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Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Nathaniel E. Castellano

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¶ 22 DATA RIGHTS: DOD's Proposed Data Rights Regulations For MOSA Undercut Its Pursuit Of Commercial Innovation

A special column by W. Jay DeVecchio and Locke Bell, Morrison & Foerster LLP. Jay DeVecchio is a litigator and former Co-Chair of Morrison & Foerster's Government Contracts and Public Procurement practice. Locke Bell is a partner in the firm's Government Contracts and Public Procurement practice. The views expressed in this article are solely those of the authors and do not necessarily reflect the views of their firm or its clients.

On November 17, 2023, the Department of Defense published its long-awaited proposed revisions to the Defense Federal Acquisition Regulation Supplement data rights regulations to implement a Modular Open Systems Approach (MOSA). 88 Fed. Reg. 80258. In this article, we focus on one aspect of these proposals in particular—the unnecessary but very adverse effect these revisions will have on commercial software and technology developers. Some of these ill effects can be avoided. We will point out the principal issues and offer solutions.

Assumptions And A Proposition

We begin with a handful of assumptions and a proposition that seem inherently sensible and almost certainly correct:

First, policymakers within the DOD recognize that computer software and the commercial companies producing it are the driving forces behind modern innovation and technological advancement across almost all fields of endeavor. From Microsoft to Intel to Alphabet, private sector investment in research and development outstrips the DOD (and its largest primes) by an order of magnitude and billions of dollars.

Second, DOD policymakers mean what they say publicly and regularly about the need for the DOD to embrace this private-sector innovation. Take, for example, the first-ever National Defense Industrial Strategy (NDIS) published by the DOD in January 2024: "*The DoD must find the best capabilities to support the warfighter, including commercially available solutions. … [C]ommercial solutions are a vital tool to achieve our national objectives.*" See https://www.businessdefense.gov/docs/ndis/2023-NDIS.pdf. Or this, in DOD News on March 3, 2022, from the prior Director of DOD's

Defense Innovation Unit: "*We're really trying to look at what all of the innovative companies are doing around the country... because most of what we need to do to modernize the Defense Department is led by industry now; it's commercial technologies…. We have to be harnessing what the private industry is doing if we're going to be giving our warfighters the capability that they need.*" See https://www.defense.gov/News/News-Stories/Article/Article/2953893/addressing-dods-tech-focus-areas-requires-new-approaches/.

Third, these commercial innovators rationally wish to protect their profound investment and the intellectual property arising from it, which sustains their businesses and allows further advances.

Fourth, the DOD, with equal rationality, wishes to (and is required by Congress to) design and acquire modular systems with interfaces allowing one supplier's components to be swapped with another's to accommodate rapidly changing technology and avoid being locked into a particular company—i.e., the dreaded "vendor lock." This is known as a modular open system approach, or "MOSA." See 10 USCA § § 3771 & 4401. A primary goal of MOSA, according to the recent NDIS, is "*to isolate proprietary technology and prevent overleveraging of limited private investments from undermining return on government investment.*"

Fifth, MOSA—by definition—can be accomplished readily and without much fuss from industry by the DOD's getting all the information it needs (inputs, outputs, physical and electrical interfaces) to connect various contractors' black boxes into a larger system, without any need for unlimited rights or Government purpose rights (GPR) in the proprietary technology or software within that box. That is the essence of MOSA, as articulated by Congress: In mandating MOSA across all defense acquisition, congressional "intent is to expand the use of modularity in the design of weapons systems, as well as business systems and cybersecurity systems, to more easily enable competition for upgrades as well as sustainment throughout a product's lifecycle, while protecting the proprietary intellectual property embodied within the modules of modular systems." H.R. Rep No. 116-617, at 1683 (2020).

