IP Evaluation: Perspectives and Considerations

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James McEwen, Senior Intellectual Property Attorney, Sikorsky Aircraft Corporation
Larry Brantley, Intellectual Property Counsel, Office of Command Counsel, Headquarters, U.S. Army Materiel Command
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“Considering intellectual property (IP) deliverables and associated license rights in source selection evaluation is an important acquisition and mission objective for many DoD acquisitions consistent with DoDI 5010.44 IP Acquisition and Licensing. When doing so, there is a fundamental tension between the following two complementary principles and practices:

1. Restrictions on Requiring Greater Than Standard IP Rights: The circumstances of contracting and policy implemented in other parts of the DFARS constrain the IP deliverables and license rights that the DoD may effectively require. In simple terms, the DoD cannot force contractors to agree to sell the IP that DoD may desire.

2. Smart Evaluation of IP Deliverables and License Rights: However, source selection evaluation factors may allow proposals to be evaluated for the impact of proposed restrictions on the Government's ability to use or disclose IP deliverables such as technical data and computer software. See DFARS 227.7103-10(a)(5) and 227.7203-10(a)(5). Conducting source selection evaluation of IP considerations consistent with these Procedures and the DFARS IP rules requires detailed understanding of and planning for these considerations to be effective and efficient. …

Source: DoD Source Selection Procedures (Linked to DFARS PGI 215.300)
Appendix E of SSPs pt. 2

Working with, leveraging, and negotiating within these tensions requires careful planning. Detailed guidance on balancing these competing objectives related to IP is beyond the scope of this document. Refer to the Adaptive Acquisition Framework Guidance Intellectual Property: A Strategic and Tactical Guidebook for more information on evaluating IP in source selection to effectively meet mission objectives and balance the interests of DoD and its contractors fairly and equitably. Assistance with IP acquisition issues is available from a member of the DoD IP Cadre in your DoD organization or within the Office of the Under Secretary of Defense for Acquisition and Sustainment.”

Source: DoD Source Selection Procedures (Linked to DFARS PGI 215.300)
“(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense except for the data identified at 227.7103-5(a)(2) and (a)(4) through (9).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, components, or processes developed at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to those items may be restricted.”

Source: Here
“(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed exclusively at private expense except for the software identified at 227.7203-5(a)(3) through (6).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish computer software developed exclusively at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose the software may be restricted.”

Source: [Here](#)
“(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights.”

Source: Here
“(5) Information provided by offerors in response to the solicitation provision at 252.227-7017 may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose computer software or computer software documentation.”

Source: [Here](#)
“2.3.2.4. Quality of Product or Service. In accordance with FAR 15.304(c)(2), the quality of product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, technical risk, management capability, personnel qualifications, and prior experience.

Note: The term “technical,” as used below and throughout the document, refers to non-cost factors other than past performance. More than one technical factor can be used and titled to match the specific evaluation criteria appropriate for the RFP. Unless stated otherwise in this document, the ratings in Table 2A and Table 2B or Table 3 shall be used for all quality of product or service factors other than past performance, regardless of the technical factor title.”

Source: DoD Source Selection Procedures
<table>
<thead>
<tr>
<th>Color Rating</th>
<th>Adjectival Rating</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blue</td>
<td>Outstanding</td>
<td>Proposal demonstrates an exceptional approach and understanding of the requirements, contains multiple strengths and/or at least one significant strength.</td>
</tr>
<tr>
<td>Purple</td>
<td>Good</td>
<td>Proposal demonstrates a thorough approach and understanding of the requirements and contains at least one strength or significant strength.</td>
</tr>
<tr>
<td>Green</td>
<td>Acceptable</td>
<td>Proposal demonstrates an adequate approach and understanding of the requirements.</td>
</tr>
<tr>
<td>Yellow</td>
<td>Marginal</td>
<td>Proposal has not demonstrated an adequate approach and understanding of the requirements.</td>
</tr>
<tr>
<td>Red</td>
<td>Unacceptable</td>
<td>Proposal does not meet requirements of the solicitation and, thus, contains one or more deficiencies and is un-awardable.</td>
</tr>
</tbody>
</table>

Source: [DoD Source Selection Procedures](#)
Table 2B. Technical Risk Rating Method

