THE FALSE CLAIMS ACT AND DATA RIGHTS:
WHAT PLAINTIFFS’ LAWYERS NEED TO KNOW BUT DO NOT WANT TO HEAR

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I. INTRODUCTION

Plaintiffs’ attorneys and the Department of Justice (DoJ) have been increasingly creative in their pursuit of civil False Claims Act (FCA) qui tam actions. Often, however, this creativity outstrips their understanding of complex regulations. This is particularly apparent in cases involving the government contract clauses addressing rights in technical data and computer software. Those provisions are among the most difficult and least understood portions of the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS). This is, in part, because some aspects of these regulations are counterintuitive. It is also, in part, because there are widely held misconceptions about key issues. These issues include who “owns” the rights in technical data and computer software (the contractor); whether the government is entitled to delivery of the data or software in which it has rights (not necessarily); and whether a contractor can charge the government for software, developed in whole or in part at government expense, that later qualifies as a commercial item (yes, at a fair and reasonable price). Each of these issues, and several others, has perplexed the government and contractors in varying degrees for years. Although regulatory misunderstandings are troublesome enough during a contract dispute, they are far more serious if they erroneously trigger a qui tam action. That is something everyone should wish to avoid.

To help avoid that problem, this Article will endeavor to inject some clarity into this area and address the most common misunderstandings about the “data rights” regulations and their application. First, the Article will briefly introduce the FCA. Next, it will identify common misconceptions, clarifying the relevant law. Last, it will discuss three important aspects of data rights for government contractors and how they relate to the FCA.

1. “Qui tam is a portion of the Latin phrase qui tam pro domino rege quam pro si ipso in hac parte sequitur,” which means “[w]ho sues on behalf of the King as well as for himself.” United States v. Fla.–Vanderbilt Dev. Corp., 326 F. Supp. 289, 290 (S.D. Fla. 1971) (internal quotation marks omitted).
2. See FAR 27.4.
4. Even if the qui tam suit is ultimately dismissed with prejudice, as a majority of these cases are, the contractor is forced to expend hundreds of thousands of dollars defending against speculative claims that may “linger on for months, or even a year” and can result in significant reputational harm as a result. See Todd J. Canni, Who’s Making False Claims, the Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge, 37 PUB. CONT. L.J. 1, 2 (2007); see also infra notes 16–20 and accompanying text.
II. THE FCA

The civil False Claims Act is well known to companies that regularly deal with the federal government. It is pursued independently by the DoJ as well as by private plaintiffs—known as “relators”—who bring qui tam actions in the name of the government. Depending upon whether the government elects to intervene in the action, the relator will receive between fifteen and thirty percent of the recovery. This, of course, is the incentive for the plaintiffs’ bar. They will typically get a portion of this amount as a contingent fee in addition to the statutory attorney fees and costs. It is a profitable business.

Although various actions are subject to the FCA, the most common allegations are that a company has “knowingly present[ed], or cause[ed] to be presented, a false or fraudulent claim for payment or approval” or has “knowingly ma[de], use[ed], or cause[ed] to be made or used, a false record or statement material to a false or fraudulent claim.”

The terms “knowing” and “knowingly” as used in the statute do not require proof of specific intent to defraud the government, but rather require the defendant to have “actual knowledge” of the false information or act either in “deliberate ignorance” or in “reckless disregard of the truth or falsity of the information.” There are a multitude of cases examining the dimensions and nuances of the “knowing” requirement. Simplistically, it is something other than a mistake or mere negligence, but rather circumstances approaching gross negligence. Regardless of the case law, “knowingly” is in practice frequently alleged to have occurred through statements that most contractors and defense counsel would classify as a simple error or oversight.

This is particularly troublesome for government contractors because many of the procurement laws and regulations require a “certification” or representation that the laws or regulations have been complied with, a contract’s condition has been met, or various events have occurred. Complementing the problem, plaintiffs and the courts are increasing the number

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6. Id. § 3730(a)–(b); Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 768–69 (2000).
7. 31 U.S.C. § 3730(d); see also Canni, supra note 4, at 2 (noting that qui tam plaintiffs personally recovered nearly $1.8 billion over the last twenty years).
9. Id. § 3729(a)(1)(A)–(B).
10. Id. § 3729(b)(1)(A)(i)–(iii).
11. These cases are collected and discussed in the leading treatise on the False Claims Act (FCA): JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.06[C], at 2-11 (4th ed. 2013).
and breadth of certifications and “implied certifications” that are theoretically actionable under the FCA.\textsuperscript{14} Many of these certifications require detailed and relatively sophisticated levels of knowledge in areas that are often difficult to understand.\textsuperscript{15} In the best of circumstances, it is easy for errors to creep into the facts underlying a representation. Yet, any inaccuracies in a certification can lead to a false claims allegation, regardless of the real-world compliance difficulties. Perfection is difficult to achieve. It is nevertheless increasingly the de facto standard against which qui tam defendants are measured, at least at the pleading stage where a plaintiff’s allegations are taken as true. But the pleading stage is critical because, if a plaintiff can get past a motion to dismiss, a defendant has a long, expensive haul through discovery to prove that even though what it did was not perfect, it was not reckless.

