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Protecting Defense Technology Innovations

By Graham C. Phero, Michael Nathanson and Mike D. Webb *

Defense contracting is entering an era characterized by more competition, a faster pace of innovation, and dual-use technology. Defense contractors that are succeeding in this new environment are pursuing patent protection that establishes them as technology leaders, provides distinct revenue streams after contract execution, and streamlines relationships with international partners and subsidiaries. The authors of this article discuss protecting defense technology innovations in this new era.

The defense industry has historically been characterized by several consistent themes: dominance by a few major contractors, design-build contracts, and technology developed exclusively with government funding and for military use.

Times are changing. New players such as Palantir, Anduril, Shield AI, and Applied Intuition, are not only securing major prime contracts, but are leading bids for generational programs.[1] Further, this shift is driven in part by a focus on software-based innovations, particularly in artificial intelligence (AI) and autonomy. The ability to execute contracts without robust manufacturing facilities or supply chains lowers the barrier to entry for newcomers.

Further, the Department of Defense's (DoD) shift to software based innovations goes hand in hand with the rising prevalence of dual use technologies—those valuable for both the defense and commercial markets. For example, some estimates indicate that the number of dual-use technology startups in NATO countries rose by 16% within the last six months.[2]

Additionally, investment in dual-use technology increased by 25% during a similar period.[3] Furthermore, dual-use technology is increasingly developed with Internal Research and Development (IRAD) funds and private investors such as venture capital firms and venture capital arms of established primes.[4]

Ultimately, innovation within the defense industry is coming from a wider variety of companies, developing faster, and has diverse applicability and

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[1] https://www.forbes.com/sites/greatspeculations/2025/04/28/spacex-palantir-and-anduril-lead-the-race-to-build-trumps-golden-dome/.

[2] https://news.crunchbase.com/defense-tech/global-dual-use-tech-surge-onetti-mindthebridge/.

[3] Id.

[4] https://investors.boeing.com/investors/news/press-release-details/2022/Boeing-and-AE-

funding. The result is a more competitive and crowded landscape that calls for a fresh perspective on protecting defense technology innovations.

THE DEPARTMENT OF DEFENSE ENCOURAGES INTELLECTUAL PROPERTY OWNERSHIP

The recently published Intellectual Property (IP) Guidebook for DoD Acquisition affirmatively states that "IP protects industry innovation and generates revenue while also serving as a linchpin for national security."[5]

To be sure, the U.S. government does not automatically own patented inventions developed with DoD funding. Rather, the Bayh-Dole act—expanded by Ronald Reagan in 1983 to specifically apply to federal contractors—allows contractors to retain patent rights. The government obtains a non-exclusive, paid-up, royalty free license to use the invention for government purposes. But, the contractor retains rights to license, assign, and enforce the patent if it complies with the election, disclosure, and filing requirements defined in the Bayh-Dole act and the Defense Federal Acquisition Regulation Supplement (DFARS).[6] The government may exercise march-in rights if the contractor fails to achieve a practical application, meet public use requirements, satisfy health and safety needs, or comply with U.S. industry preferences.[7] However, since the enactment of Bayh-Dole, no federal agency has exercised its march-in rights.[8] Although, recent administrative moves suggest this trend could change.[9]

Further, as discussed in more detail later in this article, the DoD encourages data rights agreements that allow contractors to retain trade secrets, but it also wants to maintain competitive bidding and avoid dependence on a single vendor for a particular technology ("vendor-lock").

Industrial-Partners-Launch-Second-Venture-Fund-to-Invest-in-Innovative-Aerospace-and-Defense-Startups/default.aspx.

[5] Intellectual Property Guidebook for DoD Acquisition, p. 7, Office of the Under Secretary of Defense for Acquisition and Sustainment (April 30, 2025).

[6] 35 U.S.C. §§ 200–212; DFARS 252.227-7038(c).

[7] 35 U.S.C. § 203; DFARS 252.227-7038(h).

[8] Pricing and March-In Rights Under the Bayh-Dole Act (2025), https://www.congress.gov/crs-product/IF12582.

[9] https://www.reuters.com/legal/government/harvard-patents-targeted-by-trump-administration-2025-08-08/.

PATENT PROTECTION CAN SECURE FAVORABLE CONTRACTS AND SUB-CONTRACTS

In the defense procurement landscape, patents provide a legitimate basis for sole-source awards. Thus, if a company holds a patent on mission-critical technology, the DoD may contract with that company on a non-competitive, sole-source basis.

This is critical for start-ups, especially when developing a proprietary solution with no direct peer. A patent can justify a sole-source award, thereby allowing contractors to avoid competitive procurement. Notably, the DoD distinguishes strategic sole-source awards from undesirable vendor-lock. Specifically, although the DoD seeks to avoid unintentional vendor-lock caused by a failure to acquire necessary data rights, sole-source acquisition can be desirable based on market conditions and intelligence.[10]

Even if a company is not executing a prime contract directly, owning patents relevant to DoD needs demonstrates know-how that bolsters a hopeful sub-contractor's bid. Further, instead of absorbing the full duty of contract execution, a patent owner can license patent rights to prime contractors, thereby monetizing its innovation without incurring additional costs (e.g., hiring, investing in manufacturing, etc.).

