BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Exclusivity Agreements—Uses And Limitations Under FAR 52.203-6, "Restrictions On Subcontractor Sales To The Government"

By Brian A. Darst[*]

Exclusivity agreements limit the ability of one or more parties to the agreement to do business with others, whether they be potential competitors, suppliers, customers, or other business partners. When properly drafted, used in appropriate circumstances, and tailored to comply with antitrust and other laws, exclusivity agreements can be an effective tool to secure and protect market advantages and the parties' costs of investment, while minimizing uncertainties associated with their relationship and competition. However, before entering into an exclusivity agreement involving a U.S. Government contract, businesses must consider restrictions imposed on contractors and their subcontractors by the clause appearing at Federal Acquisition Regulation (FAR) 52.203-6, "Restrictions on Subcontractor Sales to the Government."[1] That clause implements a statutory policy prohibiting Department of Defense (DoD) and civilian agency prime contractors and subcontractors from entering into agreements or taking actions that have or may have the effect of unreasonably precluding direct sales by a subcontractor to the Government of any items or processes made or furnished by that subcontractor under the contract or under any follow-on production contract.[2]

At first glance, FAR 52.203-6 appears to be simple and straightforward—prohibiting the use of exclusivity agreements in almost any context except for FAR Part 12 procurements for commercial products or commercial services.[3] Yet, a closer examination of that clause, other clauses and statutes, and their implementing FAR and Defense FAR Supplement (DFARS) provisions shows that there are several nuances, caveats, and exceptions that limit the reach of these prohibitions.

[*]*Brian A. Darst is of counsel to the Reston, Virginia law firm of Odin Feldman Pittleman, P.C. where he specializes in Government contracts law.*

IN THIS ISSUE:

Depending on the kind of items, processes, or services being sold to the Government, the value of the contract or subcontract, and whether a subcontractor or supplier furnishes the item, process, or service directly to the prime contractor, a first-tier subcontractor, or a lower-tier subcontractor, prime contractors and subcontractors have some flexibility to enter into exclusivity arrangements without running afoul of the restrictions in FAR 52.203-6(a) or FAR 52.203-6(b) (Alternate I), prescribed for acquisition of commercial products or commercial services.

This Briefing Paper discusses the applicability of FAR 52.203-6 to different types of procurements and phases of the federal contracting process and examines the scope of the restrictions in that clause by analyzing its language in the context of other FAR and DFARS provisions, statutes, and agency guidance to assist the reader in determining what may be permissible. It also discusses what "other rights," which are reserved under paragraph (b) of both versions of the clause, a prime contractor or higher-tier subcontractor may be able to assert against the U.S. Government or private parties. While the goal of this Briefing Paper is to resolve some of the confusion surrounding FAR 52.203-6, because of inartful wording in the statutes and the clause itself, a lack of meaningful legislative or regulatory history, and a paucity of case law interpreting FAR 52.203-6, not every question can be answered. In those cases, this Briefing Paper points out areas of remaining uncertainty in FAR 52.203-6 and the underlying statutes that contractors should take into account when considering the use of an exclusivity agreement and when drafting its terms and conditions and that Government personnel should consider when drafting solicitations and contracts.

Exclusivity Agreements—Types, Uses, And Limitations In The Commercial Arena

Companies rely on exclusivity agreements to protect their interests by ensuring that they are the only parties with whom other signatories to that agreement may conduct business. During its term, one or more of the parties to an exclusivity agreement are effectively precluded from marketing to third parties or engaging in the activities covered by the agreement. By doing so, exclusivity agreements allow businesses to protect their investments and provide for greater certainty and stability. They can be an important tool to forecast future earnings with greater accuracy and plan accordingly.

