

## Sustainment Series: Intellectual Property Considerations and Planning to Tailor IP for Product Support Strategy

### Q&A Responses

#### IP Essentials:

- **Benefits of Data Rights:** Why does the Government need Data Rights for software created by Contractors? **RESPONSE:** If the Government needs to use, modify, reproduce, perform, display, release, or disclose software created by contractors, it needs clearly stated data rights setting forth what the Government can and cannot do with the software and who is authorized to receive the software from the Government and what they can do with it. For example, if the Government requires data to develop technical manuals or software user manuals that walk operators and maintainers through troubleshooting codes to help complete operations or maintenance tasks, the Government will require the rights to use computer software or computer software documentation to conduct any tasks, and ensure these tasks are documented in the operator or maintainer technical manual. This process to understand “what” data is needed comes from conducting a failure modes effects and criticality analysis (FMECA). The FMECA informs criticality of software operations and maintenance tasks, which is then required to be documented in user technical manuals and in any depot maintenance work requirement (DMWR) manuals for use in troubleshooting software codes that come up during depot work for software embedded on depot level hardware. Analysis informs “what” data is needed. License rights to use the computer software or technical data may be specified by standard DFARS clauses or can be negotiated.
- **ULR vs. OMIT:** Please cover the difference between Unlimited Rights and OMIT rights. **RESPONSE:** Unlimited rights is a category of license rights for other than commercial items under the DFARS. Data necessary for Operations, Maintenance, Installation, and Training (OMIT) is often treated as a category or type of data. This is because under the DFARS 252.227-7013 clause, the Government is allowed to require ULRs in other than commercial item technical data necessary for OMIT unless that data is also Detailed Manufacturing or Process Data (DMPD). Similarly, for commercial item technical data, the Government may require “unrestricted rights” to use or distribute data necessary for OMIT other than DMPD. Please reference the process outlined in the Figure 2.2 of the LCSP Outline version 3.0 to understand “how” to identify the data needed to conduct a product support activity. Then, consider the commerciality and source of development funding for a particular part or component and identify the required use of the data. The type of data, commerciality, and source of development funding will determine the standard license rights under the DFARS; and the desired use of the data will help programs effectively negotiate and tailor license rights to meet DoD’s needs. The stakeholder IPT process to develop the LORA and PS BCA will help inform how programs develop or tailor data requirements and license rights, based on required use cases for each data or software item.
- **Documenting IP in the LCSP:** How do you address this topic in an LCSP? And what to do if it wasn’t documented during EMD and you are later in the lifecycle? **RESPONSE:** You would need to conduct a LORA and PS BCA based on actual system data. Consider creating a worksheet (based on Figure 2-2 of the DoD LCSP Outline version 3.0) using actual system data, work with a product support analysis SME to conduct modeling and simulation, and then use your stakeholder IPT to identify risks, issues, and opportunities. If competition is no longer an option,

you can perform a BCA on incorporating a modular open systems approach to support future competition for spares as part of supply support or field level maintenance so these activities can be conducted competitively. For any depot level repairs not previously competed, you can conduct a cost benefit analysis to inform how to incentivize OEM performance in meeting DoD statutory objectives for Depot requirements based on availability and maintainability key performance parameters or key system attribute objectives.

