s.³⁸

The data rights related problem noted by GAO for Up-armored High-Mobility Multipurpose Wheeled Vehicles (HMMWVs) was of a somewhat different nature. As reported by GAO:

When the Army first developed the up-armored HMMWV in 1993, it did not purchase the technical data necessary to develop new sources of supply to increase production. Army officials anticipated fielding these vehicles to a limited number of Army units for reconnaissance and peacekeeping purposes. At that time, the Army did not obtain technical data required for the manufacture of up-armor HMMWVs. With the increasing threat of improvised explosive devices during operations in Iraq, demand for up-armored HMMWVs increased substantially, from 1,407 vehicles in August 2003 to 8,105 vehicles by September 2004. According to Army officials, the manufacturer declined to sell the rights to the technical data package. Because of the lack of technical data rights to produce up-armored HMMWVs, program officials explained they were unable to rapidly contract with alternate suppliers to meet the wartime surge requirement.³⁹

This episode highlights the limitations of military planners' ability to project defense requirements way into the future, here from the purchasing decisions in 1993 to the wartime

³⁵ *Id.* at 9.

³⁶ *Id.*

³⁷ *See id.* at 9-10.

³⁸ *See FN Mfg. v. United States*, 42 Fed. Cl. 87 (1998).

³⁹ GAO, *supra* note 30 at 8.

surge requirement in 2004. As a result, it provides a cautionary counterpoint to a policy statement often cited by critics of DOD efforts to acquire more technical data. “DOD policy is to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs.”⁴⁰ The question of what data is necessary to satisfy agency needs is not a simple one, especially given that weapons systems can stay in service for many decades, a time span over which a contractor can evolve substantially through mergers, acquisitions, alteration of its business model, or dissolution. Attempts to address that question through the vehicle of a data management strategy are discussed further below.

In the 2006 report, GAO summarized its findings:

The lack of technical data rights has limited the services’ flexibility to make changes to sustainment plans that are aimed at achieving cost savings and meeting legislative requirements regarding depot maintenance capabilities. . . . Although the circumstances surrounding each case were unique, earlier decisions made on technical data rights during system acquisition were cited as a primary reason for the limitations subsequently encountered.⁴¹

Just this year, in a report addressing awards of noncompetitive contracts across civilian agencies as well as in DOD, GAO reviewed 47 noncompetitive DOD contracts.⁴² GAO noted that “[f]or 27 of the 47 noncompetitive DOD contracts [GAO] reviewed, the government was unable to compete requirements due to a lack of access to proprietary technical data.”⁴³ “Most of the contracting and program officials at DOD that [GAO] spoke with pointed to the lack of access to technical data as one of the main barriers to competition.”⁴⁴ GAO observed that “[s]everal officials pointed out that the situation the government is currently experiencing is a result of decisions made years ago, when first acquiring a weapon system, to not purchase critical technical data packages for reasons that include budgetary constraints or a push toward streamlined contracting processes by purchasing commercial items.”⁴⁵ The 2010 report cited

⁴⁰ DFARS 227.7103-1.

⁴¹ GAO, *supra* note 30 at 3.

⁴² See U.S. Gov’t Accountability Office, GAO-10-833, *Federal Contracting: Opportunities Exist to Increase Competition and Assess Reasons When Only One Offer Is Received* (2010) at 19.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

additional examples of DOD attempts to buy technical data rights being met with contractor refusal and prices likely so high as to vitiate any possible savings.⁴⁶

The Air Force noted an aircraft program on which the original equipment manufacturer (OEM) contractor had been working for 30 years for which the OEM estimated a \$1 billion price for a TDP, but still declined to sell it even at that price.⁴⁷ On another Air Force program, a contractor quoted a \$1.3 billion price tag for data rights related to a \$4.8 billion sustainment and support contract, but also declined to sell the rights.⁴⁸ For an Army missile system produced by an OEM since the 1960s, the OEM requested \$30,000 to prepare a cost estimate for a TDP with rights, which subsequently came in at \$31 million but which included only certain missile data and excluded critical software.⁴⁹

