



INTELLECTUAL PROPERTY
FALSE CLAIMS ACT
DCAA AUDITS
GOVERNMENT CONTRACTS ANNUAL UPDATE

FOLEY
FOLEY & LARDNER LLP

©2016 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60654 • 312.832.4500



GOVERNMENT CONTRACTS ANNUAL UPDATE
INTELLECTUAL PROPERTY
FALSE CLAIMS ACT
DCAA AUDITS

Defense Contract Audit Agency (DCAA) Audits

Erin L. Toomey

©2016 Foley & Lardner LLP

About DCAA



- Provides audit and financial advisory services to DoD and other federal agencies
 - Audits for civilian agencies traditionally represent 9-11% of DCAA's budget (\$50-64M in funding)
- Operates under the authority, direction and control of the Under Secretary of Defense
- Audits must be conducted in accordance with the DCAA Contract Audit Manual (CAM) (available online at dcaa.mil/cam.html)
 - DCAA also issues audit guidance that is not incorporated in the CAM, but is also available on DCAA's website

©2016 Foley & Lardner LLP

3

About DCAA



- DCAA is an audit and advising agency – DCAA only makes recommendations
- Contracting Officer (CO) / Administrative Contracting Officer (ACO) is ultimately the decision maker
- For Example...
 - DCAA may recommend the assessment of penalties when expressly unallowable costs are included in an incurred cost submission (ICS)
 - The CO/ACO is responsible for determining whether to assess or waive the penalty

©2016 Foley & Lardner LLP

4

Types of DCAA Audits



■ Pre-award Accounting System Survey

- Before contract award to determine if the contractor's accounting system is acceptable for accumulating costs under a government contract
- May be performed post-award if:
 - A pre-award audit was not performed, or
 - Deficiencies discovered pre-award and the corrective actions need to be reviewed

■ Proposal Audit

- Most likely when a fixed-price contract is anticipated
- Certified cost or pricing data

©2016 Foley & Lardner LLP

5

Types of DCAA Audits



■ Audits of Certified Cost or Pricing Data Post-Award

- Timesheet Check
- Contract Financing (e.g., Progress Payments)
- Provisional Billing Rates
- Incurred Cost Submissions

©2016 Foley & Lardner LLP

6

Types of DCAA Audits



- **Cost Accounting Standards Compliance**
 - Disclosure Statement adequately describes actual or proposed accounting practices
 - Review of cost impact proposals
- **Business Systems (CAS Covered)**
 - Accounting (DFARS 252.242-7006)
 - Earned Value Management (DFARS 252.234-7002)
 - Estimating (DFARS 252.215-7002)
 - Purchasing (DFARS 252.244-7001)
 - Material Management & Accounting System (DFARS 252.242-7004)
 - Property (DFARS 252.245-7003)

©2016 Foley & Lardner LLP

7

Audit Process



- CO/ACO requests that DCAA perform an audit
- DCAA sends the contractor a letter notifying the contractor of the audit
- Contractor and DCAA have exchanges regarding documentation requested and timing of on-site review
- DCAA conducts on-site review
- DCAA often submits follow-up requests for documentation or clarification after on-site visit
- DCAA conducts an exit conference to discuss audit findings
- DCAA issues a draft audit report to the contractor
- Contractor provided an opportunity to comment on the draft report
- DCAA issues a final report

©2016 Foley & Lardner LLP

8

DCAA Access to Contractor Records



- Heads of all executive agencies (or authorized representatives) have broad authority to inspect plants and audit records of contractors performing cost-type contracts
- Agencies authorized to examine “all records” relating to a contractor’s proposal and the contract when certified cost or pricing data are required (See FAR 52.215-2, Audit and Records – Negotiation)
- DCAA may subpoena any records DoD would be authorized to audit or examine under its statutory audit authority

©2016 Foley & Lardner LLP

9

DCAA Access to Contractor Records



- CAM 1-504.4(d), Denial of Access
 - If access to records is denied, DCAA may determine it cannot evaluate certain costs and will question all such costs
 - May result in significant disallowances
- But what about...
 - Internal audit reports?
 - Internal investigations?
 - Compliance reviews?
- *Newport News* cases in 1988 held
 - Documents containing internal auditor *subjective* evaluations *are not* within DCAA’s subpoena power
 - Documents containing *objective* factual records relating to the accuracy of costs charged to the government *are* within DCAA’s subpoena power

