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Inside DOD's Reasonable Approach To Data Rights Rule

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W. Jay DeVecchio

On June 16, 2016, the U.S. Department of Defense issued a proposed rule to implement Section 815 of the National Defense Authorization Act for Fiscal Year 2012. Industry and practitioners alike have awaited this proposal since Congress enacted Section 815 in December 2011, substantially amending 10 U.S.C. § 2320. Under the proposed rule, if technical data or computer software are "segregation or reintegration" data, they may be released to a third party, including a competitor, even if they are limited-rights data or restricted-rights software, subject to constraints: that the recipient may use the data or software only for segregation or reintegration, and that the recipient must later destroy the data or software. The rule also permits the DOD to require delivery, without any time limits, of various technical data and software that either have been generated or merely "utilized" in the performance of a contract.

These are significant changes to the ways DOD contractors have conducted "data rights" business for almost 50 years, and the proposed rule, which occupies 21 pages in the Federal Register (81 Fed. Reg. 39,483–39,503), contains other notable revisions. This rule therefore is recommended, though dense, reading. Nonetheless, after a years-long process of listening to industry and academic input, the DOD's proposed rule mostly turns a badly written Section 815 into a workable framework allowing contractors certain protections while keeping in line with DOD's Better Buying Power initiative toward modularity and "plug-and-play" open systems architectures. A number of potential pitfalls remain, however, and two of them are particularly troublesome.

What the Heck are Segregation or Reintegration Data?

When Section 815 first appeared, everyone wondered what exactly Congress meant by "segregation or reintegration," which, as is typical of our legislature, were ill-defined. According to Section 815, these data are "necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes." This definition was only marginally useful, because "reintegration" was an entirely unknown concept, and "segregation" suggested data previously understood as "form, fit, and function" (FFF) data, in which the government already obtains unlimited rights. Yet Congress contemplated that "segregation or reintegration" data could be subject to limited rights. And necessarily these new forms of data were somehow distinct from, and more than, FFF data. Indeed, in response to industry head scratching, congressional staff suggested early on that these were "simply" more detailed form, fit, and function data, whatever that meant.

The DOD also had to wrestle with the regrettable fact that Congress wrote Section 815 with only technical data in mind, while the DOD and industry have to deal with software as well. And if the DOD extended its rule to software, a significant concern for industry was whether "source code" (often a contractor's most closely held information) would get swept into these definitions. The DOD's work certainly was cut out for it.

The rule's authors thus understandably struggled to relate these "segregation or reintegration" data to FFF data, and to harmonize them with a grant of limited rights in technical data and restricted rights in computer software. Their solutions are reasonable, if expansive. First, the DOD took the opportunity to expand the definition of FFF data to include technical data and, for the first time, computer software "that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics" of an item or process, but expressly to exclude source code and detailed manufacturing or process data. These exclusions are an important clarification, because they eliminate a common argument by DOD program personnel that the DOD is entitled to unlimited rights in source code or manufacturing data that these personnel often incorrectly contend are FFF information.

Second, noting that Section 815 contemplates that segregation or reintegration data could be subject to limited rights, the DOD amplified the statutory definition by adding that "segregation or reintegration data" are limited rights data (or, in the case of computer software, subject to restricted rights) and are "more detailed than form, fit, and function data." Consistent with the long-standing Defense Federal Acquisition Regulation Supplement definition of the term "developed" as it relates to determinations of development at private expense, the proposed rule further provides that, unless otherwise agreed, "the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities." Although this last point still leaves some room for debate about who qualifies as reasonably skilled in an art, it no doubt eliminates Defense Contract Audit Agency personnel from contention.

These clarifications notwithstanding, the ambiguity in this definition is apparent — whatever comprises information that is "more detailed than form, fit, and function data" will be in the eye of the beholder. Moreover, by using a catch-all qualifier, the proposal opens the door to broad or aggressive interpretations of the definition, which should make contractors wary. In its final sentence, the DOD's proposed definition of "segregation or reintegration data" states that the term "[m]ay include, but would not typically require, detailed manufacturing or process data or computer software source code." Simply saying that source code or manufacturing data "typically" is not required does not make it so. Contracting officers and their technical representatives can, and likely will, contend such data are essential.

The new definition also adopts the doctrine of segregability, long reflected in the DFARS, noting that the segregation or reintegration of an item may be performed at any practical level, including down to the "lowest practicable segregable level, e.g., a subitem or subcomponent level, or any segregable portion of a process, computer software (e.g., a software subroutine that performs a specific function), or documentation." This language potentially broadens exponentially the reach of segregation or reintegration data. For instance, it is difficult to see how segregation or reintegration data associated with a software subroutine will not also arguably cover source code.

To protect source code and detailed manufacturing data, and to avoid confusion, contractors should proactively identify and define what they perceive as segregation or reintegration data. If a contractor,

drawing on its personnel "skilled in the applicable art," thoughtfully and carefully creates packages of what it deems to be segregation or reintegration data before the government requests such information, then the contractor will be in a far better position to define and justify the data and software it is relinquishing for disclosure.