In this most recent report on the subject of data rights problems in DOD, GAO cited its numerous prior reports on the issue and the guidance provided by Congress last year with WSARA.⁵⁰ GAO also noted “the John Warner National Defense Authorization Act of Fiscal Year 2007 require[ment for] DOD program managers for major weapons systems to assess the long-term technical data needs and establish corresponding acquisition strategies that provide for the technical data rights needed to sustain such systems over their life cycle.”⁵¹ This requirement has been promulgated in DFARS 207-106 (S-70), and 227.7103-1(f) with a parallel requirement in 227.7203-1(e) for software. One may observe that this assessment of technical data needs is in effect the data management strategy proposed by DOD in response to the 2004 GAO report as discussed previously.⁵²

⁴⁶ *See id.* at 19-20.

⁴⁷ *See id.* at 19.

⁴⁸ *See id.*

⁴⁹ *See id.* at 20.

⁵⁰ *See id.* at 20-21.

⁵¹ *Id.* (footnote omitted); *see* John Warner National Defense Authorization Act of Fiscal Year 2007, Pub. L. No. 109-364, § 802(a), 120 Stat. 2083, 2312-13 (2006) (codified at 10 U.S.C. § 2320(e) (2009)).

⁵² *See* text accompanying footnote 28.

How Can Data Rights Be Used in Source Selection?

Now that we have considered the forces pushing the data rights “pendulum” at DOD, we will consider what can and cannot be done with respect to contractor data rights within the legal constraints imposed on those in the acquisition work force charged with executing these requirements. Specifically, on what basis, if any, may DOD consider rights in data or software as an evaluation criterion? The starting point must be 10 U.S.C. § 2320(a)(2)(F):

(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract—

(i) to sell or otherwise relinquish to the United States any rights in technical data except—

(I) rights in technical data described in subparagraph (C); or

(II) under the conditions described in subparagraph (D); or

(ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).⁵³

While this provision states what is prohibited, I would like to emphasize what it does not prohibit. Although it might be recognized that 10 U.S.C. § 2320 does not have any effect on rights in computer software since the definition for Title 10, Chapter 137 of “technical data” in 10 U.S.C. § 2302(4) excludes computer software, the DFARS implements this prohibition for software as well.⁵⁴ Because of the exclusion in § 2320(a)(2)(F)(i)(I), the prohibition does not affect: corrections or changes to Government furnished technical data;⁵⁵ form, fit or function data;⁵⁶ operation, maintenance, installation, or training data (other than detailed manufacturing or process data);⁵⁷ and data released to the public or otherwise without restriction.⁵⁸ Because of the exclusion in § 2320(a)(2)(F)(i)(II), the prohibition does not extend to certain uses of technical

⁵³ 10 U.S.C. § 2320(a)(2)(F) (2009).

⁵⁴ *See* DFARS 227.7203-1(c) and (d).

⁵⁵ *See id.* § 2320(a)(2)(C)(i).

⁵⁶ *See id.* § 2320(a)(2)(C)(ii).

⁵⁷ *See id.* § 2320(a)(2)(C)(iii).

⁵⁸ *See id.* § 2320(a)(2)(C)(iv).

data under specified conditions, e.g., for emergency repair or overhaul,⁵⁹ and to foreign governments for informational or evaluational purposes.⁶⁰

Beside these explicit exclusions, it must be borne in mind that this prohibition only applies to surrender of rights in technical data that are recognized by the statute in the first place. If development was funded exclusively at private expense “the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons *outside the government* or permit the use of the technical data by such persons.”⁶¹ Thus, the Government may require that any license of technical data to the Government be a license to the entire Government and not create situations in which data is sold to one agency or department and then sold again to another. This fact is reflected in the definition of “Limited Rights” in DFARS 252.227-7013(a)(13). Accordingly, a proposal to DOD that did not offer at least Government wide rights could be found to be nonresponsive to a solicitation without running afoul of the § 2320(a)(2)(F) prohibition.

