A Basic Introduction to Intellectual Property Rights
Pursuant to NASA Procurement Contracts

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Disclaimer

All charts in this presentation have been prepared for general information purposes only. The information presented herein constitutes facts, is not legal advice, is not to be acted as legal advice, may not be current, and is subject to change without notice.
“Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.”
“Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant ...”

“Subject invention means any reportable item which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant ...”

“Made means when used in relation to any invention other than a plant variety, the conception or first actual reduction to practice of the invention.”
Attempting to Balance the Interests of the Parties

• Contractor (K) Interests
  – Protecting intellectual property developed at the K’s sole expense;
  – Given reasonable compensation for actual work associated with collecting, formatting, maintaining, and delivering data.

• Government (Gov’t) Interests
  – Certain data is required in the form of operating manuals to properly use and maintain items;
  – The Gov’t requires detailed data to make both routine and emergency repairs;
  – The Gov’t requires data to obtain competition in the re-procurement of end-items and spare parts;
  – The Gov’t requires data to encourage further research and development and to evaluate products.
General Data Policy

• The Gov’t’s general data policy in which proprietary rights are claimed is that such data are not delivered to the Gov’t.
• Rather, the K is permitted to deliver form, fit, and function data.
  – Note that NASA/JSC has relatively unique data requirements due to the inherent risks of human spaceflight.
• The K owns data first produced in performance of a contract.
• The Gov’t retains an Unlimited Rights license (discussed on the next page) in data first produced in performance of a contract.
• Just because the Gov’t has unlimited rights in data, doesn’t mean the K is obligated to deliver the data.
• Unlimited Rights in Data

  - Unlimited means unlimited.
  - The practical effect of the Unlimited Rights license is that the Gov’t enjoys the same rights as a typical owner of data. And, arguably, because the K is limited in its rights by FAR 52.227-14(b)(2), the K has less rights as compared to the Gov’t.
  - Definition: The right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.
  - Applies to (1) data produced in performance of the contract; (2) form, fit, and function data delivered under the contract; (3) manuals or instructional and training materials delivered or furnished under the contract; (4) all other data delivered under the contract not otherwise marked as Limited Rights Data or Restricted Computer Software.
Government Rights in Data (cont’d)

• Less than Unlimited Rights
  – Limited Rights Data
    • Data, other than computer software, that embody trade secrets or are commercial or financial and confidential and privileged, to the extent that such data pertains to items, components, or processes developed at private expense, including minor modifications.
    • Private expense means 100% at private expense.
      – The K has the burden of proving 100% private expense through financial and technical records.
    • The Gov’t has limited rights in such data.
      – The FAR has a standard set of limited rights. FAR 27.404-2(b).
      – The Gov’t can customize this set of limited rights (consultation by an IP Attorney is required).
Government Rights in Data (cont’d)

• Restricted Computer Software

  – Definition: Computer software developed at private expense and that is a trade secret, is commercial or financial and confidential and privileged, or is copyrighted computer software, including minor modifications of the computer software.

  – The Gov’t has limited rights in such data.

  • Unlike the limited rights for Limited Rights Data, the limited rights for Restricted Computer Software are defined in FAR 52.227-14.
Data Marking

• When a K delivers data to the Gov’t, it must mark each piece of data on which it asserts less than unlimited rights to the Gov’t.
  – Limited Rights Data and Restricted Computer Software cannot be unilaterally delivered to the Gov’t by the K (i.e., without the Government’s consent).
  – If a K delivers data with any restrictive markings and the Gov’t does not believe the restrictive markings are warranted, the Contracting Officer can challenge the markings. FAR 52.227-14(e)
Final Thoughts

• It is the current policy of the Gov’t to acquire only such data and rights therein as are essential to meet the Government’s needs. FAR 27.406-1

• This policy is an attempt to strike a balance between the interests of the Gov’t and that of the K. In addition, this policy recognizes the administrative burden (and associated cost) resulting from excessive data acquisition.
Questions?