

Do You Own It or Not? - A Primer on Noncommercial Software Licensing

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Do You Own It or Not?
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Agenda

Introduction

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Summary



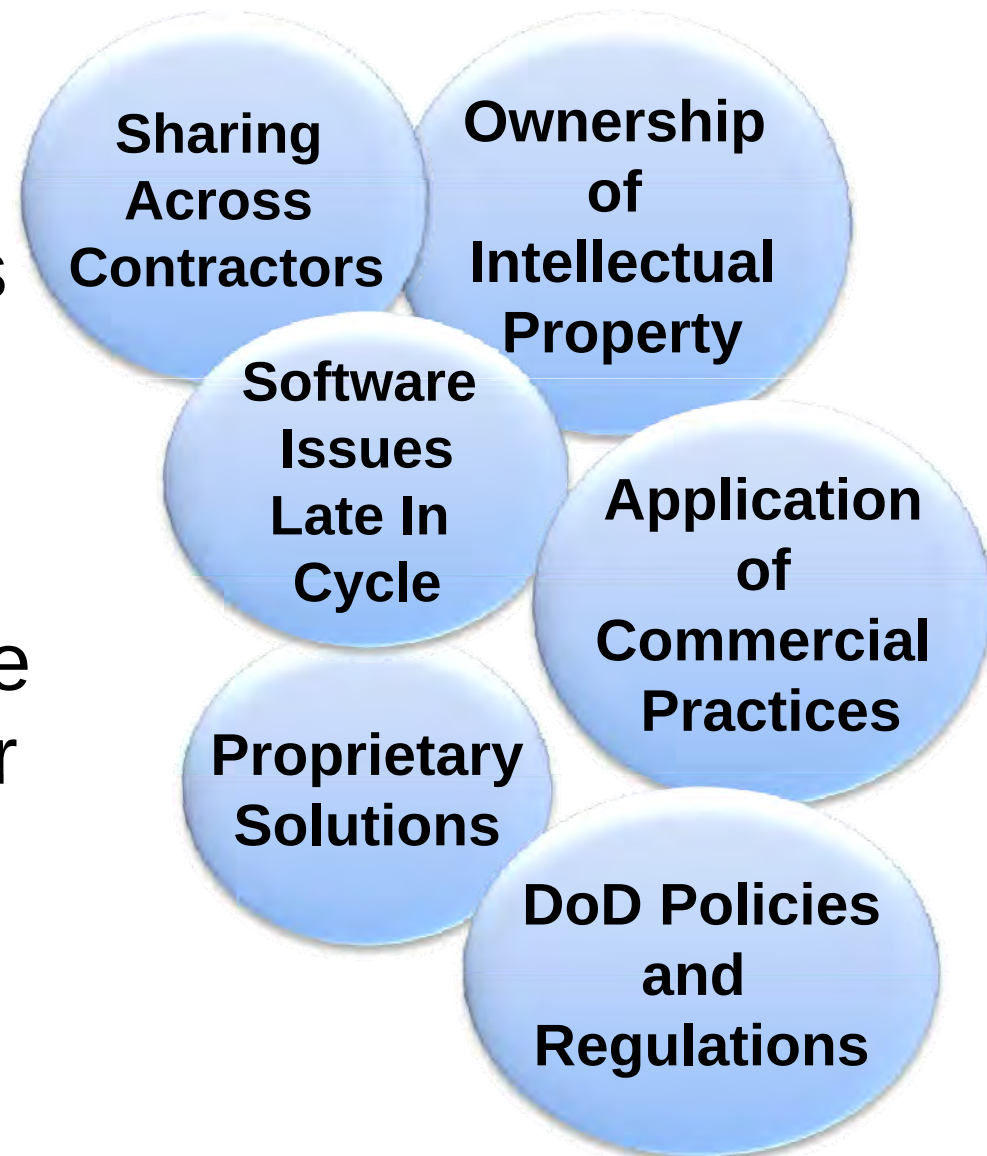


Introduction



Background – Finding the Pain of Software Rights

- PEO representatives from across the Services
- Loosely structured discussion to determine **pain points** of current programs that could have been prevented by better RFPs and contracts
- **Software rights loomed large**



Background - A Chance Encounter

A developer/contractor was selling logistics software to the Services and was concerned about **competitors being able to see his code**.