- **Multiple IP Strategies:** Could a program have quite a few different IP strategies, depending on that Level of Repair Analysis (LORA) for individual items? **RESPONSE:** Yes, different components may warrant different IP strategies. (See Tony Donatelli's chart 27 in the webinar slide deck). However, they are all documented in a single strategy or plan that is an annex to the Life Cycle Sustainment Plan (LCSP). In addition, LORA and mainly Failure Modes Effects and Criticality Analysis (FMECA) help inform critical parts; criticality helps you understand demand data and failure rates (from the LORA) which is important to understanding candidates to meet operational objectives.
- **Level of Repair Analysis (LORA):** Do Life Cycle Logisticians (LCLs) review the LORA information? **RESPONSE:** Yes, it is very important for the LCLs on the Product Support Management IPT to be involved in the LORA process as the results directly influence the Product Support Strategy.
- **Program-specific help:** My programs will be awarding contracts between FY25-27, and we are aggressively targeting data. Please provide POCs to help regarding our strategy. **RESPONSE:** Please consult this site: <https://www.acq.osd.mil/asda/ae/ada/ip-cadre.html> for assistance identifying POCs for MILDEP IP Cadres and the OSD IP Cadre.
- **Trade Secrets Act:** What Does the Trade Secrets Act cover for Government personnel and contractors? **RESPONSE:** The Trade Secrets Act (18 U.S.C. section 1905) requires Federal employees to protect and maintain the secrecy of any confidential or propriety material received through their employment duties. Contractors may disclose confidential business information, including trade secrets, to the Government in providing goods and services under an acquisition contract. A *trade secret* is a "formula, practice, process, design, instrument, pattern or compilation of information" not generally known, which may provide a company with a competitive advantage. Examples of information, which may qualify as trade secrets, that contractors provide to the Government include computer programs, data designs, technical know-how, manufacturing information, and financial information such as costs, pricing and budgets. If the contractor marks information that it provides to the Government with restrictive markings, disclosure of the information by a government employee may result in a violation of the Trade Secrets Act punishable by imprisonment, a fine and termination of employment.
- **Advisory & Assistance Contractors:** How does this topic apply to contracting corporations, doing work on behalf of the government? **RESPONSE:** Advisory and Assistance Services (A&S) Contracts are a category of services contracts where the purpose of obtaining the services is to improve policy making, decision-making, management, administration, etc. Thus, a contractor could be retained to provide these services to the Government. See the following link on DAU's website for information on contracting strategies well-suited for A&AS Services: <https://aaf.dau.edu/aaf/contracting-cone/scenarios/aas/>.

### Critical Thinking:

- **Contract Language:** Is there standard contract language Engineering and Life Cycle Logistics should use to obtain the "right" data to allow the Government to optimize competition, organically manage supply and repair, and work directly with the sub-tier suppliers. **RESPONSE:** No, there is no one size fits all standard contract language that will necessarily obtain the right

data or the necessary associated rights to accomplish any particular tasks. Serious analysis of short and long term system characteristics and mission objectives is necessary to determine data and rights requirements. To do this, activities need to develop IP strategies specific to their programs, systems, and mission objectives. Product support planning is just one aspect. SD-26, Army PSM Technical Manual Contract Development Guidebook (posted on DAUs website, and others) is one document that might be considered in developed a program's IP strategy. DoDI 5010.44 and the forthcoming DoD IP Guide will provide further guidance

- **FLRAA Contract Language:** Can we see the Future Long Range Assault Aircraft (FLRAA) program's contract language for Specially Negotiated License Rights? **RESPONSE:** We do not recommend copying other contract language; but rather tailor to your individual use case. You can consult other contracts as a guide but always tailor to your use case because each is unique. Recommend contacting the FLRAA program directly if appropriate. (Same response for those seeking FLRAA-specific LORA information).
- **Impasse with OEM:** How do you navigate a situation where the DoD and the Contractor cannot agree on IP terms? **RESPONSE:** Such impasses may be caused by disagreements on various elements of a license agreement, including the scope of deliverables, license rights, or ancillary terms (e.g., disputes, challenges, or consideration). Reach out to your MILDEP IP Cadre for assistance and be prepared to do some of the analysis discussed in this webinar to inform IP risks, issues, and opportunities. In addition, please inform the cognizant IP Cadre team about: 1) the development history of this technology (to inform discussion about return on investment for both parties); 2) the short and long-term goals of the program; and 3) data and software deliverables (and required use cases and recipients for this data and software) necessary to accomplish these goals.
- **Delivery of Data:** I've run into issues where a contractor says they will provide the data we need, but then backs off once the contract is awarded. Does the "FLRAA methodology" grant power we haven't had in the past? Concern is they propose one thing (giving us the crown jewels), but "drag their feet" when it comes down to delivery. **RESPONSE:** All of the Specially Negotiated License Rights (SNLRs) should include a "third party verification" clause to ensure that, but yes that can be a risk. An independent data rights validation plan was included in the Request for Proposal (RFP) and placed on contract. Escrow Agreements can also be a tool available to trigger delivery at agreed-upon conditions. Part of the FLRAA IP strategy was also to define Operations, Maintenance, Installation, and Training (OMIT) and Form-Fit-Function (FFF) through use cases. For example, the USG requires unlimited rights to the data necessary to execute this a specific/inherent USG function (OMIT). As part of the RFP we asked the contractor to agree or disagree with those definitions.
- **Obsolete Parts:** My program lacks IP for a few obsolete parts the OEM does not want to continue repairing; any advice? **RESPONSE:** Use the concepts in SD-19, SD-22, SD-26, and the LORA and PS BCA process to determine how best to develop a performance based outcome to this issue. Consider whether the part a candidate for a modular open systems approach. Does it make sense to create a MOSA to address DMSMS? MOSA does not force an OEM to continue repairing a part or provide the data necessary for 3rd party repairs. However, if the Government has or can persuade an OEM to supply certain data such as form, fit, and function data or modular system interface data, a MOSA may allow a program to swap out obsolete/unrepairable parts with more contemporary or repairable parts. Conducting a risk, issue, opportunity analysis for that part will help identify opportunities to reduce or mitigate risk and inform the IP required to implement the strategy.
- **Return on Investment:** Can you give a sense for the order of magnitude of the costs and amounts that can be saved by properly planning and tailoring IP requirements for product