©2016 Foley & Lardner LLP

10

DCAA Access to Contractor Records



- **Section 832 of the 2013 NDAA**
 - When DCAA seeks access to internal audit reports, DCAA must maintain certain documentation including
 - A written determination that access to such reports is necessary to complete required evaluations of contractor business systems
 - A copy of any request from DCAA to the contractor for access to such reports
 - A record of the response received from the contractor, including the contractor's rationale if access was not granted
- **DCAA Guidance (4/23/13)**
 - Allows access to internal audit reports for the purpose of assessing contractor business systems and the effectiveness of the contractor's internal controls
 - Requires DCAA to demonstrate a nexus between the requested report and the risk assessment procedures in the current audit

11

©2016 Foley & Lardner LLP

16/11/16

DCAA Access to Employees



- **There is no statutory, regulatory or contractual authority for DCAA to conduct interviews of contractor employees**
- **In July 2013, DCAA issued guidance**
 - Encourages auditors to interview contractor employees about allegations of fraud
 - Auditors are encouraged to be proactive in identifying and referring fraud to the appropriate investigative organization

12

©2016 Foley & Lardner LLP

16/11/16

Best Practices During Contract Performance



- Retain all records relating to auditable contracts
 - FAR Subpart 4.7, Contractor Records Retention
- Ensure CO decisions on the allowability of certain costs are clearly documented in writing (even via email) and kept in the contract file

13

©2016 Foley & Lardner LLP

16-11184

Best Practices During Audits



- Appoint one contractor employee to be a single point of contact for all communications with the auditor
 - Provide training to the appointed representative
- Be fully responsive to audit requests
 - Failure to provide requested documents could result in DCAA issuing a subpoena
- **BUT** try to negotiate reasonable limitations on the documentation to be made available to the auditor
 - Do not give the auditor unfettered access to your file room, your computer systems or your employees
 - Carefully consider the production of privileged documents (e.g., internal investigation or internal audit reports)
- Keep copies and records of all documents provided to the auditor
- Ask DCAA for written requests for documents / information

14

©2016 Foley & Lardner LLP

16-11184

Best Practices During Audits



- If DCAA seeks to interview contractor employees, establish clear boundaries with the auditor regarding the scope of the interview
 - These interviews will not be privileged
 - Have the audit liaison sit in on the interview and take copious notes

Best Practices Post-Audit



- Respond to errors or misrepresentations in draft audit reports
- Promptly implement any necessary corrective actions, including the removal of expressly unallowable costs from government invoices / indirect rate calculations

FY 2016 National Defense Authorization Act



■ Section 893, Improved Auditing of Contracts

- Effective 11/25/15, DCAA “may not provide audit support for non-Defense agencies unless the Secretary of Defense certifies that the backlog for incurred cost audits is less than 18 months of incurred cost inventory”
 - DCAA does not consider an incurred cost audit backlogged until a proposal as been awaiting review for 2 years (2012 GAO Report)
- The amount appropriated and otherwise available to DCAA for FY 2016 “shall be reduced by an amount equivalent to any reimbursements received by the Agency from non-Defense agencies for audit support provided”
- Resulted in increased audit activity on DoD contracts and decreased activity (including suspended audits) for civilian agency contracts

©2016 Foley & Lardner LLP

17

FY 2016 National Defense Authorization Act



■ Section 893, Improved Auditing of Contracts

- Requires DCAA to report on the percentage of DCAA “questioned costs” sustained or recovered by the government
- Includes efforts to avoid duplicative audits and streamline oversight reviews

©2016 Foley & Lardner LLP

18

Quick Closeout Procedures



■ FAR 42.708

- CO shall negotiate the settlement of direct and indirect costs for a specific contract, task or delivery order to be closed in advance of the determination of final indirect rates if:
 - The contract or order is physically complete
 - The amount of unsettled direct and indirect costs is relatively insignificant
 - Does not exceed the lesser of \$1M or 10% of the contract/order amount
 - CO performs a risk assessment and determines that the use of quick closeout procedures is appropriate
 - Agreement can be reached on a reasonable estimate of allocable dollars

19

©2016 Foley & Lardner LLP

10/11/16

Quick Closeout Procedures



■ DCMA Class Deviation issued 9/10/15

- Directed ACOs to continue to exercise the flexibilities previously authorized to close out
 - Specific contracts, task or delivery orders before the determination of final direct costs or indirect rates
 - Regardless of dollar value or percentage of unsettled direct or indirect costs allocated to any one contract, task or delivery order
 - If all other conditions for quick closeout are met
- Extension in effect until 9/30/17 (or until otherwise rescinded)

