

# **DoD Limited Rights Are Not Adequate Protection For Leading Edge Commercial Proprietary Data**

By

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## **Executive Summary**

Commercial business units and commercial laboratories would like the opportunity to make more of their R&D and products in development available to the DoD but are prevented by regulations that do not adequately protect their proprietary intellectual property. Commercial laboratories (a laboratory for which the preponderance, greater than 90%, of their R&D activities are devoted to the commercial market) will be willing to allow DoD greater access to their developments and technologies when contracting officers have the ability to provide sufficient protection for their proprietary data and the flexibility to negotiate for only the data rights that are required for the specific action. The magnitude of the technology that is currently unavailable to DoD is illustrated by our analysis of 2006 R&D expenditures, which showed that DoD's \$37 billion of external R&D went to:

\$26 Billion to the 30 traditional Defense Contractors for which DoD R&D was greater than 10% of their expensed R&D, which was \$11 Billion.

\$10.8 Billion went to smaller firms, Universities and Non-profits, who invested \$69 Billion in R&D.

Leaving only \$0.2 Billion for the 511 larger US firms that invested between \$8 Billion and \$33 Million in R&D. Their total 2006 R&D investment was \$166 Billion or 68% of the non-Federal R&D investment.

The present Technical Data Rights Regulations appear to work for the major Defense Contractors but clearly are a significant barrier to The DoD's ability to access the technology rich commercial laboratories. This paper concludes with six recommendations that, when effectuated, will enable the DoD to more effectively tap into the vast reservoir of technology that exist and are being developed in commercial laboratories.

When a commercial business or laboratory allows its proprietary data and/or technologies to be accessed by the DoD the number of people who have potential access to this data grows exponentially from a very few trusted employees of the business to potentially all of the employees within the Government, all of the foreign governments and possibly a few direct competitors. Why would an astute business manager allow DoD to have knowledge of their laboratory activities that might have significant commercial sales potential when the best protection DoD can offer is Limited Rights?

In 2006 the US R&D investment of \$343 Billion was split; 65% Industry, 28% Federal Government and 7% Non-profits and Universities. Industry performed \$242 Billion of R&D with 9% funded by the Federal Government from taxes and 91% paid by Industry from profits. Of the \$37 Billion of DoD expenditures for R&D, \$26 Billion was performed by the 30 Defense Contractors (firms in which DoD R&D was greater than 10% of their internally funded R&D) who also invested an aggregate total of \$11 Billion in R&D. DoD also benefits from some very small portion (less than 1%) of the commercial investment in R&D, particularly from the military use of dual-use technology (dual-use meaning that the item, component or process has both commercial and government applications), the majority of which is privately funded.

However, a recent IDCC study estimates that in 2006 approximately 86% of the larger industrial firms that invested \$166 Billion in R&D are not making their technologies available to DoD until the products developed are actively being sold in the commercial marketplace. This 86% in the 2006 study represents an improvement from our previous similar study for 1997 that indicated 92% of the industrial firms were not allowing DoD access to their technologies. Part of this improvement must be credited to DoD's creation and implementation of the "Intellectual Property: Navigating Through Commercial Waters" and the "Manager's Guide to Technology Transition in an Evolutionary Acquisition Environment" guidebooks.

Leading edge commercial firms assure their continued existence and growth predominately as a result of exclusively selling developed products and services in the highly competitive global commercial market. Virtually every technology rich commercial business aggressively protects its proprietary data. This proprietary data defines the business and its potential. These commercial firms keep their proprietary data related to important commercial developments well protected within the organization. Normally only a relatively few trusted business and technical employees, with a vested interest in the commercial success of the development, will have access to the data until production scale up.

On many occasions, when considering a DoD R&D activity, the responsible commercial business executive asks the question "Is there any risk of losing control of our Intellectual Property?" Unless that question can be answered satisfactorily there is no reason to weigh the other regulatory burdens and risks against the potential benefits of the activity.

Because of industry's vital need to protect its proprietary data it is very unlikely that DoD will be able obtain substantially greater access to leading edge commercial technologies until changes are made in the regulations that are perceived to put industry's data at risk.

## **The DoD Technical Data Regulations**

The basic premise is that data rights are based on the source of funding for the development of the item, component, or process, but there are some minimum rights which the government always receives regardless of funding.

The Government obtains Limited Rights in technical data pertaining to an item, component or process developed at private expense and Restricted Rights in computer software developed at private expense. The Government obtains Government Purpose Rights in technical data pertaining to an item, component or process developed with mixed funding and in computer software developed with mixed funding.

Limited/Restricted Rights permit disclosure within the Government (which isn't defined) and to support contractors. While some controls and limits are placed on support contractors, these limitations are not sufficient in today's commercial environment. In some cases, allowing someone else to simply "know" about a trade secret/proprietary information is the concern, even with restrictions placed on usage. Limited Rights is the best "protection" that the Government can provide for technical data developed exclusively at private expense - it can't agree to something stronger - but Limited Rights does not provide sufficient protection for leading edge commercial technologies.