support? **RESPONSE:** It may reach billions over the life cycle in some cases (depending on fleet size, number of repairs, and cost of repairs).

- **Commercial Derivative Aircraft:** Where can I find out about IP considerations for Product support relating to Commercial Derivative Aircraft? **RESPONSE:** This question considers IP rights for modified commercial products. At DFARS 227.7102-4(b), the DFARS has some direction regarding the application of the other than commercial item technical data rights clause 252.227-7013 to portions of a commercial item that was developed at Government expense. This question is beyond the scope of this presentation and should be directed to local IP counsel or other IP SMEs.
- **Defense Business Systems (DBS):** For IT systems, what is considered the contractor's Intellectual Property? **RESPONSE:** This is a very broad question for which specific answers are going to depend on the specific facts of an IT system. If an acquisition is proceeding under the DFARS, the first question is whether the IT system is considered commercial or not. If the system is other than commercial (and not under the SBIR or STTR program), under the DFARS, the data rights for software and software documentation will be specified by the DFARS 252.227-7014 clause and the data rights for any associated technical data that is not software documentation would be specified by the DFARS 252.227-7013 clause. Generally, under both these clauses the OEM would hold title to any underlying copyrights or trade secrets that may exist and the Government just gets license rights specified by those clauses to use and distribute the data. So, that means any trade secrets or copyrights are considered the contractor's IP. If software is being purchased as a commercial item, again any underlying trade secrets or copyrights are owned by the OEM and the Government just gets license rights. However, this time, the other than commercial item clauses do not specify the Government's license rights. Under policy at DFARS 227.7202-1(a), the Government's license rights should be specified in "licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs." Large commercial IT system purchases are often subject to enterprise contracts or license agreements with specific terms beyond the scope of this presentation. A different situation exists for right in inventions, which may be protected by patents. If in a DFARS contract, if an invention is made in the performance of that contract, the contractor would be able to elect title (own) any patent and the Government would get license rights to use the invention. However, if the contractor does not elect title (and chose to pursue a patent), the Government has the option to file a patent application and any resulting patent would belong to the Government and the contract would just get license rights.
- **Reverse Engineering:** How do you address IP rights when reverse engineering parts for use internal to DoD, such as for Additive Manufacturing? **RESPONSE:** Reverse engineering (follow guidance in DFARS PGI 217.7504): Rules depend on who is printing parts, third parties, DoD civilians or military personnel? Proactive engagement with developers EARLY and specially negotiated license rights that are mutually agreeable to both parties is critical.
- **SBIRS Rights:** How do we motivate or incentivize a contractor who developed a component of our software system under Small Business Innovative Research (SBIR) rights to Government Purpose Rights (GPR) or Restricted Rights. Is there a way to structure a Request for Proposal (RFP) to move that component to GPR or Restricted Rights? **RESPONSE:** Under the applicable DFARS clauses, the Government has SBIR data rights in all technical data (limited rights) or computer software (restricted rights) generated or developed under SBIR contracts during the period commencing with contract award and ending upon the date twenty years after completion of the project from which such data were generated or developed. The government

can structure the product support strategy for those components of the WBS where limited rights and restricted rights apply, through specially negotiated license rights tailored to the exact use of the data. For example, a specially negotiated license that is mutually beneficial to both parties, or ideally, incorporate a modular open systems approach that enables the OEM to retain their rights in the data, yet allows the Gov't the ability to retain flexibility.

- **10 USC 2320:** How does 10 USC 2320 assist in pursuing Operations, Maintenance, Installation, and Training (OMIT) rights? **RESPONSE:** 10 USC 2320, Rights in technical data, provides the statutory basis for pursuing data rights, including OMIT rights. However, it is only one piece of the puzzle, with others including the Defense Federal Acquisition Regulation Supplement, contract clauses, statement of work tasks, contract data requirements lists, etc. A program's Intellectual Property Strategy must take all of these into consideration in determining what rights are needed and how best to pursue them.