Regrettably, the data rights provisions offer some superficially easy targets for a false certification allegation. At the Department of Defense (DoD), whenever a contractor is proposing to deliver either technical data or computer software in which it is asserting various forms of limitations or restrictions on the government’s rights of use, the contractor must state what those limitations are and describe the bases for them.\textsuperscript{16} There are similar provisions under the FAR data rights provisions, which apply to “civilian” agencies.\textsuperscript{17} Obviously, if these representations are false or reckless, they could lead to FCA liability.

If the contractor does properly assert “limited rights” in its technical data or “restricted rights” in its computer software, the government may not use the technical data or software for competitive procurement purposes.\textsuperscript{18} The contractor, therefore, holds these rights in a sole-source position.\textsuperscript{19} This is neither fair nor unfair; it simply reflects the legal recognition that the holder of intellectual property rights in data or software (such as trade secrets or copyright) is entitled to protection of those rights and to the competitive advantage gained by having them.

Conversely, however, when viewed through the lens of a plaintiffs’ counsel, if one can allege that the assertion of limited or restricted rights was “knowingly” incorrect, then it is a short step to contend the government has been defrauded out of its ability to use freely the data or software for competitive purposes. Worse, it is only yet another stride to allege that the government’s award of sole-source contracts in reliance on such representations has caused the government to award a contract under false pretenses. The conse-

\begin{itemize}
  \item \textsuperscript{14} Id. at 132.
  \item \textsuperscript{15} See id. at 139 (highlighting how relators take advantage of the complexities of the Medicare rules and regulations to allege false claims).
  \item \textsuperscript{16} DFARS 252.227-7017.
  \item \textsuperscript{17} FAR 52.227-15.
  \item \textsuperscript{18} DFARS 252.227-7013(a)(14) (defining “limited rights”); see also JAMES G. McEWEN ET AL., INTELLECTUAL PROPERTY IN GOVERNMENT CONTRACTS 87 (2d ed. 2012).
  \item \textsuperscript{19} W. Jay DeVecchio, Rights in Technical Data & Computer Software Under Government Contracts: Key Questions and Answers, BRIEFING PAPERS, Sept. 2010, at 5.
\end{itemize}
quent damages of such a claim can be the value of the contract tripled and compounded by penalties of up to $11,000 per invoice.20

The grave problem with such allegations is they often spring from profound misunderstandings of the circumstances in which a contractor can properly assert restricted or limited rights, as well as an equally profound misunderstanding of what those rights actually mean. Indeed, in this author’s experience, many of the FCA allegations made in the context of data rights suffer from these fundamental misconceptions.

Sometimes this is understandable: there are data rights issues that are relatively intricate. Nevertheless, most of the fundamental principles that people get wrong are straightforward, although perhaps somewhat obscure if one is turning to the regulations for the first time. This Article will illuminate the most frequent errors, starting with a surprisingly common point of confusion—identifying which regulations apply.

III. CLARIFICATIONS TO COMMON DATA RIGHTS MISCONCEPTIONS

A. Clarification No. 1: The FAR Data Rights Provisions Do Not Apply to DoD

There are two sets of regulations and three basic contract clauses that apply, depending upon whether one is dealing with a DoD organization or with a “civilian” executive agency. For civilian agency contracts, the regulations are found in FAR Subpart 27.4.21 In turn, these regulations are implemented in most circumstances by one FAR clause, 52.227-14, “Rights in Data—General.”22 The regulations applicable to DoD are found in DFARS Subpart 227.71, “Rights in Technical Data,” and DFARS Subpart 227.72, “Rights in Computer Software and Computer Software Documentation.”23 Correspondingly, for DoD contracts, there are two principal clauses: DFARS 252.227-7013, “Rights in Technical Data—Noncommercial Items,” and DFARS 252.227-7014, “Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.”24

Although relators’ counsel often invoke the FAR provisions in DoD cases, that is incorrect. FAR 27.004, “Scope of Subpart,” expressly exempts the DoD from FAR Subpart 27.4, stating that “the policy statement in 27.402 applies to all executive agencies except the Department of Defense.”25 The “policy state-
"government" is merely an articulation of broad principles; it has nothing to do with any of the specific requirements of FAR Subpart 27.4 or with any of the clauses incorporated into contracts. This is also evident from the DoD’s unique statutory requirements regarding rights in technical data, which are not applicable to civilian agencies.

B. Clarification No. 2: The Clauses Grant the Government a License, Not Title or Ownership

When examining the FAR or DFARS, it becomes evident that what the clauses provide the government are the rights of use in technical data and software, nothing more. In this context, the right of use is a license right. The licensing concept is expressly stated throughout the DFARS. DFARS 227.7203-4(a), for example, which pertains to software, is entitled “License Rights” and grants the government a license from the contractor. DFARS 227.7103-4, “License Rights,” does the same for technical data. Nothing in any of the regulations or the clauses mentions, much less vests, title or ownership in the government. Moreover, there is not one word in any of the regulations or clauses giving the government an exclusive or sole license to technical data or software, or to the intellectual property embedded in the data or software. As this Article will discuss, one of the license rights the government may obtain is “unlimited” rights. But “unlimited” does not mean “exclusive.”