20

©2016 Foley & Lardner LLP

10/11/16

Statute of Limitations



- For contracts awarded after 10/1/95, the Contract Disputes Act requires submission of a contract claim “within 6 years after the accrual of the claim.” 41 USC § 7103(a)(4)(A)
- DCAA’s audit backlog has created statute of limitations concerns for the government and potential defenses for contractors
- Several recent statute of limitations cases relating to the government’s request for reimbursement of costs identified during late-performed audits

21

©2016 Foley & Lardner LLP

Recent Statute of Limitations Cases



- *Raytheon Co. Space & Airborne Sys.*, ASBCA 57801 (April 22, 2013)
 - Government claim accrues when the government knows or has reason to know that some injury occurred, even if the amount is not finalized or a more complete analysis will follow
 - Appeal involved several separate government claims including:
 - CAS change in cost accounting practice, for property accounting and management submitted in 2004, with an impact submitted in 2006, government claim brought in 2011 was *timely*
 - Transfer of enterprise resource planning, notice given in 2004 with known adverse cost impact to begin January 1, 2005, government claim in July 2011 was *untimely*
 - Change in fringe rate and labor rate with notice in November 2004 effective January 24, 2005, government final decision on August 22, 2011 was *untimely*
 - **Holding:** Rejected the government’s argument that the statute of limitations does not start until the audit is complete

22

©2016 Foley & Lardner LLP

Recent Statute of Limitations Cases



- *Raytheon Missile Systems, ASBCA No. 58011 (1/28/13)*
 - CAS disclosure statement notice given in late 1998 that effective January 1999 “major subcontracts” would receive a lower burden rate
 - In September 2006, DCAA audit report challenges Raytheon’s application of the reduced burden rate on a 1999 contract
 - CO issued a claim in 2011
 - **Holding:** Rejected the government’s argument that the claim did not accrue until either the government “understood” the impact or the information was transmitted to an individual with supervisory authority

©2016 Foley & Lardner LLP

23

Recent Statute of Limitations Cases



- *Alion Science & Tech. Corp., ASBCA No. 58992 (11/10/15)*
 - Alion appealed an ACO’s final decision asserting a \$338,921 claim seeking penalties for allegedly including expressly unallowable costs in an ICS proposal for FY 2005
 - Alion submitted its ICS on 3/31/06, but it was missing schedules identified by DCAA
 - Alion provided the missing schedules on 9/7/07, but DCAA still considered the submission inadequate
 - Alion provided additional information between 1/27/08 and 2/20/08
 - DCAA issued its audit report on 4/9/12
 - ACO issued its final decision on 8/21/13
 - Alion moved for summary judgment on the grounds that the government’s claim was time barred
 - **HOLDING:** Issue of material fact whether the 3/31/16 ICS proposal included the allegedly expressly unallowable costs at issue in the appeal

©2016 Foley & Lardner LLP

24

Recent Statute of Limitations Cases



- ***Sikorsky Aircraft Corp. v. U.S.*, 773 F.3d 1315 (Fed. Cir. 2014)**
 - Traditionally the expiration of the CDA statute of limitations served as a jurisdictional bar to filing the case before a Board of Contract Appeals or the Court of Federal Claims
 - **HOLDING:** The CDA statute of limitations is not jurisdictional, but instead an affirmative defense that must be determined on the merits

©2016 Foley & Lardner LLP

25

Summary



- DCAA's audit backlog, combined with the CDA's statute of limitations, has created some interesting issues for contractors...
 - Contractors must be aware of the statute of limitations both when defending against government claims, as well as when asserting contractor claims
 - Contractors can use the statute of limitations argument when negotiating final ICS adjustments with the CO / ACO
- Will the restriction on DCAA's audit of civilian agencies be lifted in FY 2017?

©2016 Foley & Lardner LLP

26



INTELLECTUAL PROPERTY
FALSE CLAIMS ACT
DCAA AUDITS

Questions and Answers

©2016 Foley & Lardner LLP

27



GOVERNMENT CONTRACTS ANNUAL UPDATE

INTELLECTUAL PROPERTY
FALSE CLAIMS ACT
DCAA AUDITS

Recent Developments Under the False Claims Act

Jennifer Z. Belveal

©2016 Foley & Lardner LLP

28

Recent Developments Under the FCA – Agenda



- FCA Statistics: Increased Risk to Contractors
- A Quick Refresher on the FCA
- Case Law Update: The Impact of *Escobar*
- Legislative Activity
- Top Tip to Reduce FCA Risk