Within the supply chain, exclusivity agreements can be divided into two main categories: (1) exclusive purchase agreements; and (2) exclusive supply agreements. Exclusive purchase agreements are for the benefit of suppliers and manufacturers and prohibit a dealer or reseller from selling products or services of any other manufacturer or source of supply or service. Conversely, exclusive supply agreements restrict a supplier of goods or services from selling those products or services to another buyer, like another dealer or reseller, a competitor, or directly to a customer or end user.[4] Exclusive supply agreements offer protection from competitors and ensures that

Editor: Valerie L. Gross

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

the intermediate buyer of the items or services (*i.e.*, the "middle man") has unique selling points—all of which could translate into a greater likelihood that customers will choose that business when purchasing the products or services in question.

Sometimes, a contract between a buyer and seller combines exclusive purchase and exclusive supply provisions, limiting both parties' abilities to conduct business with others involving the "inputs" and "outputs" identified in the agreement. Bilateral exclusivity agreements may provide stability for both parties to the agreement—guaranteeing a steady stream of revenues for a supplier, while assuring the buyer a consistent supply of goods, services, or other products. This could also lead to better pricing and discounts associated with increased volumes and ultimately translate into cost savings for both parties and even their customers.

Another variation of exclusivity agreements that is frequently encountered in Government contracting is the "exclusive teaming agreement." An exclusive teaming agreements is one in which two or more parties team with one another to pursue a future business opportunity, and, at the same time, place restrictions on one or more members of that team from competing against the team for that opportunity, or from acting as team members to other would-be competitors. Exclusive teaming agreements focus primarily on pre-award activities of the team members, but they may incorporate restrictions on a team member's activities after the award of a contract or subcontract if the team's efforts result in the award of a contract—essentially converting the exclusivity provisions into either an exclusive purchase agreement, an exclusive supply agreement, or both.

While exclusivity agreements may offer many benefits, there are also risks and downsides to such agreements. Because exclusivity agreements limit the parties' flexibility when dealing with others, they could adversely impact future operations, costs, and long-term marketing strategies. Such agreements may significantly restrict a company's ability to collaborate with other potential partners, suppliers, or customers, ultimately leading to reduced profits because of missed opportunities. Thus, anyone considering an exclusivity agreement should weigh the potential benefits and drawbacks before committing to such an arrangement and should draft each exclusivity agreement in a way that best protects their interests, that achieves their goals, and that recognizes each party's unique circumstances, services, products, markets, etc.

Exclusivity agreements take many forms and can be stand-alone agreements or provisions contained within other vehicles. They can apply to a variety of different business activities. Despite the lack of a uniform set of terms, to reduce the risks associated with these agreements and other problems, parties negotiating an exclusivity agreement should, at the very least, consider addressing the following:

- Identify which products, services, and activities are covered by the agreement;
- Describe the scope of the restrictions on the parties' activities when marketing, purchasing, buying, or selling those products or services;
- Specify the duration of the restrictions and agreement, as well as the methods by which the agreement may be terminated early by one or both parties; and
- Describe the legal and contractual consequences of one party's breach of the agreement to ensure that everyone understands what is expected of them, how the restrictions imposed on them align with each party's present and future business interests, and what could happen in the event of a violation.

No matter how well an exclusivity agreement is written, it can be difficult to monitor and enforce. The farther down the supply chain the parties to such agreements fall, the more difficult it may be to detect or prove a violation. It may also be difficult to take effective legal action against a breaching party without costly or time-consuming litigation. Furthermore, because exclusivity agreements have the

potential to restrict trade, they must be for a proper purpose and drafted in a way that complies with each applicable jurisdiction's limitations. Businesses considering an exclusivity agreement must, therefore, take into account federal and state laws and court rulings limiting their use and enforceability in the context of unreasonable restrictions on trade and antitrust laws. Even where the use of an exclusivity agreement may be permissible under FAR 52.203-6 or its Alternate I, when entering into any such arrangement, whether it be a pre-award exclusive teaming agreement or a post-award exclusivity agreement, that limits a subcontractor's or prime contractor's ability to pursue business with others, the parties must take this into account and draft their agreements accordingly.