Also, depending on the contract language, patented technology developed by a first contractor under a first contract can be licensed to a second contractor to execute a second contract. A DoD contract may contain a standard "Authorization and Consent" clause allowing the DoD to authorize other contractors to use the patented invention. Even with such a contractual requirement, patent owners can still license the invention outside the DoD, as discussed below.

PATENTING DUAL-USE TECHNOLOGY UNLOCKS UNIQUE MARKETS AND REVENUE STREAMS

When a company develops a sensor system or autonomous navigation platform for defense purposes that same technology can often integrate into commercial drones, smart vehicles, or industrial automation. A carefully crafted patent application that considers both commercial and military contexts can create lucrative opportunities for the patent owner.

Specifically, protecting dual use technology opens the door to in-house development of new products derived from the underlying protected invention.

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[10] Intellectual Property Guidebook for DoD Acquisition, p. 12, Office of the Under Secretary of Defense for Acquisition and Sustainment (April 30, 2025).

Additionally, patent owners can license their technology to private industry partners, thereby gaining access to unique markets and customer bases.

Because a patent is a right to exclude others, defense contractors developing dual-use technology can enforce their patents against private sector infringers. Completing a DoD contract without obtaining patent rights can leave contractors without means to profit from the continuing impact of their innovations, particularly where that innovation applies to distinct products and markets.

PATENTS CAN INCREASE PRIVATE FUNDING AND VALUATIONS

As venture capital becomes increasingly popular in the defense technology sphere, it is important, particularly for dual-use technology start-ups, to pursue patent protection. Venture capital firms, including venture capital arms of large DoD contractors, hesitate to invest in technology that competitors could readily copy and reproduce. The threat of copying poses a higher risk to investors in dual-use technologies, because the breadth and variety of potential copiers is greater than for technology that is exclusively applicable in the military theatre.

A strong patent portfolio not only opens doors to investment, but is also a valuable financial asset. For example, Archer Aviation recently purchased a patent portfolio from Overair to develop a hybrid-electric Vertical Take-Off and Landing aircraft for the U.S. military.[11] As another example, AeroVironment acquired BlueHalo for $4.1 billion in November 2024, including over 100 patents concerning drone swarm and counter drone technology.[12] Accordingly, patent protection can make an innovative defense firm stand-out to investors, and can serve as a powerful asset that drives sales and acquisitions.

PATENTS EASE ITAR/EAR COMPLIANCE AND CAN HELP AVOID SUBSTANTIAL FINES

Patent protection not only offers beneficial revenue and development opportunities, but can also simplify product development. Contractors that have international employees, or international suppliers or subcontractors face barriers to exporting technical data—specifically, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). Contractors are subject to severe fines for violations (e.g., $500,000 per

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[11] https://www.ainonline.com/aviation-news/defense/2025-08-11/archer-boosts-defense-capability-overair-ip-and-composites.

[12] https://bluehalo.com/aerovironment-and-bluehalo-complete-transaction-creating-a-global-defense-technology/; https://www.defensenews.com/pentagon/2024/11/19/aerovironment-to-acquire-bluehalo-known-for-drone-swarm-tech-for-4b/.

violation) and the government has previously reached eye-popping settlements with highly respected contractors.[13] Compliance is not inexpensive, requiring internal resources, export license fees, and waiting periods of 90 days or more to obtain an export license. Contractors that opt to restrict international communications cut out potential partners and complicate collaboration among globally distributed internal divisions. In turn, ITAR and EAR compliance and violations are often a substantial cost of doing business.

However, published patent applications, available in any patent office, are generally exempt from ITAR and EAR export regulations.[14] Specifically, technical data disclosed in a published patent application are not subject to ITAR or EAR. Therefore, through a patent application, defense contractors can share the disclosed technical information internationally without requiring an export license or incurring significant fines. Accordingly, DoD contractors that pursue patent protection enable lawful, cross-border collaboration while maintaining compliance with strict export control laws. Notably, the U.S. government can prevent publication where it deems national security is at risk, which would preclude application of the ITAR/EAR exemption.

Critically, the exemption from ITAR and EAR restrictions offered by a published patent application only extends to the technical data disclosed in the patent application. Accordingly, contractors should take care to distinguish the information disclosed in a patent application within their Technology Control Plan (TCP).

TRADE SECRET PROTECTION CAN BE A VALUABLE SUPPLEMENT FOR DEFENSE CONTRACTORS

For innovations that cannot be reverse engineered, trade secret protection provides certain advantages over patents because the underlying invention remains confidential. However, that advantage comes with strings attached. Fundamentally, maintaining enforceable trade secrets under state and federal law requires implementing internal processes to limit access, along with robust Non-Disclosure Agreements (NDAs) and employment agreements. The DoD procurement context introduces additional wrinkles.