29

©2016 Foley & Lardner LLP

16-11884

FCA Statistics



The FCA is a billion dollar business:



- DoJ has obtained **more than \$26 billion** in FCA settlements and judgments since January 2009
- 2015 was the fourth consecutive year in which DoJ recouped **more than \$3.5 billion** in false claims violations
- In the first half of 2016, federal and state governments have amassed **more than \$1.86 billion** in FCA recoveries

30

©2016 Foley & Lardner LLP

16-11884

FCA Statistics



The number of FCA claims are increasing:

- For the sixth consecutive year, **over 700** new FCA matters were docketed in 2015, with **more than 600** filed under the FCA's whistleblower, or *qui tam*, provisions
- FCA matters involving government contracts are one of the most active areas of enforcement in the last year

FCA Settlements



Recent Representative FCA Settlements:

- Jan. 2016: \$9M FCA settlement against a design and construction firm that allegedly concealed it had already engaged joint-venture partners for a USAID project
- Feb. 2016: \$7.4M FCA settlement against a subcontractor of services at a military base for allegedly double-billing certain salaries as both direct and indirect costs

FCA Settlements



- Feb. 2016: \$4M FCA settlement against a government contractor for allegedly violating environmental laws and then making claims for Department of Energy funds that indicated compliance with those laws
- March 2016: \$5M FCA settlement against government contractor that allegedly misrepresented itself as a veteran-owned business
- March 2016: \$8M FCA settlement against Army contractor for misrepresenting the source of raw materials

33

©2016 Foley & Lardner LLP

16-11984

A Refresher on the FCA



The “False Claims Act” may refer to 3 different statutory schemes:

1. The Civil False Claims Act*
2. The Criminal False Claims Act
3. State “Mini” False Claims Act*



*Includes *qui tam*/whistleblower cause of action

34

©2016 Foley & Lardner LLP

16-11984

A Refresher on the FCA



Risk of FCA liability if:

1. Submit a money-related “claim” to the government;
2. The submission is false; and
3. Do so “knowingly”

©2016 Foley & Lardner LLP

35

A Refresher on the FCA



1. Factually false claims
 - False claim (31 U.S.C. § 3729(a)(1)(A))
 - False record (31 U.S.C. § 3729(a)(1)(B))
2. Legally false claims
 - Express certification
 - Implied certification
3. Reverse false claims (31 U.S.C. § 3729(a)(1)(G))

©2016 Foley & Lardner LLP

36

A Refresher on the FCA



Factually false claims:

- A known inaccuracy in an affirmative statement or supporting documentation
- Examples:
 - Misrepresenting the work done or the amount due
 - Submitting false bid documents
 - Misrepresenting the role of a disadvantaged business in a project

©2016 Foley & Lardner LLP

37

A Refresher on the FCA



Reverse false claims:

- The failure to pay money to the government based on a known inaccuracy
- Example:
 - Falsely accounting for government property in a contractor's possession to avoid having to compensate the government



©2016 Foley & Lardner LLP

38

A Refresher on the FCA



Express false certification:

- A knowingly false statement of compliance with payment requirements
- Examples:
 - Misrepresenting that all subcontractors have been paid
 - Misrepresenting that the work meets contract requirements

A Refresher on the FCA



Implied false certification:

- Failure to disclose material violation(s) of statutory, regulatory, or contractual requirements for payment
- Examples:
 - Failure to pay applicable wages
 - Seeking reimbursement for work that doesn't meet qualifications
- Before *Escobar*, the validity and scope of "implied certification" was unclear

The Implied Certification Theory in *Escobar*



- Patient suffered a fatal seizure after receiving mental health counseling at a clinic
- Patient's parents sued under FCA's *qui tam* provisions, alleging:
 - Staff members were not properly licensed or supervised, as required by government regulations; and
 - By billing government for counseling services, the clinic impliedly certified the services were performed in compliance with state regulations when they were not

©2016 Foley & Lardner LLP

41

The Upshot of *Escobar*



The Supreme Court unanimously recognized the validity of implied false certification as a basis for FCA liability *but* simultaneously clarified the FCA's "rigorous" and "demanding" materiality standard for pleading and proving a statutory violation

©2016 Foley & Lardner LLP

42

Supreme Court Holding in *Escobar*



Implied certification theory applies if two conditions are satisfied:

1. “the claim does not merely request payment, but also makes **specific representations** about the goods or services provided;” and
2. “the defendant’s failure to disclose noncompliance with **material** statutory, regulatory, or contractual requirements makes those representations misleading half-truths.” *Escobar* at 2001

Supreme Court Holding in *Escobar*



Defendants CAN be liable for violating government requirements even if they were NOT expressly designated as conditions of payment. *Escobar* at 1996.