<table>
<thead>
<tr>
<th>Adjectival Rating</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>Proposal may contain weakness/weaknesses which have low potential to cause disruption of schedule, increased cost, or degradation of performance. Normal contractor emphasis and normal Government monitoring will likely be able to overcome any difficulties.</td>
</tr>
<tr>
<td>Moderate</td>
<td>Proposal contains a significant weakness or combination of weaknesses which may have a moderate potential to cause disruption of schedule, increased cost, or degradation of performance. Special contractor emphasis and close Government monitoring will likely be able to overcome any difficulties.</td>
</tr>
<tr>
<td>High</td>
<td>Proposal contains a significant weakness or combination of weaknesses which is likely to have high potential to cause significant disruption of schedule, increased cost, or degradation of performance. Special contractor emphasis and close Government monitoring will unlikely be able to overcome any difficulties.</td>
</tr>
<tr>
<td>Unacceptable</td>
<td>Proposal contains a deficiency or a combination of significant weaknesses that causes an unacceptable level of risk of unsuccessful performance.</td>
</tr>
</tbody>
</table>

Source: DoD Source Selection Procedures
## Table 3. Combined Technical/Risk Rating Method

<table>
<thead>
<tr>
<th>Color Rating</th>
<th>Adjectival Rating</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blue</td>
<td>Outstanding</td>
<td>Proposal demonstrates an exceptional approach and understanding of the requirements and contains multiple strengths and/or at least one significant strength, and risk of unsuccessful performance is low.</td>
</tr>
<tr>
<td>Purple</td>
<td>Good</td>
<td>Proposal indicates a thorough approach and understanding of the requirements and contains at least one strength or significant strength, and risk of unsuccessful performance is low to moderate.</td>
</tr>
<tr>
<td>Green</td>
<td>Acceptable</td>
<td>Proposal meets requirements and indicates an adequate approach and understanding of the requirements, and risk of unsuccessful performance is no worse than moderate.</td>
</tr>
<tr>
<td>Yellow</td>
<td>Marginal</td>
<td>Proposal has not demonstrated an adequate approach and understanding of the requirements, and/or risk of unsuccessful performance is high.</td>
</tr>
<tr>
<td>Red</td>
<td>Unacceptable</td>
<td>Proposal does not meet requirements of the solicitation and, thus, contains one or more deficiencies and is unawardable, and/or risk of performance is unacceptably high.</td>
</tr>
</tbody>
</table>

Source: [DoD Source Selection Procedures](#)
### Technical Evaluation Example

**GAO Matter of Raytheon – B-417535, et al.**

<table>
<thead>
<tr>
<th></th>
<th>Raytheon</th>
<th>Lockheed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Technical Approach</strong></td>
<td>Outstanding⁶</td>
<td>Good⁷</td>
</tr>
<tr>
<td><strong>Data Rights</strong></td>
<td>Outstanding</td>
<td>Outstanding</td>
</tr>
<tr>
<td><strong>Management Approach</strong></td>
<td>Acceptable⁸</td>
<td>Acceptable</td>
</tr>
<tr>
<td><strong>Past Performance</strong></td>
<td>Acceptable⁹</td>
<td>Acceptable</td>
</tr>
<tr>
<td><strong>Total Evaluated Cost/Price</strong></td>
<td>$335,886,866</td>
<td>$287,618,537</td>
</tr>
</tbody>
</table>

⁶ An outstanding proposal was found to meet requirements by demonstrating an exceptional approach and understanding of the requirements with multiple strengths and a low risk of unsuccessful performance. RFP at 396.

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Source: B-417535, et al. at 3.
B.2 Value Adjusted Total Evaluated Price Tradeoff.

“The VATEP technique monetizes different levels of performance that may correspond to the traditional requirements process of defining both threshold (minimum) and objective (maximum) performance and capabilities. It identifies in the RFP the percentage price increase (or dollar amount) the Government is willing to pay for specific, measurable levels of performance between threshold (minimum) and objective (maximum) criteria (e.g., better weapon accuracy, increased operational ranges, etc.). This amount is based on the value to the Government for above-minimum performance or capabilities. Value and cost are completely separate concepts that VATEP links in the RFP to inform industry decisions on what to offer to gain a competitive advantage. As described herein, VATEP is merely a structured technique for objectivizing how some (or all) of the requirements would be treated in the tradeoff process and then communicating that to offerors via the RFP.

VATEP may be appropriate when the RO wishes to optimally balance price and performance/capability above threshold (minimum) requirements to maximize the achievement of program objectives. One of the benefits of this process is that offerors may be more likely to propose innovative solutions, which provide higher performance/capability if it is clear to Industry what value the end user places on exceeding the threshold (minimum) performance/capability and how that will influence the evaluated cost/price.”