Setting aside the various exclusions, under this prohibition, an offeror’s or contractor’s eligibility for a contract award or responsiveness to the solicitation cannot be conditioned upon that party’s willingness to relinquish additional data rights. However, this is not the whole story. In accordance with 10 U.S.C. § 2305(d), for major systems, agency heads are supposed to consider including requirements for proposals including technical data and rights sufficient for competition, but only under certain conditions and possibly in conflict with the § 2320(a)(2)(F) prohibition. DFARS 207.106(b)(1)(A) provides a less convoluted explication of the relevant aspects of § 2305(d). DFARS 207.106(b)(1)(B) states that if and when such proposals can be required, “evaluation of items developed at private expense [must] be based on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.” I will not explore the intricacies of § 2305(d) since my target is rather what DOD can do within the boundaries of § 2320(a)(2)(F) regardless of whether proposals enabling competition could be required under § 2305(d). For that, I turn to the DFARS implementation of § 2320.

The DFARS has mostly parallel provisions for technical data and software (in the noncommercial area). DFARS 227.7103-2(b)(2) and 227.7203-2(b)(2) provide the same basic language for technical data and software: “When reviewing offers received in response to a solicitation or other request for data [computer software or computer software documentation],

⁵⁹ *See id.* § 2320(a)(2)(D)(i)(I).

⁶⁰ *See id.* § 2320(a)(2)(D)(i)(II).

⁶¹ *Id.* § 2320(a)(2)(B) (emphasis added).

data managers must balance the original assessment of the Government's data [] needs with data [] prices contained in the offer.”⁶² This merely seems to state the common sense notion that if the price is too high, do not make the purchase.

Leeway to evaluate data rights in source selections appears in the instructions for use of the assertion of restrictions list in solicitation provision DFARS 252.227-7017. For technical data, DFARS 227.7103-10(a)(5) states:

Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights.

For computer software, DFARS 227.7203-10(a)(5) states:

Information provided by offerors in response to the solicitation provision at 252.227-7017 may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose computer software or computer software documentation.

In substance, these provisions are the same. The second sentence of DFARS 227.7103-10(a)(5) is duplicative of DFARS 227.7103-1(c) and (d) while DFARS 227-7203-1(c) and (d) provide corresponding restrictions for software.

So, if proposed restrictions on Government rights in technical data and software can be used to evaluate the impact on evaluation factors, what kind of evaluation factors and evaluations are possible? Certainly, cost or price of rights can be considered if there is one. That is, if two offerors both offered comparable license rights on the same data or software, there can be no question of a prohibited requirement, and cost or price can be evaluated. We can compare apples with apples.

However, let us consider offerors Alpha Corp. and Beta Corp. In a major system research and development contract, Alpha proposes a contract price of \$1 billion and makes no assertions of restrictions of rights on the Government. The Government will fund all the

⁶² The [] text indicates the alternate text in the 227.7203-2(b)(2) version.

development and therefore have Unlimited Rights licenses. On the other hand, Beta proposes \$750 million because it has already developed much of the technology as independent research and development, but it provides the Government with an extensive list asserting Limited and Restricted Rights in a large proportion of key system technology. Even if the Government requested the priced option as suggested by 10 U.S.C. § 2320(e)(2), the prohibitions described above mean that Beta can decline. So, which deal is the best value for the Government? Ignoring all other technical evaluation factors, would it be fair to Alpha to award the contract to Beta and ignore any effects from the extensive restriction list? A playground sense of justice would seem to say no.