Supreme Court Holding in *Escobar*



“Clarified” the Materiality Requirement:

1. “[A] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government’s payment decision in order to be actionable under the False Claims Act.” *Escobar* at 2002.
2. The materiality standard is “rigorous,” “demanding,” and subject to “strict enforcement.” *Id.* at 1989, 2002, 2003, 2004 n.6.

©2016 Foley & Lardner LLP

45

Supreme Court Holding in *Escobar*



What is material?

- No bright-line rule; rather, “[u]nder any understanding of the concept, materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” *Escobar* at 2002.
 - For example, if “the defendant knows that the government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement.” *Id.* at 2003.

©2016 Foley & Lardner LLP

46

Supreme Court Holding in *Escobar*



Are all payment requirements material?

“[S]tatutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment.” *Escobar* at 2001.

Application of *Escobar*



Examples of implied certification in government contracts:

- Knowingly supplying materials of lesser quality than specified
- Billing for work performed by a non-engineer when the contract requires work to be done by a licensed professional engineer

Application of *Escobar*

If there is a material statutory or regulatory non-compliance issue in connection with a government contract, there is now a risk of an FCA claim



©2016 Foley & Lardner LLP

49

Legislative Activity

Treble damages and CMPs:

Effective August 1, 2016, the FCA's minimum and maximum CMPs nearly doubled—from a statutory minimum of \$5,500 and a maximum of \$11,000 to a minimum of \$10,781 and a maximum of **\$21,563 per claim**. See 81 Fed. Reg. 42491, 42501 (June 30, 2016)

©2016 Foley & Lardner LLP

50

Top Tip to Reduce FCA Risk



Tune up your compliance program to include:

- Clear tone-at-the-top
- Concise written policies and procedures
 - Full compliance with all applicable rules, regulations, and requirements
 - Mechanism for reporting violations
 - Thorough investigation of potential violations
- Quality training
- Effective auditing and monitoring

Questions and Answers



GOVERNMENT CONTRACTS ANNUAL UPDATE

INTELLECTUAL PROPERTY
FALSE CLAIMS ACT
DCAA AUDITS

Intellectual Property Protection: Technical Data and Computer Software

Erin L. Toomey

53

©2016 Foley & Lardner LLP

Overview

INTELLECTUAL PROPERTY
FALSE CLAIMS ACT
DCAA AUDITS

- FAR/DFARS breaks IP into three general categories
 - Patents
 - Technical Data
 - Computer Software

54

©2016 Foley & Lardner LLP

Patents

- Governed by the Bayh-Dole Act
- FAR 52.227-11, Patent Rights – Ownership by the Contractor
 - Subject Invention: Any invention of a contractor ***first conceived or first actually reduced to practice*** in the performance of work under the government prime contract or subcontract
- Contractor receives title in the subject invention provided it satisfies the notice requirements
- Government receives a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world
- Strict notice and reporting requirements

©2016 Foley & Lardner LLP

55

Technical Data – Non-Commercial Items

- “Technical Data”: Recorded information of a scientific or technical nature regardless of the form or method of recording
 - Includes computer software documentation
 - Does not include computer software or data incidental to contract administration (financial and/or management information)
- General rule is “follow the funds”
- Doctrine of segregability – identify when technical data was developed at the lowest practicable, segregable level
- Government gets **limited rights** when the item was funded exclusively at private expense and data is delivered under the contract
- Government gets **unlimited rights** in technical data developed in whole or in part with government funds and delivered under the contract

©2016 Foley & Lardner LLP

56

Technical Data – Non-Commercial Items



- Under the FAR, government gets **unlimited rights** in
 - Manuals or instructional and training material for installation, operation, or routine maintenance and repair of items delivered under the contract
 - Form, Fit and Function Data
 - Data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability
 - Data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements
 - Computer software identifying source, functional characteristics and performance requirements *but excludes* the source code, algorithms, processes, formulas and flow charts of the software
 - All other delivered data if not marked as limited rights data or restricted rights computer software

57

©2016 Foley & Lardner LLP

16-11884

Technical Data – Non-Commercial Items



- DoD Only: Government gets **government purpose rights** in technical data developed with **mixed funding** and delivered under the contract
 - Provides the government with the ability to use the technical data for government purposes only for a specified period of time (typically 5 years, but negotiable) and after that period, the government receives an unlimited rights license in the technical data
 - Provides the contractor with an opportunity to use the technical data commercially before any other company can do so
- Technical Data FAR/DFARS Clauses
 - FAR 52.227-14, “Rights in Data – General”
 - DFARS 252.227-7013, “Rights in Technical Data – Noncommercial Items”