This is an important concept for attorneys to recognize because it means that even when the government gets the broadest “unlimited” rights under the data rights clauses, the contractor is not divested of ownership. The contractor retains the ability to use or to license others to use unlimited rights data or software. This conclusion has been affirmed periodically by the courts, particularly with respect to the DoD clauses. The Secretary of Defense confirmed this stance: “The government may own the delivered physical medium on which the IP resides, but generally will not own the IP rights. ‘License rights’ refers to the government’s ability to use, reproduce, modify, and release the delivered IP.”

27. DeVecchio, supra note 19, at 2.
30. DFARS 227.7203-4.
32. DFARS 252.227-7013(a)(16).
33. See DFARS 227.7103-4(a).
34. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1044 (9th Cir. 1983); Regents of the Univ. of Colo. v. K.D.I. Precision Prods., Inc., 488 F.2d 261, 264 (10th Cir. 1973).
This principle is reflected for civilian agencies in the FAR, which provides in part:

The contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the contractor in the performance of the contract, except—

1. As prohibited by federal law or regulation (e.g., export control or national security law or regulations);
2. As expressly set forth in this contract. . . .

In other words, absent an express preclusion in a contract or an intervening statute, even if the government paid entirely for the development of an item, component, process, or software, the contractor may derive profit from it by selling it or by licensing others to make, use, or sell it.

C. Clarification No. 3: License Rights Are Not Delivery Rights

Just as nothing in the data rights clauses vests the government with title, ownership, or exclusive rights, so too is there nothing in any of the basic data rights clauses that requires a contractor to deliver to the government the technical data or computer software in which the government may obtain rights under the clauses.

Under virtually all contracts, a contractor is required to deliver the item (a jet, a tank, or a piece of furniture) that is specifically identified as a “deliverable” under the contract. This is common sense: the contractor is getting paid to deliver what is specified to be delivered or what the government has a right to have delivered in the future—i.e., deferred delivery. This is true as well for technical data and software. That is, although the FAR and DFARS data rights clauses anticipate delivery, the basic data rights clauses do not establish any delivery requirements for the contract nor provide a mechanism for the government to obtain delivery of technical data or software. Again, the clauses’ principal role is to define the license rights—the rights of use—the government obtains in data or software. Thus, the clauses specify rights, not deliverables.

Data deliverables are specified elsewhere in a contract—most commonly in the Contract Data Requirements List (CDRL). If the data or software is not a deliverable, then the government will get rights in data or software that it does not have. FAR 27.403 makes this point plainly:

Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the government and the contractor regarding the use, disclosure, or reproduction of the data.

36. FAR 52.227-14(d). Notably, under the FAR, the government has unlimited rights in “any data first produced in the performance of a contract.” FAR 27.404-1(a).
37. E.g., FAR 52.227-14(a)(2) (Alt. II) (“If delivery of that data is required, the contractor shall . . .”); DFARS 252.227-7014(b)(3)(i) (“The government shall have restricted rights in noncommercial computer software required to be delivered. . . .”).
38. See DFARS 253.303-1423.
40. FAR 27.403 (emphasis added).

DoD must ensure that the contract requires the delivery of all information that is necessary to accomplish each element of the acquisition strategy. It is important to realize that the standard DFARS clauses that establish the rights in technical data or computer software do not specify requirements. Therefore, when drafting delivery requirements for either technical data or computer software, it is important to specify [content, recording/storage format, delivery/storage medium]. . . . Also, for computer software it is critical to distinguish the human readable source code from machine-readable object/executable code.41

Stated differently, even when the government gets the broadest license rights in data or software (“unlimited rights”), it does not have a right under the licensing clauses to delivery of those data or software. For example, if computer source code was never a deliverable, the government might or might not have some form of license rights in it, but it would not have the source code itself nor a right to obtain the code under the basic data rights clauses. Therefore, declining to deliver the information is not a contractual failure and thus certainly not an FCA violation.42

This scenario makes economic as well as contractual sense. Even when the government is paying entirely for the development under a contract, it is bargaining under the clauses for a license to use the development work—the intellectual property. It is not bargaining for delivery, unless delivery is specified. Delivery also may be costly and unnecessary. Consider, for example, the substantial cost to put a technical data package (TDP) into the format required by the government. Separating rights and delivery, overall, makes economic sense for taxpayers. If the government later negotiates for delivery, it negotiates just the cost of formatting and actual delivery.