Sixth, yet, the DOD's perpetual anxiety over perceived industrial jujitsu by vendor lock has inspired consistent IP overreaction by DOD leadership; Secretary of the Navy Carlos Del Toro recently boasted of his instructions to Navy's lawyers to "*leverage all legal means at our disposal to ensure that the American people are getting what they paid for*," emphasizing data rights. See *Navy Secretary Roasts Defense Contractors Over "Excuses" and Profits*, The Maritime Executive (Feb. 18, 2024), https://www.maritime-executive.com/article/navy-secretary-roasts-defense-contractors-over-excuses-and-profits. Compelling perhaps when discussing noncommercial developments actually funded by the taxpayer, but not so much when seeking privately-funded commercial innovations. Which brings us to our proposition:

Proposition: If the DOD holds any real hope of partnering with commercial innovators (which increasingly seems in real doubt), it must take care not to overstep in the name of MOSA and vendor lock paranoia. This is particularly true given that most sophisticated DOD systems depend on and will never be rid entirely of black boxes, as long as our nation respects private IP rights and desires private investment in the industrial base.

Actions: OK, given these assumptions and proposition, what actions would one expect DOD regulation writers to take when drafting these latest data rights regulations? The most inherently sensible and almost certainly correct answer would be to allow MOSA interchangeability while

limiting encroachment on commercial IP rights, so as to encourage and attract the private sector innovators the DOD needs so badly, right? YES, but the DOD has overstepped, instead writing clauses guaranteed to cause commercial software and technology companies to flee defense procurement by permitting—even requiring—release of their most sensitive, closely held IP, including source code, to their competitors.

The draft regulations go well beyond the statutes they supposedly implement; apply noncommercial principles to commercial activity and technical data principles to software; make up definitions previously unknown; and require mandatory negotiations over "appropriate and reasonable compensation" to be paid contractors for giving up their proprietary technology developed at private expense, without any insight into how the parties can resolve the inevitable dispute over the inevitably low amounts that will be urged by the Contracting Officer. It is easy to predict how that will end for contractors (badly), as we will discuss.

It is unfortunate that the DOD appears so hellbent on amassing data rights in the name of MOSA that it is overlooking (or willfully ignoring) apparent harms to our national defense. We will address these points. First a bit of background.

A Brief History (Feel Free To Skip To The Next Section)

This all began with § 815 of National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, which introduced the concept of disclosing limited rights *technical data* to third parties outside the Government if the information was necessary for "segregation" or "reintegration" or an item or process. This was a precursor to MOSA—the first step to allowing the DOD to plug and play different components. The problem was nobody knew what Congress meant by segregation and reintegration (S&R), and the DOD had to figure it out in regulations. We did know, however, that the statute—and therefore those terms—did *not* apply to commercial items or to software. See DeVecchio & Bell, *Inside DOD's Reasonable Approach to Data Rights Rule*, LAW360 (June 29, 2016), available at https://www.jdsupra.com/legalnews/inside-dod-s-reasonable-approach-to-51510/.

In turn, in § 809 of the 2017 NDAA, Pub. L. No. 114–328, Congress bounded the scope of S&R data to "interfaces" as specifically "pertaining to an interface between an item or process and other items or processes 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 is found today in 10 USCA § 3771(b)(4)(A)(ii) "Rights in technical data: regulations." Elaborating, Congress also defined "*modular system interface*," which is described today in 10 USCA § 4401(b)(4), "Requirement for [MOSA] in major defense acquisition programs; definitions," as "a shared boundary between major systems, major system components, or modular systems, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements." See DeVecchio & Bell, *Congress Revisits the Data Rights Statutes and Advances Modular Open Systems Architecture in the FY 2017 NDAA*, Morrison Foerster Government Contracts Insights (Jan. 5, 2017), https://www.jdsupra.com/legalnews/congress-revisits-the-data-rights-88722/.

Crucially, 10 USCA § 3771, which is the authority for the DOD's proposed regulations, directs the DOD to take greater rights to support MOSA *only* for "technical data pertaining to a *modular system interface* developed exclusively at private expense or in part with Federal funds and in part at private expense *and used in a modular open system approach pursuant to section 4401 of this*

title, " with an exception not relevant here. 10 USCA § 3771(b). Thus, interfaces for other systems or circumstances are *not* covered nor regulations authorized.