Government Purpose Rights permit disclosure for government purposes, which contracting officers have indicated means any activity in which the Government is a party. The possibilities are beyond comprehension. Since our Government has activities in most of the countries on Earth an estimate of individuals that could potentially have access to proprietary data to which DoD has Government Purpose Rights is an extremely large but unknowable number.

### **Within the Government?**

The Limited Rights technical data regulations allow for disclosure "within the Government." What does "within the Government" mean? Note that the regulation does not say within the contracting laboratory, the contracting facility, Agency, or even DoD; it says within the Government! The contractor's valuable technical data, developed exclusively at private expense, is not restricted to permanent Federal Government employees, employees with a need to know, or even employees who have been trained on protecting Limited Rights data.

The 2006 United States Federal Government headcount was 2.7 million civilians plus hundreds of thousands of contract employees. The regulations permit any or all of those 2.7 million people to have access to commercially valuable technical data even though more than 99% of the Government employees have no use

or interest in the technical data. How comfortable will a prudent commercial business manager feel knowing that a potential key to the future of the business is accessible to 2.7 million additional people? The fact that this wide distribution normally does not take place is little comfort to the business that is counting on their investment in technology developments to pay handsome dividends in the future.

**DoD's Limited Rights in technical data developed at private expense are limited except for:**

"Form Fit and Function Data" — DoD always gets Unlimited Rights in Form, Fit and Function Data.

DFAR 252.227.7103 "Unlimited rights means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, for any purpose whatsoever, and to have or authorize others to do so."

In the increasingly competitive global commercial marketplace most commercial businesses are highly protective of the potential Form, Fit and Function Data until the developing new product is formally introduced to the commercial market. How can they protect their investment in a developing technology if DoD has the right to share the Form, Fit and Function Data with the public in the technology development phase?

Example: A commercial firm responds to a DoD solicitation with a product that is under development and will be available in eight months, in time to fill the DoD need, satisfying the commercial item definition. DoD would have Unlimited Rights in the Form, Fit or Function data months prior to the commercial introduction of this product, at a time when that data is sensitive information. After a product has been sold commercially Unlimited Rights in form, fit and function technical data would be appropriate.

"Necessary for Emergency Repair and Overhaul"

"except that the Government may reproduce, release or disclose such data or authorize the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is --

(i) Necessary for emergency repair and overhaul;"

What is Emergency Repair and Overhaul? Could this include, for example, the emergency repair of a copy machine or a computer when the Officer in charge needs the output? Or is an Emergency an official declaration by the President of an Emergency? What if the provider of the technology could perform the repair? For most materials, components, electronic or communications technologies the only firms that could successfully use their technical data developed at private expense for Repair and Overhaul, other than the developing firm, will be a direct competitor!

"A foreign government that is in the interest of the Government"

"except that the Government may reproduce, release or disclose such data or authorize the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is --

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes;"

The regulations appear to allow anyone in the Government to release proprietary technical data developed exclusively at private expense to a foreign government. Why should the foreign government be allowed to evaluate a developing commercial technology if the developing firm plans

to market and possibly manufacture the resultant products worldwide? What about those countries where a competing foreign firm is a quasi-governmental organization?

### **Proprietary data issues to be addressed**

To enable the DoD to gain substantial access in the Trillions of Dollars that commercial firms have invested in technology, DoD needs to:

1. Enable wider use, with commercial laboratories, of Other Transactions Agreements that are unencumbered by excess oversight and audits.
2. Effectuate a Non Disclosure Agreement with teeth that will be signed by government employees, which includes enforceable penalties.
3. Create a separate section in the FAR/DFAR for interactions with Commercial Laboratories to address; defining or allowing definition of “the government,” ”government purpose,” and ‘government use’ plus, dealing with march-in rights, trade secrets and other Intellectual Property and proprietary issues.
4. Establish and thoroughly train a cadre of innovative contracting officers who have, as an addendum to their warrant, the authority to waive Bayh-Dole in appropriate situations.
5. Enable R&D contracts or agreements with an enforceable liquidated damages clause, which is how many industrial firms develop products for potential Original Equipment Manufacturers.
6. Most importantly, because the current, non participating commercial laboratories will normally not be prime contractors, the above changes must be structured for the potential commercial business unit or laboratory that is a subcontractor at either the R&D or production phase!

Please contact Alan Ayers at 860-633-6772 or [adayar@idcc.org](mailto:adayar@idcc.org) with any questions or comments regarding this paper, which is an update on a paper prepared several years ago by Robert C. Spreng, Past President, IDCC, formerly 3M Co., Stanley D. Fry, Past Chairman IDCC, formerly Eastman Kodak Co. and Wayne Prochniak, Honeywell International, Inc.