Later delivery is most often accomplished through delivery clauses. The DFARS contains two of them, the “Deferred Ordering” and “Deferred Delivery” clauses of DFARS 252.227-7027 and -7026, respectively.43 Correspondingly, there is the “Additional Data Requirements” clause of FAR 52.227-16(a).44 The DoD’s current Deferred Ordering clause, however, applies only to data and software “generated in the performance of this contract or

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41. DoD IP ACQUISITION GUIDE, supra note 35, at 2-7 (emphasis added).
42. See, e.g., United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 726, 734 (4th Cir. 2010) (“Congress crafted the FCA to deal with fraud, not ordinary contractual disputes. . . . There is a difference between a false statement sufficient to support a claim of fraud, on the one hand, and honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights on the other.”); United States ex rel. Wilson v. Kellogg Brown Root, Inc., 525 F.3d 370, 373, 378 (4th Cir. 2008) (“Relators have consistently sought to shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the False Claims Act. This misguided journey must come to an end. If every dispute involving contractual performance were to be transformed into a [qui tam] FCA suit, the prospect of litigation in government contracting would literally have no end.”); accord United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 326, 329 (9th Cir. 1995).
43. DFARS 252.227-7026, 252.227-7027.
44. FAR 52.227-16(a).
any subcontract hereunder.” Therefore, it does not oblige the contractor to deliver data or software that was developed before a company had a government contract. The FAR clause is broader. It states that a Contracting Officer may “at any time during contract performance or within a period of three years after acceptance of all items to be delivered under this contract, order any data first produced or specifically used in the performance of this contract.”

D. Clarification No. 4: Just Because the Government Paid for Some Development Does Not Mean It Gets Broad Rights in Everything

Yet another misconception: If the government has paid (directly or indirectly) for any portion of the development of an item or software, then the government is entitled to unlimited rights or, pursuant to a DoD contract, “government purpose rights,” in the associated technical data and software. It is, in the eyes of a qui tam litigator, thus improper for a contractor to attempt to limit or restrict the government’s rights in this circumstance, and doing so gives rise to a false claim. This is incorrect. First, if the contractor performed the development without the use of any direct payments under a government contract for work that was not required by a contract, then the contractor can indeed limit or restrict the government’s rights—even if the government has reimbursed, through indirect cost accounts, the cost of that development work. Second, even if the government paid for development directly under a contract, it will get broad rights only in the segregable portion of development for which it paid. Addressing these points requires understanding at least three things: (1) when a contractor can properly limit or restrict the government’s rights in data or software; (2) how the regulations define private expense versus government expense; and (3) that development is to be analyzed at the lowest segregable component level and not as an aggregate.

1. Definitions

“Limited rights” is a term that applies to technical data, not software. To be categorized as limited rights under the FAR, the data must have been “developed at private expense” and “embody trade secrets or are com-

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46. FAR 52.227-16(a) (emphasis added).
47. Government purpose rights are expressly provided for only at DoD. These rights accrue when development has occurred with a mix of private and government funds and are essentially unlimited rights for U.S. government purposes. See DFARS 252.227-7013(a)(13), (b)(2), 252.227-7014(a)(11), (b)(2).
48. DFARS 252.227-7013(a)(8), 252.227-7014(a)(8).
49. See infra Part III.F.
mercial or financial and confidential or privileged.” 51 Under the DFARS, those rights typically accrue in technical data “[p]ertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend. . . .” 52 With some exceptions, “limited rights” means the right to use the data internally within the government for various circumscribed purposes and to provide it to certain support contractors in even fewer circumstances. 53 Limited rights, however, do not include the right of the government to provide the data to third parties otherwise, or make the data available for competitive procurements. 54

“Restricted rights” are the analog to limited rights. 55 They apply only to computer software. 56 To be considered restricted rights software under the FAR, the software must be developed at private expense and embody trade secrets, be commercial or financial data that are confidential or privileged, or be copyrighted. 57 Under the DFARS, the contractor is entitled to assert restricted rights if the development of the noncommercial software occurred exclusively at private expense. 58 Restricted rights, although different from limited rights in specificity, have the same general restrictions. They allow the use of the software within the government and, like limited rights data, the government can provide it to certain support contractors in limited circumstances. 59 But again, restricted rights do not permit the government to copy and provide the software to any other contractors to facilitate competitive procurements. 60

2. Private Expense

The concept of private expense is key to determining whether a contractor can properly limit or restrict the government’s rights in data or software. Understanding what constitutes private expense is key to dispelling one of the most common misconceptions—namely that if any government money is involved in the development process, then development is not accomplished entirely or exclusively at private expense and, therefore, the contractor cannot limit or restrict the government’s rights. This reasoning is incorrect; private expense can best be understood by referring to the definitions in the DFARS.

The DFARS defines “developed exclusively at private expense,” whereas the FAR does not, even though the term “private expense” is in the FAR def-

51. FAR 27.401, 27.404-2(b).
52. DFARS 252.227-7013(b)(3)(i)(A). They also can accrue in technical data created “exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.” DFARS 252.227-7013(b)(3)(i)(B).
53. DFARS 252.227-7013(a)(13); FAR 52.227-14 Alt. II (g)(3).
54. DFARS 252.227-7013(a)(14).
56. DFARS 252.227-7014(a)(15).
57. FAR 27.401.
58. DFARS 252.227-7014(b)(3)(i).
59. DFARS 252.227-7014 (a)(15); FAR 52-227-14 Alt. III (g)(4).
There is no reason to think that the meaning of private expense as used in the FAR will be interpreted differently from its use in the DFARS, a point generally accepted by practitioners and noted by the commentators. The definition in DFARS 252.227-7013(a)(8), pertaining to technical data, is identical to the definition in the DFARS Noncommercial Computer Software clause, 252.227-7014(a)(8):

(a)(8) “Developed exclusively at private expense” means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

Conversely, government funding and mixed funding are defined as follows:

(9) “Developed exclusively with government funds” means development was not accomplished exclusively or partially at private expense.