What The DOD Has Done To Exceed Congress And The Law

Notice that 10 USCA § 3771, which invokes the MOSA statute, applies to technical data, *not* to software and certainly not to commercial computer software. The DOD has wrestled for decades with congressional silence on software, solving this silence by replicating changes to technical data regulations in the regulations pertaining to *noncommercial* computer software but not to commercial computer software. This is because in the 1995 data rights revisions the DOD eliminated all contract clauses for commercial computer software and pared the commercial software regulations to three brief sections, all boiling down to requiring the DOD to use commercial software licenses "unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs." DFARS 227.7202-1(a).

However, 10 USCA § 3771, the authority for the new regulations, is not a "Federal procurement law" applicable to commercial computer software nor does it purport to address agency needs for commercial software.

Similarly, the only Government "need" for technical data related to modular systems interfaces is ostensibly only for components of major systems acquisitions per 10 USCA § 4401; other acquisitions are to follow MOSA only "to the maximum extent practicable." That is being read by the DOD as carte blanche, with all things being practicable, an overreach.

And the DOD is disregarding its own long-standing practice about making changes only for noncommercial software by significantly altering the commercial computer software regulations, and in ways guaranteed to drive away innovative software developers. Here is how:

First, the drafters modified the DFARS commercial computer software policy of DFARS 227.7202-1(c)(1) to state that commercial software contractors do not have to furnish closely held technical information about their software or software documentation *except* for "Computer software *related to a modular system interface,* " that term being a creation of and residing in 10 USCA § 4401. This DFARS change to commercial software policy, however, is not expressly tied to § 4401. Thus, it can be read as *any* modular system interface—regardless of the "extent" of "practicability," drawing in virtually all acquisitions that use commercial software modules. And what pray tell are the limits of "*related to*"? You can bet large that some COs will say this includes computer source code, which is the last thing commercial software developers wish to relinquish. This wording is a big deal.

The fix: Well, you say, one can argue that by using a term defined only in 10 USCA § 4401, the drafters meant only those modular interfaces in major weapons systems! Ok, but that is not what this draft regulation says. And we do not need another data rights argument, particularly when this ambiguity is easily cured by tying it to 10 USCA § 4401. The drafters know how to do this, as they did it in their revisions to the commercial software policy at DFARS 227.7202-1(d) where they outright invoke "*modular open system approaches requirements (10 U.S.C. 4401–4403 and section 804(a)(2)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283))* ." This does not solve the open-ended "related to" issue, but it helps.

Second, and worse for commercial suppliers because it opens the door to source code and other proprietary design information, the drafters have created a new term, unknown to the law or expe-

rience—"*interface implementation software* (delivered or otherwise provided) necessary for" segregation and reintegration—and they have anointed this as a Government "need," giving the DOD, in DFARS 227.7202-3(c)(1)(iii), the "*right to release* that interface implementation software *outside* the Government" under restrictions guaranteed to be unsatisfactory to commercial suppliers. Unless the parties can reach some other agreement, this right to release comprises GPR. More on the proposed changes to GPR shortly.

What is interface implementation software? Although used here in the commercial software regulations, it is found newly defined in the revised noncommercial software clause at DFARS 252.227-7014(a)(16) as "*computer software*" that—

> (i) Describes the detailed steps, sequences, characteristics, and conditions used or specified by the developer to implement an interface; and
>
> (ii) Has sufficient detail necessary to permit segregation of computer software from, or reintegration of that software or a physically or functionally equivalent item or process with, other software.

Without doubt, unless clarified, this will give the DOD the right to get a company's commercial computer source code (as well as noncommercial source code). Why? Easy: "computer software" is defined to *include* source code as well as all other information the DOD needs to reproduce, recreate, or recompile the software. DFARS 252.227-7014(a)(4). Commercial software sellers and designers will be fighting for the exits.

