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ALERT

Proposed Rule Would Expand the Presumption of Development at Private Expense for Challenges to Restrictions on Commercial Item Technical Data

May 11, 2016

On May 10, 2016, the Department of Defense (DOD) published a proposed rule (81 Fed. Reg. 28812) that would amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 813(a) of the Fiscal Year 2016 National Defense Authorization Act (NDAA) (Pub. L. 114-92). Section 813(a) amended the presumption of development at private expense, codified in 10 U.S.C. § 2321(f), for purposes of challenges to contractor assertions of restrictions on technical data pertaining to commercial items.

As we have previously discussed (here and here), the current rule displaces the presumption that commercial items are developed at private expense for "major systems or subsystems or components thereof, except for commercially available off-the-shelf items . . . ." DFARS 227.7103-13(c)(2)(ii). Without the presumption, a contractor must demonstrate that an item was developed at private expense if the Government challenges the contractor's restrictions on the Government's use and disclosure of technical data pertaining to that item.

Under the current rule, even a minor modification that does not alter the item's commerciality would deprive a contractor of the presumption of development at private expense if its component is ultimately incorporated into a major system (a term that is defined so broadly in FAR 2.101 as to encompass most DOD programs). This poses significant risks to contractor intellectual property, particularly for downstream suppliers whose government business is dwarfed by

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their commercial business.

The proposed rule would make several changes to the presumption of development at private expense for commercial items. ***First***, the presumption would only be displaced in the first instance for major *weapon* systems, rather than any major system.

Second, notwithstanding incorporation into a major weapon system, the presumption would apply not only to commercially available off-the-shelf items (as in the current rule), but also to:

- 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 component that is a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace; and
- Any component that is a commercially available off-the-shelf item with minor modifications made to meet government requirements.

The proposed rule would also delete the major systems rule from DFARS 252.227-7019 (Validation of Asserted Restrictions—Computer Software). As the proposed rule points out, the major systems rule would likely not lead to a different result from the normal rules for non-commercial computer software, such that inclusion of the major systems rule in DFARS 252.227-7019 is unnecessary.

These changes—particularly those that extend the presumption to modified items—represent a partial return to commercially friendly terms in commercial procurements, and will likely be a welcome relief to contractors. Comments must be submitted by July 11, 2016 to be considered.

Wiley Rein will continue to monitor developments in this area. For more information in the meantime, please contact Scott A. Felder at 202.719.7029 or sfelder@wiley.law.