- **Original code** developed at **private expense** by contractor's company
- Contractor's company **merged** with another company under new name, and contractor was a partner
- A large software company **added money to the pot** to further develop the product
- A piece of the product was **developed under contract** to one of the Services
- There were **no discussions about rights** to the intellectual property or software licenses with the Government



Workshop on Acquiring Rights to Computer Software and Technical Data

Presented in November 2008 to PEO representatives and contracting officers to work through conditions that could affect future software licensing needs

Software Criticality Issues

- Changes to **integration and interface** needs; software **reuse**; insufficient reliability, availability, and maintainability (**RAM**); discovery of **high risk vulnerabilities**

Programmatic Issues

- Changes in **policies**; inadequate market research; contractual changes; lack of software **documentation**; **budget cuts** and inadequate estimation practices; decisions regarding Joint and **foreign government** use; lack of appropriate planning for **sustainment**; changing information assurance **certification** and **accreditation**





Do You Own It or Not? The Answer



Intellectual Property vs. Licensing - Current Department of Defense Framework

DoD does not **“own”** the technical data and computer software included in deliverables, even if the Department **paid for 100 percent** of the development costs.



REF: OUSD AT&L, *Intellectual Property: Navigating Through Commercial Waters*. October 2001.



Intellectual Property vs. Licensing - Current Department of Defense Framework (cont.)

- As a general rule under Government contracts, the contractor-developer is **allowed to retain ownership** of the technical data and computer software it developed.
- The Government receives only **a license to use** that technical data and computer software.
- The **scope** of the license depends on the **needs of the agency, source of funding** for development, and the **negotiations** between the parties.

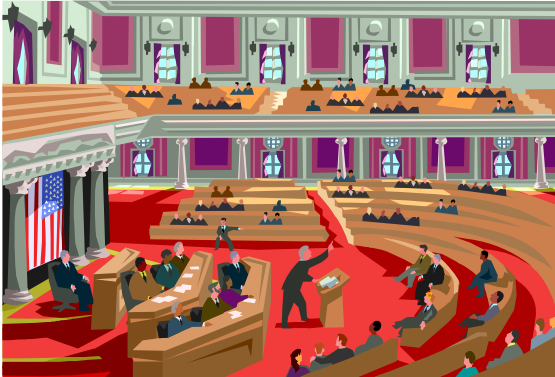




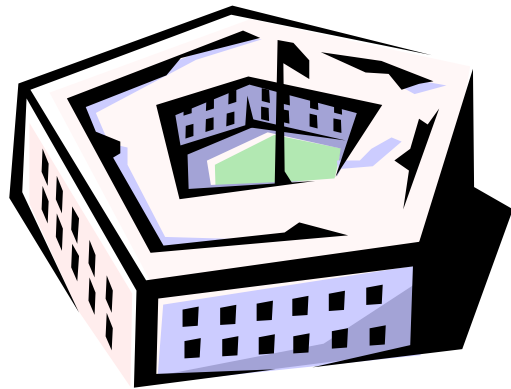
What the Regulations Say . . .



Acquisition Regulations for Computer Software



Federal Acquisition Regulation (FAR) – takes **precedence** over all other regulations



Defense Federal Acquisition Regulation Supplement (DFARS) – includes **DoD-unique process** for acquiring **intellectual property (IP) license rights** for computer software that is developed or delivered under a contract



Acquisition Regulations for Computer Software (cont.)