58

©2016 Foley & Lardner LLP

16-11884

Technical Data – Commercial Items



- No FAR clause – Contractor to propose its standard commercial license
- DFARS 252.227-7015, “Technical Data – Commercial Items”
 - The government receives **unrestricted rights** for itself and others in:
 - Form, fit and function data
 - Correction or change to technical data furnished by the government
 - Necessary for operation, maintenance, installation, or training (other than detailed manufacturing process data)
 - Provided to the government without restrictions or under a prior contract with such a license
 - For all other technical data delivered under the contract, the government may use, modify, reproduce, release, perform, display, or disclose technical data within the government only
 - The government cannot:
 - Use the technical data to manufacture additional quantities of commercial items
 - Release, perform, display, disclose, or authorize use of the technical data outside the government without Contractor’s written permission

59

©2016 Foley & Lardner LLP

16-11984

Computer Software – Non-Commercial Items



- “Computer Software”: Computer programs, source code, object code, design details, etc. that would enable the software to be reproduced, recreated or recompiled
 - Does not include computer databases or computer software documentation
- General rule is “follow the funds”
- Identify when software was developed at the lowest practicable, segregable level
- Government gets **restricted rights** when the item was funded exclusively at private expense and software is delivered under the contract
- Government gets **unlimited rights** in computer software developed in whole or in part with government funds and delivered under the contract
- **DoD Only:** Government gets **government purpose rights** in computer software developed with **mixed funding** and delivered under the contract

60

©2016 Foley & Lardner LLP

16-11984

Computer Software – Non-Commercial Items



■ FAR/DFARS Clauses

- FAR 52.227-14, “Rights in Data – General”
- DFARS 252.227-7014, “Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation”

©2016 Foley & Lardner LLP

61

Commercial Computer Software



■ FAR

- Defined in FAR 2.101: Any computer software that is a commercial item
- Government receives license customarily provided to the public to the extent such licenses are consistent with federal law and satisfy the government’s needs (FAR 12.212)
- FAR 52.227-19, “Commercial Computer Software License”
 - Used when there is a question regarding whether the license is consistent with federal law and/or satisfies the government’s needs
- FAR 52.232-39, “Unenforceability of Unauthorized Obligations”
 - Clauses in license agreements that require the government to indemnify the contractor in violation of the Anti-Deficiency Act are unenforceable

©2016 Foley & Lardner LLP

62

Commercial Computer Software



■ DFARS

- Defined in DFARS 252.227-7014: Software developed or regularly used for nongovernmental purposes which:
 - Has been sold, leased or licensed to the public;
 - Has been offered for sale, lease, or license to the public;
 - Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the contract; or
 - Satisfies one of the above criterion and would require only minor modification to meet the requirements of the contract
- Software developed at government expense but then regularly used for nongovernmental purposes and sold or offered for sale to the general public qualifies as Commercial Computer Software
- If software meets the definition, no DoD clause applies and the government acquires the software under the contractor's "standard commercial license" (DFARS 227.7202)

63

©2016 Foley & Lardner LLP

16-1194

Data Rights Assertion Table



Contractor asserts for itself, or the persons identified below, that the government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished with Restrictions	Basis for Assertion	Asserted Rights Category	Name of Person Asserting Restrictions
For technical data pertaining to items, components, or processes developed at private expense, identify both the deliverable and each such item, component, or process	Development exclusively at private expense / Commercial OR Development partially at private expense	Government Purpose Rights under this or a prior contract SBIR data under a prior contract Limited Rights Restricted Rights Specially Negotiated Licenses Commercial Item*	Corporation or individual **Include assertions of actual or potential subcontractors/suppliers

©2016 Foley & Lardner LLP

16-1194

Data Rights Assertion Table



■ Handling Commercial Items

- *While commercial rights items and software are not required to be listed by DFARS 252.227-7013, contractor has identified those data, both technical data and software, that relate to commercial items and software to avoid any misunderstanding regarding license rights to be granted to the government. “Commercial Rights” are those license rights defined at DFARS 227.7102-2 and DFARS 227.7202-3.