The fix: The DOD can free this albatross on attracting commercial innovation by stating expressly that source code is not included in the definition. The fact that the DOD has not done this is strong evidence the drafters intended source code to be included within "interface implementation software," particularly because the DOD knows how to exclude source code when it wishes to, as it has done in the equally new definition of "Form, fit, and function software" (FFFS) found at DFARS 252.227-7014(a)12, which states: "*The term does not include computer programs or computer software source code*."

Notably, this FFFS definition also has been added to the commercial software "Policy" regulation at DFARS 227.7202-1, thereby creating additional anxiety for commercial software developers because FFFS can now be required from them for the first time.

There may be an engineering fix as well. Rather than seeking rights in some vague subset of a proprietary program's source code, the DOD might instead achieve its "interface implementation" goals by promoting Government-specific application programming interfaces (APIs) that permit segregation and reintegration without poking holes into the commercial black boxes. This is consistent with the "API-first" architectures promoted by the DOD's Defense Innovation Board in its study, *Building a DOD Data Economy* (2024), https://innovation.defense.gov/Portals/63/20240118%20DIB%20Data%20Economy%20Study_Approved-compressed.pdf?ver=QW2BEgns16IBRhGipbVCAA%3d%3d.

Third, the DOD has once again applied to commercial computer software a provision of 10 USCA § 3771 that Congress intended for technical data. That alone is a problem. The problem is doubly bad, however, because the congressional language lacks any detail about how it is supposed to work in practice, and the DOD has not offered any solution, which we suspect is not an oversight. Here is the language of 10 USCA § 3771(a)(7)(C):

> For technical data pertaining to a modular system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data.

And here is the language of the proposed addition to the commercial software regulation at DFARS 227.7202-3(c)(2) regarding GPR in commercial software:

> If such computer software is or pertains to a modular system interface developed exclusively at private expense, the contracting officer shall negotiate with the contractor the appropriate and reasonable compensation for such computer software and the associated license rights.

This language also is duplicated in proposed revisions to the definition of GPR pertaining to non-commercial computer software at DFARS 227.7203-5(b)(1)(i).

How is this supposed to work? No one knows. We know, however, that whatever transpires will not be pretty because there are so many variables, and some things are predictable.

Contractor valuation, for example: This language assumes the contractor has some idea of the value of the software that is being released and no longer is proprietary. That may be the case when a company forecasts future sales of its software. If the company has not done this, it will have to figure out some reasonable valuation if it wants to sell to the Government. What method should it use: future revenue lost, cost of development by a third party, cost to recreate a comparable product? Then it will have to decide whether it wants to stick with that valuation in a proposal to the Government or whether it will succumb to internal pressure to go low to obtain a "must win" contract.

Government valuation: How does the Government have a clue about any amount to compensate the contractor? Commercial companies are exempt from providing cost or pricing data; and even if asked to provide other than cost or pricing data, what have raw development costs got to do with the value of the software? Little to nothing. Yet, the Defense Contract Audit Agency loves to look at those costs and can be counted on to advocate them as the amount of compensation.

Disagreement and timing: This suggests, and common sense tells us, there will be disputes over the valuation unless the contractor rolls over during the proposal stage and proposes a low price for a shot at a "must win" procurement. We are certain the Government is counting on pressure in the proposal process to drive this result, because they have told us as much, most recently in the NDIS: "*DoD has a compelling interest in entering into such negotiations [over IP rights] in a competitive environment to the maximum extent possible, to leverage its market power and incentivize the vendors to enter into agreements that encourage the competitor to develop business models and provide corresponding offers*…." See also DoDI 5010.44, § 1.2.b(3), encouraging a policy of negotiating vendor IP licenses "*early in the [acquisition] life cycle, when competition is more likely*." And if a price for granting GPR is an evaluation factor, an award will be made based on the evaluation and there will be no further negotiations to be had. If there somehow were to be negotiations, how would a dispute about compensation be resolved? We don't know. And so on.

The fix: There is no easy one, and none in sight for getting the proposed regulations revised. We think the burden of this will fall to contractors, with the predictable result being that many of the best, brightest, and most innovative will decline to do business with the Government. *Jay DeVecchio & Locke Bell*