DFARS SUBPART 227.72 - Rights In Computer Software and Computer Software Documentation

- Prescribes policies and procedures for the acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such software or documentation
- Does not apply to computer software or computer software documentation acquired under GSA schedule contracts

DFARS SUBPART 252.227 – In combination with FAR, provides contract clauses for inclusion in RFPs and contracts



"Other Transaction" Authority (OTA)

Awarded pursuant to authority of 10 U.S.C. 2371 and **generally not subject to the Federal Acquisition Regulation (FAR)**, its supplements, or laws

Two types of commonly-used OTAs

- “Other Transactions” for **prototype projects** – authorized under certain circumstances for prototype projects directly relevant to weapons or weapon systems.
- “Other Transactions” for **basic, applied or advanced research projects** in accordance with 10 U.S.C. 2371

OTA for prototype authority provides **flexibility to negotiate terms and conditions appropriate for the acquisition**

REF: "Other Transactions" (OT) Guide For Prototype Projects. Under Secretary Of Defense For Acquisition, Technology And Logistics. January 2001.



When Do You Plan for Rights That Will Be Acquired?

DoD requires that the Data Management Strategy (DMS), which is **part of the Acquisition Strategy**, include a **licensing strategy** for noncommercial computer software.

These documents must be completed prior to the solicitation.

Based on this strategy, the offeror/contractor will provide a **list of all noncommercial software products that have restrictions** as part of the proposal and prior to award of a contract.





License Types and the Rights They Convey



High Level Explanation of Rights

Rights that a licensor grants to the Government are:

- **Unlimited** rights
- **Government purpose** rights
- **Restricted** rights (noncommercial computer software and software documentation)
- **Specifically negotiated** license rights
- **Prior** Government Rights
- **Commercial** license



Comparison of License Rights

UNLIMITED RIGHTS

Broad use and disclosure by Government **for any purpose whatsoever and for commercial purpose**

*Developed **exclusively** with Government funds*

GOVERNMENT PURPOSE RIGHTS – GPR

Disclosure within Government; disclosure outside for Government purposes; **supports commercial development by developer**; GPR period negotiated; **after GPR period, becomes unlimited rights**

*Developed with **mixed** funding*

RESTRICTED RIGHTS (NONCOMMERCIAL)

Limited to **one terminal or central processing unit**; transfer to other Gov't agency without permission; contractors can diagnose, modify etc with **signed disclosure agreement**

*Developed exclusively at **private expense***



Comparison of Licensed Rights (cont.)

SPECIFICALLY NEGOTIATED RIGHTS

Modifications to unlimited, GPR, and restricted rights **by mutual agreement; shall not** provide the Government lesser rights than in previous clauses; contractors are not required to provide the additional rights

Developed by any funding type

PRIOR GOVERNMENT RIGHTS

Terms based on **pre-existing rights**, unless—

- (i) The parties have agreed otherwise; or
- (ii) Any restrictions have expired or no longer apply

Developed by any funding type

Note: Commercial Software

There **is no specific contract clause** governing the Government's rights in commercial computer software or commercial computer software documentation per 227.72. User rights are **the same as those of the public** and included in the commercial license agreement.





Defining Agency Needs



What Rationale Do You Use to Select License Type?

