



Software Acquisitions: The Basics --“Data Rights and License Agreements”

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Discussion Topics -- “The Fundamentals of DoD Software Acquisitions”

- **Software Acquisitions Issues**
- **Developing an IP Strategy**
- **DFARS Provisions**
 - **Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation**
 - **Commercial Computer Software and Commercial Computer Software Documentation**
- **Commercial Computer Software License Agreements**
- **Open Source Software (OSS)**
- **Computer Software and Security**
- **Resources**

Software Acquisition -- What are the Key Issues?

- **What are the Broader Program Goals?**
 - **Short and Long-term**
- **What are the Government's software requirements?**
 - **Government-off-the Shelf (GOTS)**
 - **Commercial-off-the Shelf (COTS)**
 - **Hybrid (COTS & GOTS)**
 - **Open Source**
- **Does the software need to be integrated into a Government system?**
 - **Are there integration and interoperability issues?**
- **Software used in military systems; hardware & software components**

Developing an IP Strategy -- DODI 5010.44 Section 4.1

4.1 – IP Strategy

- *Each DoD program will have a robust IP Strategy to:*
 - **identify and manage the full spectrum of IP and related matters** (e.g. technical data and computer software deliverables, patented technologies, and license rights) from program inception throughout entire product life cycle as part of acquisition strategy and during operations and support phase as part of life-cycle sustainment plan.
- IP Strategy will describe, at a minimum
 - Assessment of **long-term program requirements, ownership costs of IP deliverables and associated license rights**
 - IP and related matters necessary to support use of MOSA
- **Customize IP strategies** based on common, shared and unique characteristics of the system and its components, the system architecture and interfaces, product support strategy, organic industrial base strategy
- **Consider using SNLRs** to acquire customized IP deliverables

The IP Strategy is always evolving!

Developing an IP Strategy for Software Acquisition

- **Developing an IP Strategy -- Strategic Planning and Critical Thinking**
 - **What type of software deliverables do you need?**
 - **How will you use it (short and long-term)?**
 - **What is the best acquisition instrument?**
 - **When do you need the data?**
 - **Contract Considerations**
 - **Are all the stakeholders at the table during all phases of the project?**
 - **What are your financial considerations?**
 - **Are requirements specific and ambiguities addressed in the contract?**
 - **Have you considered contract management issues (data rights assertions and deliverables)?**

IP Strategy Development Process

- **Gather Inputs**
 - Identify IPT Members
 - Identify Program Goals
 - What data (e.g. software and technical data)/rights do you need?
- **Assess Existing Data and Data Rights**
 - What do you have?
 - Do they align with program goals?
 - Have you identified gaps?
- **Define Path Forward**
 - Address data/data rights gaps to achieve technical and business objectives
 - What and How

IP Strategy Development Process

- **Create RFI, RFP**
 - **Include data and data rights needs in the document**
- **Document**
 - **Summarize**
 - **Include in Acquisition Strategy or LCSP**

DFARS 252.227-7014 -- Definitions

Computer Software

- Computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that enables software to be reproduced, recreated, or recompiled.
- Does not include computer databases or computer software documentation.”

Computer Software Documentation

- Owner’s manuals, user’s manuals installation instructions, operation instructions regardless of storage medium; explain the capabilities of computer software

Commercial Computer Software

- Software developed or regularly used for non-governmental purposes sold, licensed or leased to the public or is a commercial item.
- Includes OSS
 - Licensing scheme provides broad rights to modify and redistribute the original source code and, sometimes, any distributed modified versions (e.g., derivative works).