(10) “Developed with mixed funding” means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

E. Clarification No. 5: Indirect Costs Are Private Expense

There are several key points within these funding-level definitions. First, they make clear that private expense encompasses “development accomplished with costs charged to indirect cost pools.” Indirect cost pools are accounts (pools) where costs that are spread against multiple cost objectives (contracts) are collected; they are most commonly referred to as “indirect” or “overhead” accounts. In turn, the most typical indirect cost account that companies use to fund development at private expense is Independent Research & Development (IR&D), which is a category of costs defined in the FAR cost principles. The core definition within this cost principle states:

Independent Research & Development (IR&D) means a contractor’s IR&D costs that consists of projects falling within the four following areas: (1) basic research, (2) applied research, (3) development, and (4) systems and other concept formula-

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61. 41 U.S.C. § 2302(d); FAR 2.101.
63. DFARS 252.227-7013(a)(8), 252.227-7014(a)(8).
64. DFARS 252.227-7013(a)(9)–(10), 252.227-7014(a)(9)–(10).
65. See DFARS 252.227-7014(a)(8).
66. See FAR 31.001.
67. See FAR 31.205-18(a).
tion studies. The term does not include the costs of efforts sponsored by a grant or required in the performance of a contract. IR&D effort shall not include technical effort expended in developing or preparing technical data specifically to support submitting a bid or proposal.\textsuperscript{68}

There has been considerable debate for many years over the meaning of “required in the performance of a contract.” One of the most thorough discussions of the subject can be found in the \textit{ATK Thiokol} series of cases.\textsuperscript{69} It has also been addressed in the context of the False Claims Act.\textsuperscript{70} If a contractor has properly charged its development work to an indirect cost account, whether it be IR&D or some other account—e.g., engineering overhead or manufacturing and production engineering—that particular development work is development at private expense. This is true as a matter of definition, notwithstanding the fact that the government reimburses contractors for a portion of their indirect costs.\textsuperscript{71}

Thus, the fact the government paid for some aspect of development indirectly does not alter a contractor’s ability—and it is not an FCA violation—to assert limited or restricted rights in that portion of the development. But if that portion of the development was not completed on indirect accounts, and instead completed partially with indirect funding and partially with government direct funding under a contract, asserting these rights may be appropriate.\textsuperscript{72}

\section{F. Clarification No. 6: Analyzing Development Funding
Takes Place at Very Low and Discrete Levels}

The DFARS definition of private expense states expressly that private expense “determinations should be made at the lowest practicable level.”\textsuperscript{73} This reflects the reality that development work for an item, component, process, or software does not occur all at once but rather at discrete, segregable levels. A piece of hardware will have subcomponents (gears, shafts, electrical devices) each of which may go through its own development phases. This also is true with respect to software; most items of software comprise modules or subroutines that are separately identifiable and developed. Thus, it is erroneous to look at the source of private expense funding for a piece of hardware or software as a whole, but rather one must examine development at lower levels.

\textsuperscript{68} See \textit{id.} (emphasis added). This provision also defines the terms “basic research,” “applied research,” and “development.”


\textsuperscript{71} FAR 31.205-18.

\textsuperscript{72} The topic of specially negotiated license rights outside the strictures of the standard license categories—limited/restricted, government purpose, and unlimited rights—is beyond the scope of this Article. See DFARS 227.7103-5.

\textsuperscript{73} DFARS 227.7013-(8)(i).
In addressing the “source of funds determination” with respect to non-commercial computer software, the DFARS states:

The determination of the source of funds used to develop computer software should be made at the lowest practicable segregable portion of the software or documentation (e.g., a software subroutine that performs a specific function). Contractors may assert restricted rights in a segregable portion of computer software which otherwise qualifies for restricted rights. . . .

There is a corresponding regulation addressing the source of funds determination with respect to technical data:

The determination of the source of development funds for technical data pertaining to items, components, or processes should be made at any practicable sub-item or subcomponent level or for any segregable portion of a process. Contractors may assert limited rights in a segregable sub-item, subcomponent, or portion of process which otherwise qualifies for unlimited rights. . . .

This concept of segregability has been recognized by the courts. Segregability is also embodied in the data rights statutes applicable to both the DoD and civilian agencies.

If a contractor’s development at the lowest practicable level of an item, component, process, or software has been achieved before receiving any direct government funding under a contract or subcontract, then the contractor is entitled to assert limited or restricted rights with respect to that particular development. The government may, in turn, have “unlimited rights” in other portions of the hardware or software that were developed exclusively with government funds.

In most circumstances, however, determining what the lowest practicable level is and whether development occurred there will be as much an engineering decision as a legal one. Unless a qui tam relator has insight into the technology or is an engineer, he or she will almost always be in a poor position to know when and where development took place.

