

## GOVERNMENT-INDUSTRY ADVISORY PANEL ON TECHNICAL DATA RIGHTS

The Secretary of Defense created the Section 813 Panel at the behest of Congress to assess the technical data rights, restrictions, and regulatory mechanisms outlined in US Code Title 10, Sections 2320 and 2321 for their compatibility with national economic and defense interests. The Panel, which features expert government, military, and private sector representation from throughout the defense acquisition community, followed a multi-item agenda to look into issues of cost, reward, procurement, government-industry collaboration, commercial technology access, and Modular Open System Architecture. The Panel developed policy recommendations to address key “tension point” issues, presented in the report as a collection of white papers.

The one conclusion to which the Panel unanimously agreed is DoD acquisition professionals require additional training in intellectual property rights procurement issues. DoD lacks consistency and promptness in articulating IP rights preferences during the competitive stage of procurement. Some acquisition officials confuse the government's IP licensing rights with its rights to receive delivery of IP products. Acquisition officials also lack knowledge of best practices in IP valuation among non-DoD federal agencies and industry. Better training of acquisition professionals will improve conditions for future negotiations with industry IP providers.

The Panel developed consensus recommendations to address several technical data rights “tension point” issues identified through extensive deliberations, including the select following among others:

### BUSINESS MODEL CONFLICT

Government's readiness to articulate long-term data requirements is lowest when industry's readiness to accommodate is highest, and vice-versa.

#### THE PANEL RECOMMENDS:

- Changes to the DFARS to require early solicitations for IP products and services include descriptions of the government's long-term requirements for sustainment and upgrades.

### DATA ACQUISITION PLANNING AND REQUIREMENTS

The DFARS lacks guidance on government access to contractor data in the absence of a formal Contract Data Requirements List.

#### THE PANEL RECOMMENDS:

- Changes to the DFARS to empower designated government contracting officials to sign non-disclosure agreements to gain data access.
- DoD develop a streamlined data rights contract clause modeled on the minimal data requirements for Other Transactions, and which enables negotiated licensing agreements for use with research institutions.

## SOURCE SELECTION AND POST SOURCE SELECTION IP LICENSING

Source selections tend either not to include data access and rights as evaluation factors or to insist on stringent and inflexible data requirements. Government often makes special requests for technical data and software access that industry fears violate the federal regulations.

#### THE PANEL RECOMMENDS:

- The FY 2020 NDAA include a section authorizing a pilot program to assess different methods of intellectual property valuation, using current Major Defense Acquisition Programs.
- Changes to federal regulations establishing data rights as a proposal evaluation factor and defining guidelines for its use.
- Tasking the federal Cadre of Experts (defined under 10 USC 2322) to recommend authorization rules for the use of special IP requirements in contract clauses.

## BALANCING THE INTERESTS OF THE PARTIES

The extent of government rights to contractor IP depends on how regulations classify the source of funding for the underlying R&D. Controversy persists because in some cases contractors retain maximal IP rights despite receiving federal funding or reimbursement for their R&D.

#### THE PANEL RECOMMENDS:

- Retaining the ‘source of funding method’ for allocating government IP rights, but supports further study of the treatment of IR&D and other indirect funding approaches.
- Several DFARS changes to permit negotiation for special government IP rights to commercial items modified to meet government-unique needs.
- Changing statute 10 USC 2320 to restrict the authorized release and use of limited rights technical data relevant to the segregation or reintegration of contracted items or processes from other items or processes.
- Changing the DFARS to give the government a right of first refusal to acquire rights to technical data or software upon a contractor's decision to cease support for a contracted product or service.
- Establishing a formal definition of software maintenance and sustainment, and the types of covered software, to enable fulfillment of maintenance and sustainment-related data rights requirements.

## IMPLEMENTATION

Implementation of data rights allocation requires assessing multiple content and source criteria that statutory and regulatory code currently inadequately define.

### THE PANEL RECOMMENDS:

- Changes to the DFARS to clarify definitional differences between technical data and computer software.
- Changes to the DFARS to clarify differences between data used for operation, maintenance, installation, or training (OMIT) and detailed manufacturing or process data (DMPD).
- DoD create standard data definitions for data for which government holds unlimited rights.
- DoD simplify and clarify the process for contractors to validate compliance with data rights requirements.
- Changes to mandatory “flowdown” to subcontractors of data rights contract clauses

## COMPLIANCE/ADMINISTRATIVE

Achieving compliance with data requirements forces contractors and government officials to solve complex technical, logistical, and personnel challenges.

### THE PANEL RECOMMENDS:

- Regulatory changes to improve the upkeep of technical data throughout a system’s life-cycle.
- Statutory changes to 10 USC 2320 to clarify that contractors developing products or services under a contract or subcontract covered by SBIR regulations receive data rights equivalent to fully privately funded products or services.
- DoD form a Cadre of Experts to address the technical knowledge deficit in the acquisition workforce.
- Regulatory changes to guide companies on their data assertion rights and responsibilities during source selection and contract execution.

## FOR MORE INFORMATION OR QUESTIONS REGARDING THE REPORT PLEASE CONTACT:

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## POST-DELIVERY DATA ACQUISITION

Government’s deferred ordering of data imposes burdens on industry, while standard contract options for data rights restrict government’s ability to carry-out long-term sustainment plans for systems.

### THE PANEL RECOMMENDS:

- Statutory changes to limit government’s ability to use deferred ordering of interface data.
- Statutory changes to 10 USC 2320 to the extend period for which government may exercise contract options to acquire technical data and licensing rights to 20 years.
- Establish a federal power of exemption from data rights requirements for deferred ordering to improve the upkeep of technical data throughout a system’s life-cycle.
- Regulatory changes to improve early identification of data rights requirements.
- Regulatory changes to establish escrow accounts to reduce the need for deferred ordering.

## MODULAR OPEN SYSTEMS APPROACHES (MOSA)

Provisions in FY 2017 NDAA establish Government Purpose Rights (GPR) for technical data related to major system interfaces but this may place other privately developed contractor data at risk

### THE PANEL RECOMMENDS:

- Statutory changes to clarify the statutory intent of Government Purpose Rights.