The Importance of Data and Data Rights

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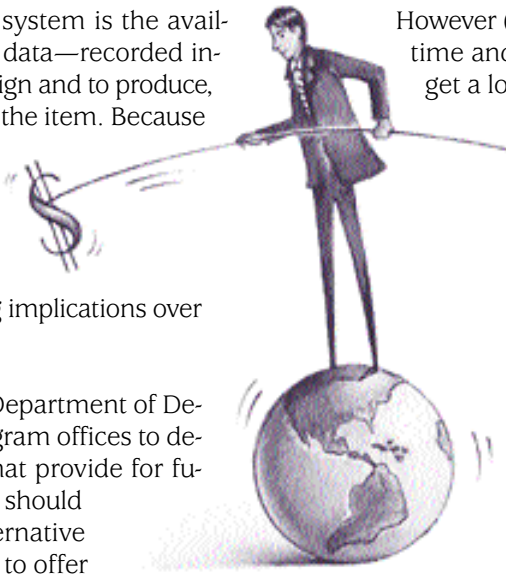
In July 2006, the United States Government Accountability Office (GAO) released a report to Congress: "DoD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems" (GAO-06-839). The report stated: "A critical element in the life cycle of a weapon system is the availability of the item's technical data—recorded information used to define a design and to produce, support, maintain, or operate the item. Because a weapon system may remain in the defense inventory for decades following initial acquisition, technical data decisions made during acquisition can have far-reaching implications over its life cycle."



GAO recommended that the Department of Defense "consider requiring program offices to develop acquisition strategies that provide for future delivery of technical data should the need arise to select an alternative source for logistics support or to offer the work out for competition."

"Program managers should consider the cost and benefits of acquiring data rights—or consequences of not obtaining them."

Today more than ever, the Department relies on its prime contractors for logistics support. Many years ago, such dependence was often limited to training systems and those weapons systems that stayed away from wartime scenarios. These days, however, there have been significant changes in acquisition strategy, and even weapon systems going into battle could have either all or partial contractor logistics support under the newer term performance-based logistics.

An Object Lesson

In the early 1980s (in pre-PBL days), I worked on what was then termed Contractor Logistics Support. Before we released the Request for Proposal for one weapons system, we were required to do an analysis to determine the lessons learned from past CLS procurements so as to incorporate that intelligence into the RFP to strengthen it.

The lesson that has stayed with me throughout my career pertained to procurement of the wrong technical data and lack of data rights. With the intent of staying with the prime contractor for life, the government bought aircraft and maintenance, as well as spare and repair parts. However (as so often), the prime's price went up over time and the government wanted to compete and get a lower price for the maintenance and supply support. With the limited data rights they maintained, they advertised and awarded a follow-on contract to a different company.

Based upon the technical data the maintenance company received from the government, it bought spare and repair parts, only to discover that they were incorrect. The purchase was based upon the government's furnished information, apparently for an earlier version of the end item. The government was forced to immediately hire back the prime contractor and absorb all the costs associated with ending the other company's contract, including the disposal of worthless spare and repair parts that could not be used in support of the end item. The lesson the government learned from that fiasco was to buy the technical data and associated data rights so that competition could be encouraged. That had a direct effect on how we designed our future acquisitions.

Data Rights: Cost and Benefits

More than two decades later, the GAO has found that DoD is still buying insufficient technical data and associated rights to sustain weapon systems, thereby precluding the customer and price benefits that could be achieved by competition. Companies that have invested in creating designs want to hold onto their data rights and the engineering drawings that provide details to manufacture the

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items. So initially, when the government asks for rights and technical data, the price is often quite high. However, if the government has contributed to the development of the design and can prove that by the examination of accounting information such as time cards, then it can negotiate for some level of data rights and associated engineering details. If any federal entity has paid for any part of the design work, then this benefit can be exercised by any other group within the federal government.

These types of challenges are often conducted by contracting officers and/or in cooperation with government patent attorneys. The burden of challenge is on the government. The government can ask for the contractor or subcontractor to furnish a written explanation for any restriction claimed on the right of the federal government or others to use the technical data.

The draft Office of Secretary of Defense 5010 manual, *Procedures for Acquisition and Management of Contractor Prepared Data* (May 18, 2006) defines data rights and types. In summary, the term "data rights" refers to intellectual property regarding the use of the data developed, accessed, and/or delivered under a government contract. Data rights involve proprietary, restrictive, government purpose, unlimited, and limited, and may include patents, copyrights, and other data rights provisions. Data rights are necessary in the determination of release, duplicating, and disclosure of technical data and are generally determined by whose money is used in the development of the data. If the data are developed with government funding, then the government has the right to access and receive the data with unlimited rights. If data are developed with private-sector funding, the government will generally be allowed government purpose rights. When the data are developed with mixed funding, both private and government, the data rights, in all probability, will need to be negotiated.

The reader is referred to the above-referenced draft policy for a full discussion of the following terms: limited rights technical data; government purpose rights technical data; unlimited rights technical data; specifically negotiated license rights; contractor rights technical data; prior government rights.

It is essential that program managers challenge the claim of sole source to insure that the claim is accurate. Many years ago, when I first worked for a prime contractor, the person in the desk in front of mine would stamp all the engineering drawings. One day I asked him what he was doing, and he said, "I stamp all these with 'proprietary' whether they need it or not." He explained that the government would always have to come back to our company for spares and repair parts. The aftermarket for these supplies could keep the company very profitable for a long time.

Competition results in significant cost savings for the government. I worked in the early 1980s for the Navy civilian who invented the DoD's "Buy Our Spares Smart" (BOSS) program. Instead of buying from the prime contractor, we went directly to the prime's vendor, and this normally resulted in a cost savings of 20 percent.

When the government has the ability to compete across possible vendors, the savings are significantly more than 20 percent. When you connect this savings potential of spare and repair parts to other areas of logistics that also rely on the technical data, the savings increase. As an example, updating technical manuals costs less when done by a government support contractor than when done by a prime contractor, but in order for the government to be able to award the updates to the subcontractor, it has to have the source data and the right to use the data.

Consider competing the actual building of a new version of an end item and/or a major system: If we have the engineering drawings of the prior designs and the rights to use these data for competition, then we can compete. Without either the rights and or the engineering drawings, we are always forced into a sole source situation.

Also of importance is the level of detail required in the engineering drawings, which depends on what function the program is competing. Is the need to carry out maintenance or to remanufacture? Remanufacture requires detailed drawings and all their associated lists; maintenance might not require as much detail, but does require enough to be able to procure the appropriate spare and repair parts as well as conduct the maintenance. MIL-DTL-31000C of July 9, 2004, gives the details needed to facilitate the preparation of the Technical Data Package and the TDP option selection worksheet specifications. It is the worksheet that must be used to specify the requirements and does in fact become part of the contractual requirement when used.

In August 2004, the GAO released to Congress the report, "Defense Management Opportunities to Enhance the Implementation of PBL" (GAO-04-715). One recommendation to the DoD was "to provide for sufficient technical data to support alternative support options using either the public or private sector."

Andrew C. Obermeyer, senior procurement analyst, DPAP Policy, says, "Program managers should consider the cost and benefits of acquiring data rights—or consequences of not obtaining them—in all acquisition decisions."

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