■ Insert comparable FAR clauses if under the FAR

65

©2016 Foley & Lardner LLP

Marking Requirements



- Data or software delivered without specified marking is considered to be delivered with unlimited rights
- If something other than unlimited rights is desired, documents, software, etc. must be marked with the appropriate legend
- Government has the right to challenge the legend, and it is then up to the contractor to justify the restriction
- For technical data pertaining to commercial items and commercial computer software, there is no standard legend

66

©2016 Foley & Lardner LLP

Deferred Ordering/Delivery



■ Beware of Deferred Ordering and Delivery Clauses

- FAR 52.227-16, "Additional Data Requirements"
 - Government can order any data first produced or specifically used in the performance of the contract for up to 3 years after acceptance of all items to be delivered under the contract
 - Contractor compensated for converting the data into the prescribed form, for reproduction, and for delivery
- DFARS 252.227-7026, "Deferred Delivery"
 - Government can require, at any time during performance of the contract, within 2 years after acceptance of all items or termination of contract (whichever is later), delivery of technical data or computer software identified as "deferred delivery" data or software
- DFARS 252.227-7027, "Deferred Ordering"
 - Government can, at any time during performance of contract or 3 years after acceptance of all items or termination of contract, order any technical data or computer software generated in the performance of the contract or a subcontract
 - Contractor only compensated for converting the data or computer software into the prescribed form, reproduction, and delivery

©2016 Foley & Lardner LLP

67

Summary



■ Benefits of Commercial Item Contracts

- Presumption technical data and computer software were developed exclusively at private expense
 - Does not apply to DoD acquisitions of major systems (now major *weapons* systems) or subsystems or components
 - Still applies to DoD acquisitions of major systems or subsystems or components that are COTS (and additional recent exceptions)
- Relaxed marking requirements
- Ability to negotiate standard commercial licenses

©2016 Foley & Lardner LLP

68

Summary



■ Prime Contractor's Perspective

- Contractor must flowdown applicable clauses to subcontractors and suppliers
- Contractor should request data rights assertion tables from subcontractors delivering technical data or computer software

■ Subcontractor's Perspective

- Subcontractor rights flow directly to the government
- If data is delivered with less than unlimited rights, it can be delivered directly to the government
- A prime contractor or higher-tiered contractor may not "use their power to award subcontracts as economic leverage to obtain rights in technical data" from a subcontractor

©2016 Foley & Lardner LLP

69

Recent Developments



■ DoD's Better Buying Power 3.0 (4/9/15):

- Theme: *Achieving Dominant Capabilities Through Technical Excellence and Innovation*
 - Our technological superiority is at risk
 - Based on effectiveness of research and development efforts
 - Innovation comes from government labs, non-profit research institutions, defense contractors, and increasingly, the commercial sector and overseas
- Focuses on, *inter alia*, commercial technology
 - "Remove barriers to commercial technology utilization"
 - "DoD can do a much more effective job of accessing and employing commercial technologies"

©2016 Foley & Lardner LLP

70

Recent Developments



- DoD's Better Buying Power 3.0 (cont...)
 - If DoD wants to gain access to innovative, cutting edge technologies, then DoD must:
 - Eliminate barriers to using commercial technology and products
 - Assess the need for both policy and regulatory changes (including intellectual property, liability implications and other commercial industry concerns)
 - Train the workforce on how to access commercial technology and products with existing authorities
 - These are achieved by eliminating, to the maximum extent practicable, government-unique requirements that are inconsistent with the commercial practices of those companies
- Better Buying Power 4.0 – Anticipated focus on sustainment

©2016 Foley & Lardner LLP

71

Better Buying Power



- What we are seeing in the industry...
 - DoD is issuing solicitations that provide evaluation preferences for offerors that provide the government with greater license rights in technical data developed at private expense
 - DoD is issuing solicitations with priced options for greater rights in technical data and computer software
 - DoD is actively challenging data rights assertions on older contracts

©2016 Foley & Lardner LLP

72

Final DFARS Rule



■ Prior Rule

- Presumption a commercial item was developed entirely at private expense
- Major Systems Rule reverses that presumption and requires contractors to show, when challenged, that an item was developed exclusively at private expense, except for COTS items

©2016 Foley & Lardner LLP

73

Final DFARS Rule



■ Final Rule (81 Fed. Reg. 65565, September 23, 2016)

- Implements § 813(a) of the National Defense Authorization Act for FY 2016
- Major Systems Rule limited to major weapon systems
- COTS exemption expanded to include
 - A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item
 - A component of a subsystem, if the subsystem was acquired as a commercial item
 - Any other component if it is a:
 - COTS item; or
 - COTS item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet federal government requirements
- **Note:** “Major Weapon System” is not defined