Where there are not two prices on comparable rights to compare, how do we avoid comparing apples and oranges? One seemingly obvious answer is total life cycle cost, i.e., how much a system will cost overall over the entire life of the system. However, in practice this could prove difficult to implement in the early stages of a system research and development contract since at the beginning it may be hard to identify what the final technology mix will be, much less the importance of the respective rights way into the future. Certainly, in the field of intellectual property and technology transfer professionals, there are legions of lawyers, accountants, economists and other experts who make livings placing valuations on IP licenses, damages in IP litigations and IP portfolio valuations in mergers and acquisitions. However, the author is curious as to how many experts there really are in estimating the value of IP restrictions in the arcane world of DFARS data rights, especially for weapons systems.

Placing a dollar value on unavailable rights might require forecasting of speculative matters such as war requirements and technology developments decades into the future. Further, possession of data rights may be a necessary but not sufficient factor in achieving any cost savings since other factors such as certification or qualification or even interest on the part of other suppliers for entire systems, subsystems or components are not guaranteed into the indefinite future. The author has heard rumors of battling accounting consultants hired by the Government and disappointed offerors, but wonders if such an exercise is any better than dueling fortune tellers. Alternatively, when using life-cycle cost as a proxy for direct evaluation of data rights, preannounced arbitrary plus-ups might be tried but could be susceptible to protest. While utilization of data rights restriction life-cycle cost impact may sound like a neat way of analyzing data rights quantitatively, it may be that it is just a lot easier said than done.

However, such proxy cost analysis is not all that the Government can do and still avoid the § 2320(a)(F) prohibition. If the Government has properly required certain data or software in

a solicitation, it is entitled to certain rights in accordance with the statute and an offer failing to propose at least those rights could be held unacceptable.⁶³

How much closer to the red line of the § 2320(a)(2)(F) prohibition can the Government go? The Navy has been particularly aggressive in trying to evaluate data rights as described in its Naval Open Architecture Contract Guidebook for Program Managers.⁶⁴ At least one protest result illustrates an evaluation of data rights, albeit with admitted errors, in the context of a competition for software with open architecture features.⁶⁵ The author is aware of one Army contract which evaluated data rights and open architecture based on an earlier Naval Open Architecture Contract Guidebook and which was awarded without protest. More recently, in a protest over joint tactical radio system (JTRS) software, the Navy again evaluated on the basis of a technical data rights subfactor⁶⁶ though it is not clear whether open architecture was necessarily a consideration. The protester thought it deserved a higher rating on the data rights subfactor, but the GAO found no prejudice since the winning offeror received the highest possible rating on the subfactor.⁶⁷

In a contract for sniper rifles, the Army seemingly pushed the envelope on requiring and evaluating data rights.⁶⁸ To avoid an unsatisfactory rating on a “GPLR” factor, an offeror had to offer at least Government Purpose License Rights (GPLRs) in certain technical data.⁶⁹ Higher ratings were keyed to when the GPLRs were provided.⁷⁰ However, while both offerors proposed to grant GPLRs, neither one did so in a fashion that fit neatly into the Army’s criteria.⁷¹

⁶³ See *Ingersoll–Rand Company, B-230101 et al.*, 88-1 CPD ¶ 574 (Comp. Gen. Jun. 16, 1988).

⁶⁴ Naval Open Architecture Enterprise Team, *Naval Open Architecture Contract Guidebook for Program Managers V 2.0* (2010).

⁶⁵ See *DRS C3 Systems LLC, B-310825 et al.*, 2008 CPD ¶ 103 (Comp. Gen. Feb. 26, 2008) at FN 20.

⁶⁶ See *ITT Corporation–Electronic Systems, B-402808*, 2010 CPD ¶ 178 (Comp. Gen. Aug. 6, 2010) at 3.

⁶⁷ See *id.* at FN 4.

⁶⁸ See *Remington Arms Company, B-297374 et al.*, 2006 CPD ¶ 32 (Comp. Gen. Jan.12, 2006) at 2.

⁶⁹ See *id.* at 8.

⁷⁰ See *id.*

⁷¹ See *id.* at 9.