The fact that an exclusivity agreement may involve current or future federal contracts does not lessen the importance of considering laws limiting unreasonable restrictions on trade. Federal antitrust statutes apply just as much to sales to the U.S. Government as they do to private parties.[5] Even before the passage of 10 U.S.C.A. § 2402 (redesignated as 10 U.S.C.A. § 4655) and 41 U.S.C.A. § 253g (redesignated as 41 U.S.C.A. § 4704)—the statutes that FAR 52.203-6 is designed to implement, the Government occasionally brought suit against prime contractors attempting to interfere with the efforts of their subcontractors to make direct sales to the Government by arguing that those efforts were illegal attempts at monopolization.[6]

The Sherman Antitrust Act of 1890,[7] as amended by the Clayton Antitrust Act of 1914,[8] places limits on the use of both exclusive purchase agreements and exclusive supply agreements and, thus, must be considered by vendors wishing to sell supplies or services to the Government and their sources of supply.[9] Would-be monopolists that try to impede the entry or expansion of new competitors by using exclusivity provisions because such competition would erode their market positions could be viewed as a violation of the Sherman Antitrust Act. At the same time, an exclusivity agreement is generally considered a non-price vertical restraint on trade and, as such, is not a *per se* violation of federal antitrust laws. As the Federal Trade Commission (FTC) has noted, exclusivity contracts can benefit competition in the marketplace by ensuring supply sources or sales outlets, reducing contracting costs, and creating dealer loyalty.[10] Because exclusivity agreements are not "*per se*" illegal, they are reviewed by courts and antitrust agencies, such as the FTC, under a "rule of reason" standard like that described in 15 U.S.C.A. § 4302.[11] The rule of reason standard looks at the totality of the circumstances to determine whether, on balance, the agreement or practice promotes or suppresses market competition.[12] Factors considered under the rule of reason standard include (1) the structure of the industry; (2) the facts peculiar to the businesses' operations within the industry (including the parties' relative market power); and (3) the history of the duration of and the rationale for the restraint.[13] The potential for harm to competition from an exclusivity agreement increases with (a) the length of its term; (b) the more outlets or sources covered by the agreement; and (c) the fewer alternative outlets or sources not covered by the agreement.[14]

In addition to federal antitrust statutes, most states have enacted antitrust laws that are enforced by state attorneys general or private plaintiffs. Each jurisdiction applies its own standards when considering the enforceability of exclusivity agreements, but many of these state statutes are based on the federal antitrust laws discussed above and apply the same analyses as federal antitrust regulators.[15] Having said this, while not prohibited by law, in many cases, exclusivity agreements may be viewed with disfavor by a court or other administrative body applying a state's law.[16] For example, under Virginia law, when determining whether to enforce such agreements, a court will evaluate whether the non-compete agreement is (1) "narrowly drawn" to protect a legitimate business interest, (2) "not unduly burdensome" on the contracting party's "ability to earn a living," and (3) "not against public policy."[17] Other jurisdictions' views on exclusivity agreements and the tests that courts or administrative bodies in those jurisdictions apply to

resolve disputes over their enforceability differ somewhat from one another.

Because of this, in addition to the drafting points discussed above, businesses negotiating an exclusivity agreement should consider including a choice of law provision that specifies which jurisdiction's laws will govern the enforceability and performance of the agreement—selecting the most favorable jurisdiction's law under applicable choice of law guidelines. Also, if the restrictions take the form of a provision within a larger agreement, the parties should consider including a "severability clause," stating that if any provision of the agreement is held to be illegal, in conflict with law, or otherwise invalid, the remaining portions of that agreement will be "severable" from and will not affect the enforceability of the provisions. A severability provision may save an otherwise void or voidable subcontract or other agreement, including a pre-award teaming agreement, even if it were found to contain one or more provisions violating FAR 52.203-6 or some other aspects of law.[18]