DoD policy for

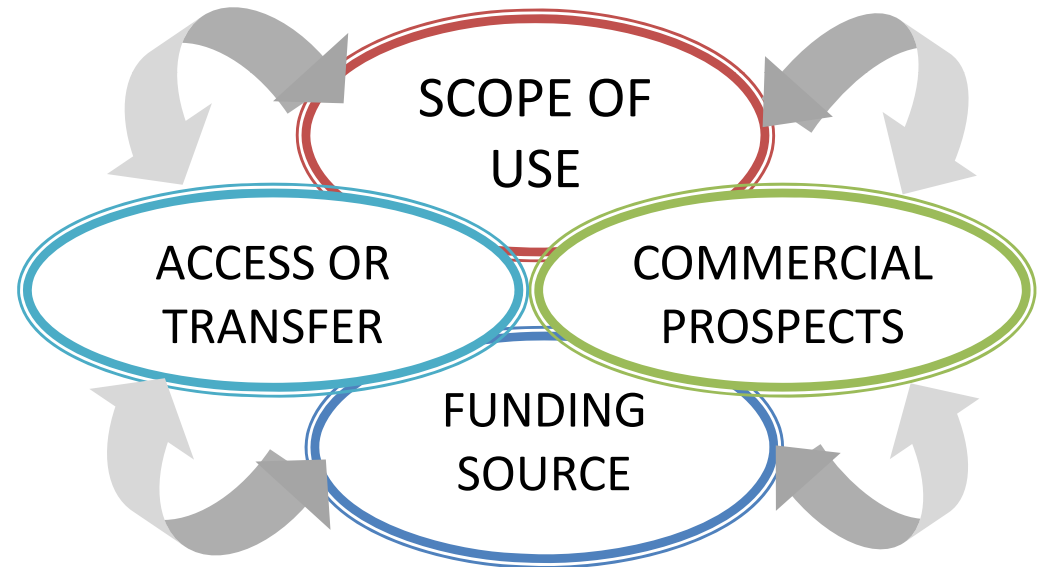
noncommercial computer software is

*“to acquire only the computer software and computer software documentation and the **rights** in such software or documentation, **necessary to satisfy agency needs**”*

[DFARS 227.7203-1]



Four Questions to Determine the Agency's Licensing Needs for Noncommercial Software



- X. Who *needs to use or modify* the product at various times of the product lifecycle and to what extent?
- X. What restrictions on *access by terminals and central processing units* or *on transfer* to other Government agencies are acceptable?
- X. Are there any plans that the product will be developed or used for *commercial purposes*?
- X. Who is going to *fund or has funded* the noncommercial computer software development and to what extent?



From Assumptions to Licensing Decisions

1. Identify assumptions.

Example Assumption for Software Criticality:

The system is highly reliant on the software and is complex; so software is critical to the system and mission.



Forming Agency Needs and Licensing Decisions for Noncommercial Software

1. Identify assumptions.
2. Construct one or more **high-level statements** that describe the Government's plan to support the assumption.

Example Plan:

The Government must ensure operations and availability during the life of the system.



Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government's plan to support the assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.

Example Capability/Decision Drivers:

The Government must have:

- access to all code, tools, test scripts, etc. to repair defects;
- legal rights to perform or authorize others
- authority to engage competing contractor, including creating derivative works,
- qualified talent available throughout life cycle



Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government's plan to support the assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.
4. Assign a numerical or rank order score to each decision driver to distinguish higher priorities from lower ones.

Example Prioritization:

Priority 3 - access to all code, tools, test scripts, etc to repair defects;

Priority 1 - legal rights to perform or authorize others

Priority 2 - authority to engage competing contractor, including creating derivative works,

Priority 4 - qualified talent available throughout life cycle



Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government's plan to support the assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.
4. Assign a numerical or rank order score to each decision driver to distinguish higher priorities from lower ones.
5. Select the option that best supports each decision driver.

Example Prioritization:

Priority 3 - access to all code . . . **Any type**

Priority 1 - legal rights . . . **Unlimited**

Priority 2 - authority . . . **Unlimited**

Priority 4 - qualified talent . . . **Any type**



Forming Agency Needs and Licensing Decisions for Noncommercial Software (cont.)

1. Identify assumptions.
2. Construct one or more high-level statements that describe the Government's plan to support each assumption.
3. Identify the necessary capabilities/decision drivers that the Government must have to be successful with its plan.
4. Assign a numerical or rank order score to each decision driver to distinguish higher priorities from lower ones.
5. Select the option that best supports each decision driver.
6. Review the selections and the priority weights to select the best option.