G. Clarification No. 7: Mixed Funding Drives Different Results Under the DFARS Than Under the FAR

A related funding question is what happens if there is mixed funding for the development of an end item or software. This is an important issue be-
cause, at the DoD, mixed funding vests the government with what are known as “government purpose rights.” For practical purposes, though, they are the equivalent of unlimited rights with respect to what the government can do with the data or software. That is, the government can use the data for any government purpose, including competitive procurement. The only limitation is that the government cannot use or authorize others to use the data or software for commercial purposes, which is not something the DoD typically does.81

There is no corresponding category of government purpose rights under the FAR. Therefore, under the FAR, if development occurred with mixed funding under a civilian agency contract or subcontract, the government, generally, would obtain unlimited rights.82

Knowing who gets what rights when there is mixed funding depends, again, on analyzing development at the lowest segregable level. This analysis would only be for those particular segregable items that were developed partially with private expense and partially with government expense, that is, mixed funding.

H. Clarification No. 8: Items and Software Can Be Developed for Data Rights Purposes Before the Final, Producible Product

Whatever the agency, the government’s license rights will turn upon determining when an item, component, or process was “developed.” The FAR does not provide a definition. It invokes “development” at private expense but does not define it.83 And, once again, the DoD steps into the breach. Development under DoD contracts has been discussed extensively and is defined in the clauses.84 There is no reason to doubt that the DoD’s concepts would be applied to an issue under the FAR.

The most venerable and comprehensive analysis of the meaning of development remains the ASBCA’s decision in Bell Helicopter Textron.85 After canvassing the history of the DoD’s data rights clauses, Judge Lane concluded:

In order to be “developed” an item or component must be in being, that is, at least a prototype must have been fabricated . . . and practicability, workability, and functionality (largely synonymous concepts) must be shown through sufficient analysis and/or tests to demonstrate to reasonable persons skilled in the applicable art that there is a high probability the item or component will work as intended.86

Necessarily, if there is only a “high probability” the item will work as intended, the item may not yet be manufacturable or producible but will still have been developed for data rights purposes:

80. DFARS 227.7103-5(b).
81. Id.
82. See FAR 52.227-14(b)(1).
83. FAR 52.227-14.
84. DFARS 252.227-7013(a)(7), 252.227-7014(a)(7).
85. ASBCA No. 21192, 85-3 BCA ¶ 18,415, at 92,355–436.
86. Id. at 92,434 (emphasis added).
All “development” of the item or component need not be 100\% complete, and
the item or component need not be brought to the point where it could be sold
or offered for sale.87

The board’s definition of development has largely been adopted by the regu-
lators. The definition was included in the 1988 interim regulations88 and re-
stated in its present form in 1995, as reflected in the basic data rights clauses:

“Developed” means that an item, component, or process exists and is workable.
Thus the item or component must have been constructed or the process practiced.
Workability is generally established when the item, component, or process has
been analyzed or tested sufficiently to demonstrate to reasonable people skilled
in the applicable art that there is a high probability that it will operate as
intended.89

There is a similar but distinct definition of development that applies to non-
commercial computer software, as stated in DFARS 252.227-7014(a)(7):

“Developed” means that—

(i) A computer program has been successfully operated in a computer and tested
to the extent sufficient to demonstrate to reasonable persons skilled in the art
that the program can reasonably be expected to perform its intended purpose;
(ii) Computer software, other than computer programs, has been tested or ana-
lyzed to the extent sufficient to demonstrate to reasonable persons skilled in
the art that this software can reasonably be expected to perform its intended
purpose. . . . 90

I. Clarification No. 9: Improvements May Not Be Developments

The DFARS also reproduce the second portion of the ASBCA’s definition
about the stage of development, stating: “To be considered ‘developed,’ the
item, component, or process need not be at the stage where it could be of-
fered for sale or sold on the commercial market. . . .”91 This means a con-
tractor can achieve a state of development that will allow the company to re-
strict or limit the government’s rights, even though the government funds
improvements of the item. The logic is that the core development has
been achieved and that further refinements are not further development.
This logic is also reflected in the case law.92

87. Id.
89. DFARS 252.227-7013(a)(7).
90. In turn, both computer software and computer programs are defined in the DFARS, with
the notable definitional point being that a computer program is a subset of computer software.
That is, a computer program is defined as a set of instructions, rules, or routines recorded in a
form that is capable of causing a computer to perform a specific operation or series of opera-
tions, whereas computer software means “computer programs, source code, source code listings,
object code listings, design details, algorithms, processes, flowcharts, formulae, and related ma-
terial that would enable the software to be reproduced, recreated, or recompiled.” DFARS
252.227-7014(a)(3)-(4).
91. DFARS 252.227-7013(a)(7).
92. Dowty Decoto, Inc. v. Dep’t of the Navy, 883 F.2d 774, 780 (9th Cir. 1989) (“Other evi-
dence in the record suggests that the bars had achieved workability before any government
This principle, when coupled with the doctrine of segregability—i.e., ex-
amining development at the lowest, component level—should counteract the
assumption that a contractor cannot assert limited and restricted rights when
its privately developed technology is modified with direct government fund-
ing. The analysis requires evaluation of whether a particular component or
subroutine has been modified at all and, if so, how extensively. If some ele-
ment of that item was developed before the government contract and has not
been significantly modified under the contract, then the contractor retains its
limited or restricted rights. Any such assertion of rights by the contractor
would be correct and could not properly be the basis for an allegation of a
false statement or a false claim.93 The government will get broader rights
only if hardware has been modified so extensively or if the function or per-
formance of software has changed so significantly that the original is essen-
tially no longer recognizable. Only then would a contractor be precluded
from continuing to assert its limited or restricted rights.