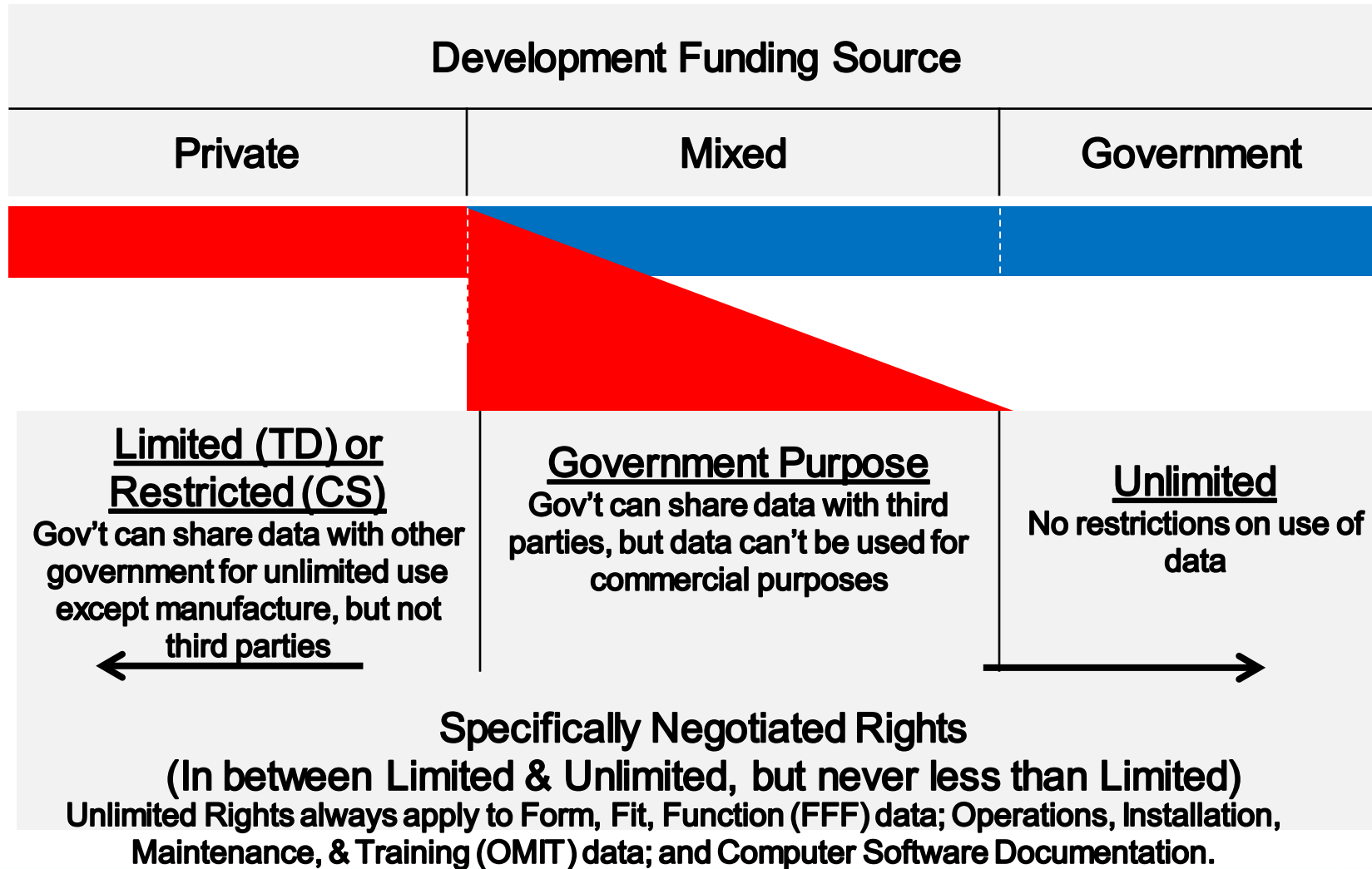
Source: <https://www.youtube.com/watch?v=BTB86HeZVwk>

Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation

DFARS 252.227-7014

- **Other than commercial computer software**
 - Doesn't qualify as commercial computer software under the definition of "commercial computer software"
- **Software – not licensed or sold to the public; used for governmental purposes**
- **Government's Licensing Rights**
 - Unlimited
 - Government Purpose
 - Restricted
 - SNLRs
- **Hybrid - COTS & GOTS software**

Data Rights and Global Funding Test – The Government’s Licensing Right



Rights in Commercial Computer Software and Computer Software Documentation

DFARS 227.7202-1 Policy – Commercial Computer Software or Commercial Computer Software Documentation

- **Acquire under same licenses provided to the public unless inconsistent with Federal procurement law or don't satisfy user needs**
- **Obtain competitively using firm-fixed-price contracts or firm-fixed-priced orders**
- **Offerors and contractors don't have to --**
 - **Furnish technical information not provided to the public (except for information documenting the specific modifications made at Government expense)**
 - **Provide Government rights (e.g. use, modify, reproduce, release) unless mutually agree**
- **No DFAR clause**

Commercial Computer Software Licenses -- Key Terms

- **License Grant**
 - What do you need to do with the software (program requirements)?
 - What does the license say the Govt. can or cannot do with the software?
- **License Term**
- **Warranty**
- **Representations**
- **Indemnification – Anti-deficiency Act**
- **Governing Law**
- **Other Issues**
 - **Upgrades**
 - **Patches**
 - **Technical Support**
 - **Maintenance**