©2016 Foley & Lardner LLP

74

Proposed DFARS Rules



■ Revise DFARS 231.205-18, Independent Research and Development and Bid and Proposal Costs

- For annual IR&D costs to be allowable
 - New IR&D efforts must be communicated to appropriate DoD personnel prior to the initiation of these investments via an online tool
 - Results from these investments must be shared with appropriate DoD personnel, at least annually and when the project is completed
 - Copies of inputs and updates must be made available for review by the ACO and DCAA to support the allowability of costs
 - “Major contractors” must also:
 - Engage in a technical interchange with a technical or operational DoD government employee before IR&D costs are generated
 - Use the online input form to document the technical interchange
- Stated purpose to:
 - Ensure that both IR&D performers and potential DoD customers have “sufficient awareness of each other’s efforts”
 - “Provide industry with some feedback on the relevance of proposed and completed IR&D work”

©2016 Foley & Lardner LLP

75

Proposed DFARS Rules



■ Rights in Technical Data and Validation of Proprietary Data Restrictions (81 Fed. Reg. 39482, June 16, 2016)

- Implements § 815 of the NDAA for FY 2012
- Permits DoD to share outside of DoD any technical data relating to an item or process developed exclusively at private expense when “*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*”
- Revised the definition of form, fit and function data to include computer software, but expressly excluded source code and detailed manufacturing or process data

©2016 Foley & Lardner LLP

76

Proposed DFARS Rules



- “Segregation or reintegration data” means technical data or computer software that is more detailed than form, fit or function data and that is necessary for the segregation of an item or process, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes
 - Unless agreed otherwise by the government and the contractor, 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
 - The segregation or reintegration of any such item or process may be performed at any practical level, including down to the *lowest practicable segregable level*

©2016 Foley & Lardner LLP

77

Proposed DFARS Rules



- Describes in more detail (than form, fit and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes
- May include, but would not typically require, *detailed manufacturing or process data or computer software source code* to support such segregation or reintegration activities
- In sum, segregation / reintegration data is limited rights data / restricted rights computer software that is more detailed than form, fit and function data
- **Takeaway:** Contractors should proactively identify and define segregation / reintegration data

©2016 Foley & Lardner LLP

78

Proposed DFARS Rules



- Segregation / reintegration data can be marked with limited rights / restricted rights legend
- If given to a competing contractor, can only be used for purpose of segregation / reintegration
 - Owner of data must be notified of release
 - Recipient must later destroy the data
- Does not specify the protections provided to the data owner if the data is used to develop a competing item, component, process or computer software

©2016 Foley & Lardner LLP

79

Proposed DFARS Rules



- DoD Deferred Ordering
 - DoD would have the right after contract award to order technical data when the data is:
 - Generated *or utilized* in contract performance
 - “Technical data pertaining to an item or process that is developed, delivered, or incorporated into the design of a system”
 - “used to provide services”
 - “other than commercially available off-the-shelf software, necessary to access, use, reproduce, modify, perform, display, release, or disclose” any technical data or software otherwise generated or utilized under the contract
 - Needed for an important sustainment or other life-cycle support activity

©2016 Foley & Lardner LLP

80

Proposed DFARS Rules



- DoD Deferred Ordering

- For a major system, a weapons system, a noncommercial item, or any portion of a commercial item developed at government expense or with mixed funding
- Was generated exclusively with government or mixed funds or is segregation or reintegration data
- Compensated only for reasonable costs incurred for converting and delivering the data in the required form
- No time limit (change from current 3 year limit)
- Reduces the government's incentive to identify deliverables at the time of contract award
- Subcontract flowdown requirement
- **Takeaway:** In proposals, contractors would need to factor in the cost of the value of the technical data and computer software that they may be required to deliver to the government

©2016 Foley & Lardner LLP

81

Proposed DFARS Rules



- DoD Data Rights Challenges

- Extends term from 3 to 6 years
- Fraudulently asserted restrictions have no time limit
- Does not apply to contracts solely for commercial items unless the acquisition is for a major system or weapon system

©2016 Foley & Lardner LLP

82

Summary

- DoD, in particular, has an increased focus on technical data / computer software rights
- Contractors must be diligent in
 - Submitting data rights assertions tables and marking delivered technical data and computer software
 - Maintaining adequate records to demonstrate development was at private expense
- Clearly communicating with the government regarding the government's rights is key to avoiding False Claims Act liability

©2016 Foley & Lardner LLP

83

Questions and Answers

©2016 Foley & Lardner LLP

84