A good example of a software change that superficially would appear signif-
icant, but that is not development, would be rewriting code in a new computer
language. The rewritten source code would be unrecognizable when com-
pared to the original (and vice versa), but that may not involve any develop-
ment if the software’s function or performance—at the module level—was un-
changed. “Development” typically requires some element of novelty.94

J. Clarification No. 10: You Can Sell Commercial Computer Software
to the Government, and Charge a Commercial Price, Even if
the Government Paid for the Software Development

Another collection of misunderstanding involves a contractor’s ability to li-
cense to the government and charge it a fair price for commercial computer
software. For instance, there is the misperception that if software is developed
under a government contract, it cannot subsequently be sold back to the gov-
ernment as a commercial item. This is often driven by the erroneous assump-
tion that commercial computer software has to be developed at private ex-
 pense. Relatedly, there is the mistaken view that if the software is sold to
the government as a commercial item, the cost of the government’s develop-
ment must be excluded from the price the contractor offers to the government.

As a threshold matter, there is nothing in any definition of commercial
item, whether under the FAR or the DFARS (and they are different), that
requires commercial computer software to have been developed at private
expense. Indeed, the “commercial item” status of software is usually deter-
mined independent of development funding. The development of software

money was paid to Decoto, and that the changes the government helped finance during the
course of the contract were aimed at increasing performance rather than achieving workabil-
ity.”). Accord Applied Devices Corp., B-187902, 77-1 CPD ¶ 362, at 9–12 (Comp. Gen. May 24,
1977) (making radar set manufacturable was not further development).
94. Id.
may have been paid for, in whole or in part, by the government, but that does not preclude the software thereafter from being commercial software.

This is a fundamentally important concept because if software is commercial, then it can be priced commercially—that is, at a fair and reasonable price, independent of whatever the costs were (or who paid for them) to develop the software. Commercial items are sold at commercial prices.

Similarly, if the government acquired license rights in the software by virtue of paying for development of the software—in whole or in part at the “lowest, practicable, segregable portion of the software . . . (e.g., a software sub-routine that performs a specific function),” then the government retains whatever rights it acquired as a result of paying for that development. If the government subsequently acquired the software as commercial software, that acquisition would not extinguish any existing government rights, such as unlimited rights. Those license rights would already have been paid for and vested under the government’s earlier development contract. This does not mean, however, that the contractor cannot later charge the government a fair and reasonable price for the commercial software. The contractor is not charging the government again for the prior development; it is charging a price for a commercial item. Nor is the government paying twice for anything; it already paid for its license rights, and now it is paying to acquire more items, not more rights.

IV. DFARS COMMERCIAL SOFTWARE

The current DFARS definition of commercial computer software was formulated for the 1995 data rights regulations and remains the same today. This definition was created before the FAR data rights definition of commercial computer software, which was not added to the FAR until December 2007 as part of the ill-named “plain language” rewrite of FAR Part 27. The DFARS definition states:

(1) “Commercial computer software” means software developed or regularly used for non-governmental purposes which—

95. DFARS 227.7203-4(b).
96. There is a caveat for noncommercial software at the DoD. DFARS 252.227-7014(j) prohibits a contractor from including in its costs any license or royalty for software or documentation when the government has already acquired the same or greater rights. There is a comparable prohibition for noncommercial technical data. DFARS 252.227-7013(j).
97. One exception would be if, under the original development contract, the government had included the deferred ordering clauses discussed supra. If these rights had not expired, the government could order the software developed under the prior contract at only the nominal cost of reproducing the software. See, e.g., DFARS 252.227-7027.
99. See FAR 2.101 (defining “commercial items” as those “sold, leased, or licensed to the general public” and that will become available in the “commercial marketplace”).
(i) Has been sold, leased, or licensed to the public;
(ii) Has been offered for sale, lease, or license to the public;
(iii) 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 this contract; or
(iv) Satisfies a criterion expressed in paragraph (a)(1)(i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this contract. 101

Note that the introductory phrase implicitly contemplates that software may have been developed under a government contract but later can become “regularly used for nongovernmental purposes.” 102 Moreover, there is no set amount of sales or offers for sales that have to be achieved, apart from one. Finally, the definition lacks language requiring development of the software at private expense. If software meets this definition, then it is commercial computer software at the DoD.