FAR 52.203-6—Origins, Prohibitions, And Confusion Surrounding The Clause

FAR 52.203-6 implements two identical statutory provisions, one of which was enacted by the Defense Procurement Reform Act of 1984—part of the Department of Defense Authorization Act for 1985,[19] and the other of which was enacted by the Small Business and Federal Procurement Competition Enhancement Act of 1984.[20] The overarching purpose of these provisions was to preclude prime contractors from using their leverage to prevent subcontractors from selling directly to the Government, thereby ensuring competition for all sectors of the economy, reducing costs to the Government, and opening up opportunities for small business concerns.[21] These Acts were separate from the Competition in Contracting Act of 1984 (CICA), which was enacted into law several months earlier as Title VII of the Deficit Reduction Act of 1984.[22] However, they share many of the same goals as CICA, which is intended to encourage competition for the award of all types of Government contracts.

The origins of the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act can be traced back to a series of congressional hearings that began in 1983 into DoD's procurement of spare and replenishment parts and the effectiveness of DoD's Spare Parts Breakout Program under the Defense Acquisition Regulation (DAR)—a predecessor of the FAR and DFARS. [23] This was not Congress' first review of its kind. Congress had been raising concerns about DoD's acquisition of spare and replenishment parts for at least 15 years before these congressional hearings began.[24] In 1982, Congress had even recommended that "direct purchase of spares from subcontractors (rather than from the prime) should be pursued."[25]

Before passage of these Acts, DoD had begun taking some actions on its own to address the costs of spare and replenishment parts.[26] However, while these hearings were being conducted, news reports began to surface about excessive charges for spare parts under DoD programs. One of the more infamous reports involved DoD's acquisition of $435 claw hammers from a major defense contractor that could have been purchased at any hardware store for only a few dollars.[27] Several news reports blamed the high cost not only of those hammers, but of other spare and replenishment parts, on a combination of greedy contractors and a lack of competition.[28] In truth, the $435 hammer was a myth and was the result of an accounting practice called the equal allocation method, which made it appear that the price of each hammer was $435. The Government's actual cost of each hammer was only about $15.[29] Nonetheless, this and related allegations in the media of wasteful spending became a rallying cry for the press, the public, and members of Congress about problems with the procurement system and the need to be able to purchase parts and services directly from a manufacturer or other source.[30]

Among other things, the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act contained sections directing Government contracting officials to include a provision in contracts for property or services that prohibit contractors from entering into agreements with their subcontractors that have or may have the effect of unreasonably restricting sales by those subcontractors directly to the Government of any items or processes (including computer software) that had been made or furnished by the subcontractors under that contract (or any follow-on production contract).[31] Both Acts also included sections precluding a contractor from acting in any other manner that would or could have the effect of unreasonably restricting a subcontractor's ability to make direct sales to the Government.[32] Today, both sections are codified at 10 U.S.C.A. § 4655 and 41 U.S.C.A. § 4704.

Three FAR provisions implement these statutes. FAR 3.503-1 sets forth the Government's policy of not unreasonably precluding subcontractors from making direct sales to the Government, FAR 3.503-2 describes the circumstances under which the clause appearing at FAR 52.203-6 must be included in solicitations and prime contracts, and FAR 52.203-6 is the clause in which these prohibitions appears. [33] Apart from differences in formatting, with three minor changes, all of which will be discussed later, FAR 52.203-6 relies on the same substantive language as these statutes.