And the Winner Is:

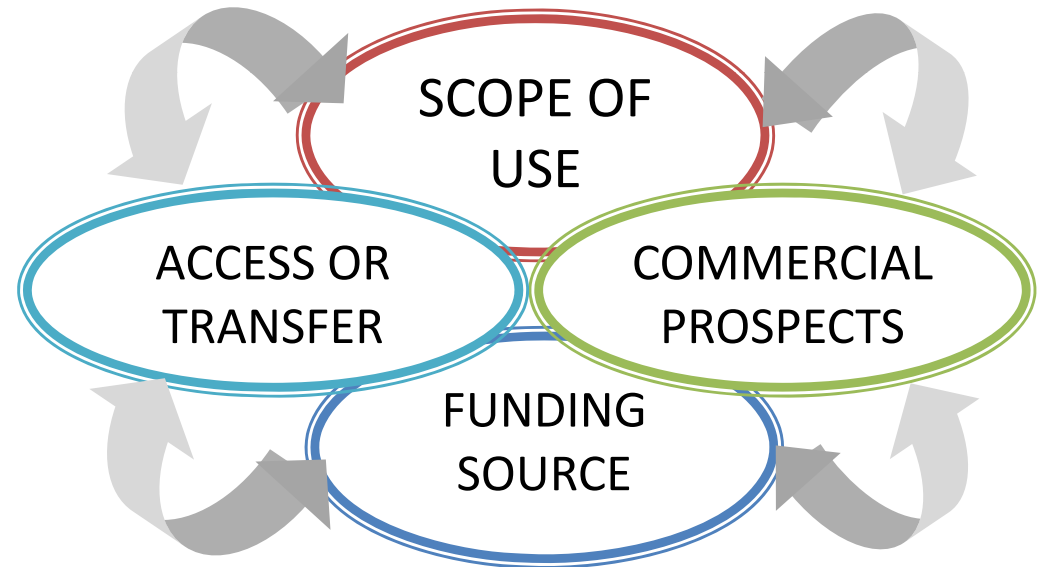
CRITICALITY ASSUMPTION: The system is highly reliant on the software and complex, so is **critical** to the system.

CRITICALITY PLAN: The Government will **ensure operations and availability** during the life of the system.

CAPABILITY/ DECISION DRIVERS	AGENCY NEED		
	Unlimited Rights	Government Purpose Rights	Restricted Rights
	X	X	X
	X	(after GPR period)	
	X	(after GPR period)	
	X	X	X
P3 - Access to all code, tools, test scripts, etc to repair defects			
P1 - Legal rights to perform any necessary work or authorize others to do it			
P2 - Authorize competing contractor to modify work, including creating derivative works			
P4 - Qualified talent available throughout life cycle			



Four Questions to Determine the Agency's Licensing Needs for Noncommercial Software



- X. Who *needs to use or modify* the product at various times of the lifecycle and to what extent?
- X. What restrictions on *access by terminals and central processing units* or *on transfer* to other Government agencies are acceptable?
- X. Are there any plans that the product will be developed or used for *commercial purposes*?
- X. Who is going to *fund or has funded* the noncommercial computer software development and to what extent?





Ensuring You Get the Software Computer Rights You Expected



Contract Clauses in the RFP or Contract Are Not Enough - CDRLs

227.72 - Noncommercial Computer Software and Computer Software Documentation

- 227.7203-3 Policy

- (b) Solicitations and contracts shall—

- Establish **separate contract line items**, to the extent practicable, for the **computer software or computer software documentation to be delivered under** a contract and require offerors and contractors to price separately each deliverable data item



Contract Clauses in the RFP or Contract Are Not Enough – Example CDRL Topics

Important CDRLs for software acquisitions include (but are not limited to):

- **Source code** and source code listings
- Software Requirements Description
- Software **Interface** Design Description
- Object code listings
- Software Design Description
- Software Test Plan
- Test procedures, scripts, cases, and results
- Algorithms and formulae
- Processes, flow charts, and related material that would enable the software to be reproduced, recreated, or recompiled
- Owners manuals
- Licenses
- Users' manuals
- Software Architecture Description
- Installation instructions



Contract Clauses in the RFP or Contract Are Not Enough – CDRs and Restrictive Markings