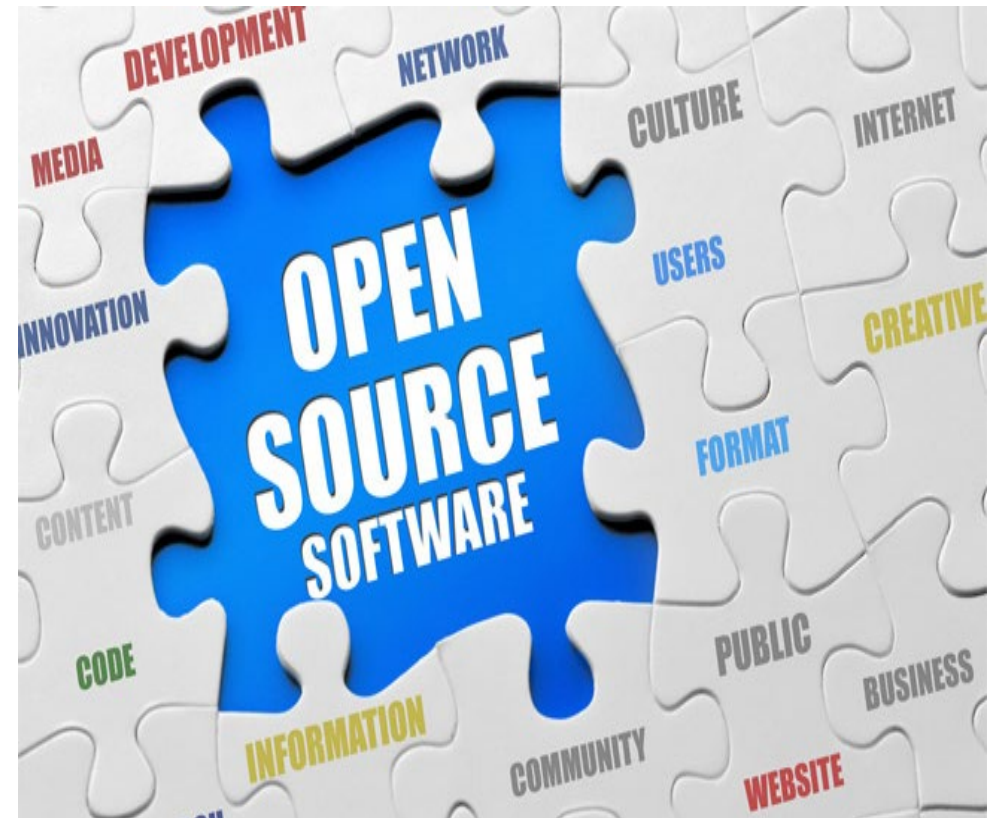
Key Take Aways:

- **Know the License Terms**
- **Consult with IP Counsel**

OMB Policy OSS (M-16-21)

Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation Through Reusable and Open Source Software”

- **Broader USG policy; agency specific guidance exists**
- **Government-wide reuse of custom-developed code**
- **Requirements**
 - **Secure rights for Government reuse; ensure delivery of code**
 - **Inventory all custom-developed code and make available**
 - **3-year pilot program; release 20% custom-developed code**



OSS -- DoD Policies and FAQs

- **Clarifying Guidance Regarding OSS -- 10/16/09**
- **DoD Open Source Software FAQ -- <https://dodcio.defense.gov/open-source-software-faq/>**
- **Software Development and Open Source Software -- 01/24/22**

How is OSS Addressed Under the DFARS?

- FAR and DFARS treat OSS as “commercial software”
- OSS licensed to USG under same terms as licensed to public
 - Commercial Item -- used by the general public or non-governmental entities for purposes other than governmental purposes; sold, leased or licensed to general public
- Different licensing scheme
 - Licensee has broader rights than traditional software licenses
 - Broader developer base

Using OSS -- Advantages and Disadvantages

- **Advantages**

- **OSS products may be more reliable and secure**
- **Access to source code allowing modification**
- **Reduced dependence on specific vendors or developers**
- **Cost savings**

- **Disadvantages**

- **License compatibility with use, users and computer network**
- **Insufficient maintenance and support**
- **Inability to negotiate license terms**

Open Source Software -- DoD Uses & Issues

- **Use of OSS in applications developed for DoD**
 - **Seek Government permission**
 - **Review License Agreement**
 - **Modification and sharing terms**
 - **What rights does the Govt. acquire?**
 - **Do the license terms present problems for the Govt.?**
- **Distributing software via OSS model -- Issues**
 - **What's the nature of software?**
 - **How will it be distributed?**
 - **Who will it be distributed to?**
 - **Does the potential of commercializing and resale back to Govt. exist?**
 - **Will the Govt. need to use it in the future?**

Computer Software and Security Concerns

- **Applicable to Commercial Software (including OSS)**
- **Proper security assessment for any software, whether OSS or proprietary, is extremely complex**
- **Requires special technical expertise**
 - **Technical and cybersecurity personnel lead assessment**
 - **Works closely with acquisition professionals and legal counsel**
- **Security Assessment**
 - **Compliance with CNSS Policy 11 and FISMA 2014**
 - **Federal Risk and Authorization Management Program (FedRAMP)**
- **Security on Contractor Information Systems**
 - **DoD agencies - NIST Special Publication 800-171 and DFARs 252.204.7012**

Resources

- **Topical Videos**

Intellectual Property and Data Rights Overview -

https://media.dau.edu/media/t/1_e3lyesu6

Software License Agreements - <https://vimeo.com/618913515/9ea50b66f4>

Open Source Software - <https://vimeo.com/616989953/2f98e0a21a>

- **Credentials**

CACQ 008 – Foundational Intellectual Property

CACQ 011 - Software Acquisition Management

- **CENDI, “Frequently Asked Questions about Copyright and Computer Software”**

https://www.cendi.gov/pdf/CENDI_OpenSourceFAQ_2Dec2020.pdf

Contact Information

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