Specifically, trade secrets are analyzed as data rights when negotiating ownership and license rights with the DoD. The DoD will seek to retain the

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[13] https://2021-2025.state.gov/u-s-department-of-state-concludes-200-million-settlement-resolving-export-violations-by-rtx-corporation/; https://2021-2025.state.gov/u-s-department-of-state-concludes-51-million-settlement-resolving-export-violations-by-the-boeing-company/; https://2017-2021.state.gov/u-s-department-of-state-concludes-13-million-settlement-of-alleged-export-violations-by-l3harris-technologies-inc/.

[14] 22 CFR §§ 120.33(b), 120.34(a)(5); 15 CFR § 734.3(b)(3)(iv).

rights necessary to avoid vendor-lock and maintain a competitive landscape. The DFARS provide several standard license packages (unlimited, unrestricted, government purpose, limited, restricted, and commercial data rights) that define what the government receives. Further, by default, the rights outlined in each license are typically applied to inventions at the lowest practical segregable level and are based on the funding source (i.e., government or internal).

Accordingly, DoD contractors seeking to maintain an invention as a trade secret should carefully track funding during development and delineate the invention into discrete components corresponding to the funding sources. For example, it may be desirable to isolate foundational components. The foundational component may be, for example, a module that enables dual-use. It may also be desirable to dedicate DoD funds to components that are uniquely applicable to the DoD contract (e.g., interoperability features, performance data, custom modifications), while relying on private funds for foundational components.

There are several alternatives to the default DFARS data rights approach, and each generally provides more flexibility to contractors and the DoD to negotiate tailored data rights agreements. Indeed, the DoD may prefer a Specially Negotiated License (SNL) based on a Modular Open Systems Approach (MOSA), whereby the DoD treats privately developed components as "black boxes" and just requires sufficient description of functionality so other vendors can develop alternative solutions.[15]

Additionally, unique considerations apply to contracts where performance is governed by the Small Business Innovation Research (SBIR) Program or the Small Business Technology Transfer (STTR) Program. Most importantly, the government obtains a non-exclusive license to use technical data developed with SBIR/STTR funding, recorded, and properly marked, but cannot disclose that data for 20 years.[16] Disclosure by the SBIR/STTR contractor can relieve the government of its non-disclosure obligation. Therefore, contractors pursuing both patent protection and SBIR/STTR data rights protection must be careful to avoid excessive disclosure in a patent application.

In general, although contractors generally own patented inventions developed with DoD funding, ownership of trade secrets is subject to negotiated license rights. A contractor that comes to the table with a robust IP portfolio, including patents and clearly identified and segregable trade secrets will have leverage relative to contractors that neglect IP development.

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[15] Intellectual Property Guidebook for DoD Acquisition, p. 24, Office of the Under Secretary of Defense for Acquisition and Sustainment (April 30, 2025).

[16] https://www.sbir.gov/tutorials/data-rights/tutorial-2#.

FILING FOR PATENT PROTECTION

The United States, and many other NATO countries, have a first-to-file patent system. That is, filing for patent protection before others secures an applicant's priority over competitors. In the United States, filing a provisional application can be an affordable and low risk option to commence formal patent protection.

Provisional applications hold a priority date for 12 months, allowing innovators to test market fit and improve the invention before committing to a non-provisional utility patent. A provisional application includes a disclosure of the invention, but the patent office does not examine or publish the application. Accordingly, applicants can further leverage the 12-month period to determine how to best balance patent and trade secret protection, while establishing a patent priority date and avoiding disclosure that bars trade secret protection (including SBIR/STTR data rights protection). Within the 12-month provisional pendency period, the applicant can file a non-provisional application and/or an international patent application that will be treated as though it was filed on the provisional application filing date.

Contractors should also consider design patent protection. Design patents protect the way an article looks, as opposed to how it functions. For example, design patents can protect unique shapes, patterns, and user interfaces. Notably, the 12-month provisional pendency period is not available for designs. However, the patent office does not publish design applications until the application issues as a patent. Also, because design patents protect aesthetics, not functionality, it is unlikely that a published design patent will disclose trade secrets. Therefore, like with provisional applications, contractors can file design patent applications without forfeiting trade secret protection, including data rights.

IN SUMMARY

Defense contracting is entering an era characterized by more competition, a faster pace of innovation, and dual-use technology. Defense contractors that are succeeding in this new environment are pursuing patent protection that establishes them as technology leaders, provides distinct revenue streams after contract execution, and streamlines relationships with international partners and subsidiaries. Further, the DoD recognizes that allowing contractors to retain IP rights is essential to competitive bidding and innovation. Therefore, in addition to retaining patent rights, defense contractors can negotiate license rights for trade secrets. Doing so builds a well-rounded IP portfolio with value beyond contract completion.