Source: DoD Source Selection Procedures
Notional Value Adjusted Total Evaluated Price Approach (VATEP)

- TEP = ECCP – VC – other non-IP adjustments
- VC =
  - If PIPP >= GIPE, VC = 0.
  - If PIPP < GIPE,

\[ VC = (GIPE - PIPP) \times IPMF \]

- TEP = Total Evaluated Price
- ECCP = Evaluated Contract Cost/Price (before final adjustments)
- VC = VATEP Credit (IP Adjustment to TEP)
- PIPP = Offeror’s Proposed IP Price
- IPMF = IP Merit Factor (from 0 to 1 worst to best)
- GIPE = Government IP Estimate

- IP Merit Factor
  - From 0 to 1 worst to best
  - Could be a percentage of enabled IP Use Cases
- Government IP Estimate
  - Value of IP from USG Perspective
  - Like an IP Valuation (subject of other IP Forum panels)
VATEP Incentive Examples

• Offer 1 PIPP=$75M; GIPE=$50M; IPMF=1
  • No VC because PIPP $75M > GIPE $50
• Offer 2 PIPP=$25M; GIPE=$50M; IPMF=.8
  • \( VC = (\$50M - \$25M) \times .8 = \$20M \)
• Offer 3 PIPP=$5M; GIPE=$50M; IPMF=.2
  • \( VC = (\$50M - \$5M) \times .2 = \$9M \)
• Offer 4 PIPP=$0M; GIPE=$50M; IPMF=1
  • \( VC = (\$50M - \$0M) \times 1 = \$50M \)
• Offer 5 PIPP=$50M; GIPE=$50M; IPMF=1
  • \( VC = (\$50M - \$50M) \times 1 = \$0 \)
VATEP: System & Use Case Hypotheticals

Ground Rules and Assumptions

Assumptions:
- Both offerings equally satisfy all technical requirements in RFP
- Both proposals are of equal price: $1m (1000 units at $1k each)
- VATEP credit will reduce the evaluated price. The offeror with the most VATEP credit will win.
- VATEP credit can be earned by either:
  1) USG having GPR or greater IP rights to the technical data necessary for execution of the use case, or
  2) granting USG SNLR to the tech data and/or software allowing for execution of the use case
VATEP: System & Use Case Hypotheticals

Example 1:
System = Frame
Use Case = Acquire Spare Frames from Alternative Suppliers (non-OEM)
Available VATEP = $50,000

What if:
1) OA’s frame was developed exclusively at private expense (LR) while OB’s frame was previously developed with USG funding (UR)?
2) OB’s frame is indestructible whereas OA’s frame will require replacement after every 1k hours?
Example 2:
System = Seat
Use Case = Acquire Spare Seats from Alternative Suppliers (non-OEM)
Available VATEP = $50,000

Offeror A
Tech Data is GPR

What if:
1) OB does not have a seat and is unable to earn VATEP for a nonexistent system?

Offeror B
No seat
Example 3:

System = Tire

Use Case = Repair Tires using a third party or organically (without OEM)

Available VATEP = $50,000

What if:

1) OA has two different types (one UR and the other LR) while OB only has two tires of the same type?
2) OB’s tires rarely need repairing because they are made from a special material only produced by 1 supplier in the world and that supplier won’t entertain giving up the IP because it makes $5B/yr commercially?
VATEP: System & Use Case Hypotheticals
Example 4:

System = Propulsion Control Software

Use Case = Modify Software using a third party or organically (without OEM) to upgrade and improve performance

Available VATEP = $50,000

What if:

OA is concerned because previous extensive testing revealed certain changes to the software could cause the energy storage device to explode, but otherwise wants USG to have the ability to upgrade and certainly wants to earn the VATEP. OA ultimately does not grant the greater IP rights due to safety concerns.
Conclusion
Questions?
(b) Required Provisions.-Regulations prescribed under subsection (a) shall include the following provisions:

“(1) Development exclusively with federal funds.-In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the unlimited right to-

(A) use technical data pertaining to the item or process; or

(B) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons.

(2) Development exclusively at private expense.-Except as provided in paragraphs (3), (4), and (7), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.”

Source: Here
"(3) Exception to paragraph (2).-Paragraph (2) does not apply to technical data that-
   (A) constitutes a correction or change to data furnished by the United States;
   (B) relates to form, fit, or function;
   (C) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component); or
   (D) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(4) Exception to paragraph (2).-Notwithstanding paragraph (2), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if-
   (A) such release, disclosure, or use-
      (i) is necessary for emergency repair and overhaul;
      (ii) is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or
      (iii) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;
   (B) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and
   (C) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use"

Source: Here
“(8) Limitations on requirements related to contractor or subcontractor rights in technical data. - A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract-

(A) to sell or otherwise relinquish to the United States any rights in technical data except-

   (i) rights in technical data described in paragraph (1) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;

   (ii) rights in technical data described in paragraph (3); or

   (iii) under the conditions described in paragraph (4); or

(B) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under paragraph (2).”

Source: Here