Unlimited Deferred Ordering Arrives

Section 815 additionally expanded the government's right to order delivery of technical data during and after contract performance. Specifically, Section 815 allows the government to require, "at any time," delivery of technical data that were "generated or utilized" in the performance of a contract. In return, the government must only compensate the contractor for reasonable costs incurred for converting and delivering the data in the required form. Having no time limit is an extraordinary thing, vastly different from the three-year limit currently in place. The DOD attempts to downplay the effect of this change by assuring contractors that nothing in the proposed rule requires contractors to preserve technical data or computer software beyond a reasonable period after performance. But this ignores the reality that configuration control regimes within most contractors do not readily permit discarding these data or software. Moreover, the DOD itself undercuts this assurance by inviting the government to make preservation of technical data and computer software for a specific period a contract requirement. 81 Fed. Reg. 39482, 39501 (proposed DFARS 252.227-7029(d)). Again, one can predict that contracting officers will accept this invitation and include extended data-preservation requirements in contracts.

The DOD also provided an expansive definition of "generated or utilized." Under the proposed rule, which adds DFARS 252.227-7029 (Deferred Ordering of Technical Data or Computer Software), such data would include "[t]echnical data pertaining to an item or process that is developed, delivered, or incorporated into the design of a system," technical data or computer software "used to provide services" in the performance of a contract, or "[t]echnical data or computer software, other than commercially available off-the-shelf software, necessary to access, use, reproduce, modify, perform, display, release, or disclose" any of the technical data or computer software otherwise generated or utilized under the contract. There is not much that will fall outside this definition.

On the other hand, there are some practical limits under the proposed rule. The government may at any time order such technical data or computer software, but only if the government finds (1) that such data is needed for the development, reprocurement, sustainment, modification, or upgrade of (2) a major system, a weapons system, a noncommercial item, or any portion of a commercial item developed at government expense or with mixed funding, and (3) the data was generated exclusively with government or mixed funds, pertains to an item or process that was developed exclusively with government or mixed funds, or is FFF or segregation or reintegration data.

Nevertheless, as discussed above, the scope of segregation or reintegration data subject to delivery may be extensive, even so much as to include source code. This means that if a contractor intends to "utilize" third-party computer software during performance, the contractor must now secure the necessary rights from the third party (i.e., the right to deliver segregation or reintegration source code) to fulfill the contractor's obligations to the government.

Importantly, the proposed rule requires this new deferred ordering clause to be inserted into nearly all solicitations and contracts, with the exception of FAR Part 12 solicitations that are not for major systems, weapons systems, or subsystems thereof. Further, the government's failure to challenge a contractor's restriction over technical data or computer software does not preclude the government from requiring delivery of the data later on.

With the government entitled, as a baseline, to deferred delivery of nearly all technical data or computer software generated or utilized in the performance of a contract, the government has little incentive to identify deliverable technical data or computer software prior to contract award. Although this may not seem material from a cost perspective, it will exacerbate a weakness that contractors tend to have — namely, not being sufficiently foresighted to factor into their cost proposals either the effort associated with delivering technical data and computer software, or the downstream loss of value associated with the risk of deliverable information being inadvertently or improperly disclosed. Without knowing which technical data or computer software the government may eventually request, contractors either must assume that the government will request delivery of all technical data and computer software "generated or utilized" during performance, or assess which data and software the government is most likely to request, and price accordingly. Thus, now even more than before, contractors must give meaningful thought to how to quantify the value of technical data or computer software they may be required to deliver as a condition of contract performance.

Conclusion

The DOD's proposed rule takes a reasonable approach to the often-criticized language of Section 815, and the DOD is to be commended for listening to industry's concerns. Many of those concerns have been addressed, although not fully. This is understandable, because the DOD drafters cannot write on a blank slate; they are constrained by the Better Buying Power initiative in pursuit of increased system modularity, interoperability, and open-systems "plug-and-play" architecture. To achieve those goals, the DOD must obtain access to more technical data and computer software at module interfaces. The DOD has attempted to do this in two ways: first, by obtaining more than FFF data, as the DOD seeks to do through the proposed rule; and second, by requesting in proposals that contractors offer priced options to give the government increased rights in technical data and computer software. This latter trend is significantly more worrisome than the proposed rule because it forces contractors, for fear of losing an award, to give up the limited and restricted rights to which they are statutorily entitled.

In all events, assuming as we should that the proposed rule will be essentially identical to the final rule, contractors should carefully and proactively identify what they consider to be segregation or reintegration data; reevaluate what assurances they will need from suppliers; and factor the government's deferred ordering rights into their price proposals to account for the potential that broad swaths of technical data and computer software may be up for grabs in perpetuity.

—By W. Jay DeVecchio and Locke Bell, Morrison & Foerster LLP

Jay DeVecchio is a partner in Morrison & Foerster's Washington, D.C., office and co-chairman of the firm's government contracts and public procurement practice. Locke Bell is an associate in the firm's Washington office.