Sample CDR-Software End Product

CONTRACT DATA REQUIREMENTS LIST (1 Data Item)				Form Approved OMB No. 0704-0188	
The public reporting burden for this collection of information is estimated to average 110 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Directorate for Information Operations and Reports (0704-0188). Respondents should be aware that notwithstanding any other provision of law, no person shall be penalized for failing to provide any information if it does not display a currently valid OMB control number. Please do not return your Government Issuing Contracting Officer for the Contract ID No. listed in Block 1.					
A. CONTRACT LINE ITEM NO.		B. EXHIBIT		C. CATEGORY: TDP _____ TM _____	
D. SYSTEM ITEM			E. CONTRACT/PR NO.		
1. DATA ITEM NO. [####]		2. TITLE OF DATA ITEM Computer Software Product End Items		3. SEE See	
4. AUTHORITY (Data Acquisition Document No.) DI MACR 00700			5. CONTRACT REFERENCE [DOW Paragraph(s)]		
7. DD 250 REQ [DD]		9. DUTY STATEMENT REQUIRED [D]		10. FREQUENCY AS REQ See BLK 16	
8. APP CODE [A]		11. AS OF DATE See BLK 16		12. DATE OF FIRST SUBMISSION See BLK 16	
14. REMARKS					
Blk 3: Subtitle should reflect the specific computer software product end item. Blks 10 - 13 - The date when the item is to be delivered are to be specified, as well as the frequency of delivery if the item is to be periodically delivered. Item to be in a format and on a medium mutually acceptable to the Government and the Contractor. Item to be clearly labeled with the license terms associated with the product as appropriate ("Unlimited Rights", "Government Purpose Rights", "Limited Rights", or other). If item consists of elements with different levels of licenses, each constituent element is to be listed and labeled with the appropriate rights. If item is subject to Government approval, then receipt of item is not to be considered the same as acceptance and approval.					

... Item to be clearly labeled with the license terms associated with the product as appropriate ("Unlimited Rights," "Government Purpose Rights," "Limited Rights," or other). If item consists of elements with different levels of licenses, each constituent element is to be listed and labeled with the appropriate rights.

REF: U.S. Navy. Guidebook for Acquisition of Naval Software Intensive Systems. V 1.0. 2008



Contract Clauses in the RFP or Contract Are Not Enough –Restrictive Markings on Software

Sample Source Code Headers

Unlimited

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REF: U.S. Navy. Guidebook for Acquisition of Naval Software Intensive Systems. V 1.0. 2008



The Most Important Advice You Can Get

In determining the approach for the acquisition strategy, RFP, and contract, consult:



EARLY AND OFTEN





“Program managers should consider the cost and benefits of acquiring data rights—or consequences of not obtaining them.”

REF: Kove, L. S. The Importance of Data and Data Rights. Defense AT&L: July-August 2007



Summary

- **FAR** and **DFARS** provides the policy, definitions, and **contract clauses** to be used in determining and requiring rights to computer software etc.
- Data rights strategies need to be **anticipated at the beginning of the acquisition effort** to avoid surprises.
- Rights to computer software, documentation, and technical data must be incorporated into the **acquisition strategy** and the **RFP**.
- Data rights strategies must take into account **both expected and possible changes in circumstances** throughout the life of the product
- Computer rights restrictions must be reflected in **contract clauses, lists of deliverables, and as markings in/on products themselves.**



Questions



References and Additional Resources

- Federal Acquisition Regulation (FAR)
- Defense Federal Acquisition Regulation Supplement (DFARS)
- OUSD AT&L. *Intellectual Property: Navigating Through Commercial Waters – issues and Solutions When Negotiating Intellectual Property with Commercial Companies*. October 2001
- U.S. Navy. *Guidebook for Acquisition of Naval Software Intensive Systems. V 1.0*. 2008
- *Techniques for Developing an Acquisition Strategy by Profiling Software Risks*. CMU/SEI-2006-TR-002
- *Understanding and Leveraging a Supplier's CMMI® Efforts: A Guidebook for Acquirers*. CMU/SEI-2007-TR-004
- U.S. Army Source Selection Guide. May 2008



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