If it is commercial computer software at the DoD, then there is no DFARS contract clause that applies or that defines the government’s license rights to the commercial computer software. This was a radical change to the DoD regulations in 1995 when the DoD embraced the principle that if the software is commercial, the government should acquire it under the contractor’s standard commercial license. This notion is stated expressly in the regulations: “A specific contract clause governing the government’s rights in commercial computer software or commercial computer software documentation is not prescribed. As required by 227.7202-3, the government’s rights . . . shall be identified in a license agreement.” 103 In turn, DFARS 227.7202-3 provides:

(a) The government shall have only the rights specified in the license under which the commercial computer software or commercial computer software documentation was obtained.
(b) If the government has a need for rights not conveyed under the license customarily provided to the public, the government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights.

Notwithstanding the broad soundness of using a standard commercial license, not all terms of a commercial license are acceptable to the government. 104 No license negotiated between the contractor and government Contracting Officer can override statutory obligations, such as the Contract Disputes Act, the Anti-Deficiency Act, and the Prompt Payment Act. 105

101. DFARS 252.227-7014(a)(1).
102. Id.
103. Id.
105. DeVecchio, supra note 19, at 3.
These same principles hold true as well when the government is engaging in a Part 12 commercial item acquisition and using a commercial license. Ultimately, the license agreement should be incorporated into a contract by modification. The contract will then specify the government’s license rights—its rights of use—just as any commercial software license. And, as a commercial software license, it may reflect the fact that the software will be priced just like any other commercial item.

V. PRICING COMMERCIAL ITEMS

How one prices those license rights of use or, more broadly, how one prices a commercial item is not dependent upon a contractor’s costs, such as development costs, whether paid for by the contractor or paid for by the government. “Costs” and “prices” are significantly different concepts under the FAR. If one has a commercial item, then one can sell it to the government at a fair and reasonable price, even if it is not necessarily what it costs to develop the item.

This is reflected in FAR Part 15, which is the measure of price analysis for civilian agency and DoD acquisitions. First, it exempts commercial items from the requirement to provide certified cost or pricing data under the Truth in Negotiations Act (TINA). Cost or pricing data are a subject unto itself, but being exempted from having to provide cost or pricing data means, essentially, that the government does not require any detailed cost information about the commercial item. Second, FAR Part 15 provides that the government must use “price analysis” for commercial items. Price analysis is defined as “the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.”

This is not to say that a Contracting Officer is precluded from asking for cost data for commercial items, but rather, the Contracting Officer is to do so only “when there is no other means for determining a fair and reasonable price.” The FAR describes in great detail the other means the government should pursue to determine a fair and reasonable price before it seeks to obtain cost data. Thus, a contractor selling commercial software, whether to the DoD or to a civilian agency, can price the software initially any way it wants, regardless of what its development costs (or any other costs) were. Commercial companies, likewise, set a price for their products based on what the market will bear and rarely, if ever, on what initial development costs were.

106. See FAR 12.212(a).
107. See FAR 15.404-1(b), 14.408-2(a), 12.209.
108. FAR 15.403-1(c)(3).
110. FAR 15.403-3(c)(1).
111. FAR 15.404-1(b)(1) (emphasis added).
112. Id.
113. FAR 15.404-1(b).
Correspondingly, there is no basis for asserting a false claim or false statement when a contractor endeavors to sell to the government software or any item that qualifies as a commercial item and seeks to charge the government a commercial price.

VI. THE FAR DEFINITION

The FAR’s definition of commercial computer software does not alter this analysis. It was first introduced in 2007 to provide a definition of commercial computer software for use in the revisions of the FAR data rights provisions. Specifically, the FAR was revised to include a definition of “commercial computer software,” which is defined simply as “any computer software that is a commercial item.” Software will be considered commercial for purposes of FAR data rights if it fits the well-known commercial item definition of FAR 2.101.

Interestingly, there is one significant difference between the FAR and the DFARS regarding the use of a contractor’s software license agreement. Recall that the DFARS has no clause for commercial computer software. Under the FAR, civilian agencies are encouraged to use a standard commercial license, subject to the same admonition as at DoD that the license cannot override other government rights. Unlike at the DoD, however, under a FAR contract, a Contracting Officer does have a clause that can be used in lieu of a commercial license. FAR 52.227-19, “Commercial Computer
Software License,” gives the government the same rights in commercial computer software that it gets in noncommercial computer software provided with restricted rights—a dubious proposition.

That aside, pricing commercial items and commercial software in particular will, at the civilian agencies, be based on the same principles of fair and reasonable price—not costs—required by FAR Part 15.

VII. CONCLUSION

There is a widely held perception within the government contracts bar that plaintiffs’ attorneys and the Department of Justice have been pursuing qui tam actions against contractors with increasing aggressiveness and creativity. There is also a widely held perception that the data rights regulations and clauses are some of the most daunting to understand because of their length and seeming complexity. The confluence of these circumstances can lead to ill-founded FCA actions that never should have been brought. There is no need for this. Although the data rights regulations are indeed lengthy, their core principles are relatively few and straightforward, as reflected in the ten “clarifications” of this Article and its brief discussion of commercial software rights. If the plaintiffs’ bar and the DoJ understand these points or take the time to sort them out before pursuing a case, then everyone’s interest in the fair pursuit of justice will be better served.

119. See FAR 27.405-3, 52.227-19.