Consequently, the Army assigned a neutral “submitted” rating on the GPLR factor to both offerors planning to negotiate the specific license terms after award.⁷² GAO concluded that the protestor was not prejudiced since the neutral substitute ratings actually gave the protestor a higher relative rating on that factor than GAO thought might have been justified.⁷³

Take Aways

Given the mounting pressure for competition and avoidance of data rights quicksand, all major DOD acquisitions in which technical data and software rights play any role in the ultimate successful utilization of the fruits of the contract must have some evaluation criteria tied to data rights. Care must be taken to avoid minimum requirements for rights that exceed those authorized by statute in order to dodge the 10 U.S.C. § 2320(a)(2)(F) prohibition. However, nothing prohibits the Government from evaluating on the basis of data rights and giving higher ratings to offerors willing to provide more than the bare minimum rights. Including such criteria in the earliest contract actions in a major system life-cycle has the best hope of fostering some actual competition in data rights offerings and of applying some purchasing leverage while the Government still has some. As noted in the many GAO reports discussed earlier, negotiating additional rights later in the life-cycle after a system has been captured in effect by an incumbent contractor is very difficult in light of the statutory prohibition in § 2320(a)(2)(F) and its DFARS counterparts covering technical data and software rights.

Further, it is critical that the acquisition workforce and contractors understand the difference between requirements for data and requirements for rights in that data. The congressionally mandated requirement for acquisition strategies to “address the merits of including a priced contract option for the future delivery of technical data that were not acquired upon initial contract award”⁷⁴ did not appreciate the distinction. The DFARS implementation in DFARS 207.106 (S-70)(2)(ii) helped by adding the phrase “and associated license rights.” However, because an option only calling for possible future delivery of technical data and software is arguably not a requirement for delivery until exercised, the assertion of restrictions procedures of DFARS 252.227-7017 may not apply leaving the Government without any rights to evaluate or ability to resolve rights in data issues with contractors. Consequently, any option price for data rights would be very hard to evaluate without insight into whether the price

⁷² *See id.*

⁷³ *See id.* at 10.

⁷⁴ 10 U.S.C. § 2320(e)(2).

includes payment for rights that: 1) should already be priced into a base contract as rights that may be required as a minimum regardless of funding history; or 2) are rights for which the Government should not have to pay again because the items, components, processes or software offered are actually a result of prior Government funding. The options that should be sought are options for *additional* rights to which the Government is not properly already entitled.

Accordingly, as the data rights rules currently stand, it is critical for DOD requiring activities to identify, as much as possible, all technical data and software that might be needed to support a system over its life-cycle and require that data as early as possible with at least the minimum rights that the Government can require. This should facilitate the process of clarifying the legitimate rights of the Government and its contractors so that rights for which a contractor can legitimately demand more compensation can be fairly and accurately priced. Hopefully, this will help bring some realism to the cost projections of major weapons systems in a future with tighter budgets. DOD program and contracting officials are trying to tackle the challenge of identifying the data, software, and rights actually needed by the Government in many cases through the vehicle of the data management strategy. DOD and the military departments are working on additional guidance on development of these strategies. DOD contractors should expect to see increasing efforts to obtain technical data and software and associated rights necessary to facilitate competition perhaps obtained by setting up competition in the offered rights themselves.

Finally, I have heard concerns that the Government is at times being asked to pay more than once for defense technology in the form of technical data or rights. Whether warranted or not, the concerns are real as evidenced by the Senate version of the 2011 defense authorization bill pending as of this writing.⁷⁵ Section 832(a) would require guidance from the Secretary of Defense regarding implementation of the requirements in 10 U.S.C. § 2320(e).⁷⁶ “Such guidance shall be designed to ensure that the United States is not required to pay more than once for the same technical data.”⁷⁷ Whether this will end up in the final law remains to be seen. Nonetheless, it would seem that whose goose is getting cooked often depends on who is holding the thermometer.

⁷⁵ National Defense Authorization Act for Fiscal Year 2011, S. 3454, 111th Cong. (2010).

⁷⁶ *Id.* § 832(a).

⁷⁷ *Id.* § 832(a)(2) (internal formatting omitted).