Since the promulgation of the FAR's provisions and clause, there has been and continues to be a substantial amount of confusion over just how broad the restrictions in FAR 52.203-6(a) are, what types of caveats and exemptions in FAR 52.203-6(b) are available to contractors and subcontractors, and under what circumstances must this clause be flowed down to first-tier or lower-tier subcontractors under FAR 52.203-6(c). Part of this confusion is due to the fact that FAR 52.203-6 and FAR 52.203-6 (Alternate I) are incorporated into a Government solicitation and prime contract by reference only.[34] The practice of incorporation by reference does not lessen the effectiveness of a FAR clause. It continues to have "the same force and effect as if [it] were given in full text."[35] Incorporating FAR and agency FAR Supplement clauses, like FAR 52.203-6, by reference only is also a common practice in subcontracts. Prime contractors and higher-tier subcontractors routinely flow down FAR and FAR Supplement clauses into subcontracts by reference only, relying on general substitutions for words like "contractor for Government" and "subcontractor for contractor," etc.

The practice of incorporation by reference may be common, but it often leads Government officials and private parties to a contract or subcontract to naively focus only on the title of a clause without ever reading it, or to dismiss a clause as being innocuous "boiler plate."[36] Generic flow-down practices by prime contractors or higher-tier subcontractors can also impose unnecessary and costly burdens on subcontractors that are not required—especially in the case of subcontracts for commercial products or commercial services. In some cases, wholesale substitutions of words and generic flow-down practices can even render a clause's terms meaningless.

Another thing that leads to confusion on the part of Government officials, contractors, and subcontractors is that FAR 52.203-6 and its underlying statutes are inartfully worded. They include terms that are not explained, are not defined in the FAR or DFARS, or do not align with other statutory or regulatory provisions—several of which came into being after the 1984 enactment of the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act. To understand the full extent of the clause's restrictions, as well as what may be permitted, it is often necessary to look beyond FAR 52.203-6 or FAR 3.503 to other FAR or DFARS provisions. That, coupled with the lack of meaningful legislative or regulatory history regarding the scope or many terms of FAR 52.203-6, has led to uncertainty at all levels of the supply chain.

Applicability Of FAR 52.203-6 To Agreements And Actions Before, During, And After Performance Of A Contract For Products Or Services

Before discussing the scope of FAR 52.203-6's three paragraphs and what may or may not be permitted under that clause or FAR 52.203-6(b) (Alternate I), let us examine the applicability of FAR 52.203-6 to and its effect on different phases of the acquisition and contracting process.

Applicability Of FAR 52.203-6 To Pre-Award Acts And Teaming Agreements

FAR 52.203-6 and FAR 52.203-6 (Alternate I) are contract clauses.[37] FAR "contract clauses" or "clauses" may include requirements that apply after contract award or both before and after award.[38] To determine whether any clause affects pre-award activities under a prime contract, one must examine its provisions to see what, if any obligations the clause imposes on an offeror or bidder before award. The questions that this presents are (1) does FAR 52.203-6 impose any duties or prohibitions on an offeror or its would-be subcontractors prior to award of a contract in which the clause appears; and (2) what effects do FAR 52.203-6's or Alternate I's post-award restrictions have on an offeror, bidder, or its proposed subcontractors that must be considered before award. The answers to these questions are particularly important in pre-award teaming agreements. They affect whether restrictive provisions in such agreements are permissible and, if so, the degree to which the agreement may limit a team member's activities outside the team's efforts.

FAR 9.601 defines a "contractor team arrangement" as one in which two or more companies form a partnership or joint venture to act as a potential prime contractor, or where a potential prime contractor agrees with one or more other companies to have them act as subcontractors under a specified Government contract or acquisition program.[39] Pre-award teaming arrangements are commonplace in the federal procurement system, and their use has steadily increased over the years. Such agreements are more likely to be successful when program costs are high; the past performance and expertise of the team members complement one another and are necessary to accomplish the requirements of a contract; and the contract requires a degree of cooperation among firms that may not be achieved by other techniques like a more traditional prime contractor/subcontractor relationship.[40] The FAR recognizes that contractor team arrangements may be desirable from both the Government's and industry's standpoint as they enable those companies involved to complement one another's unique capabilities and offer the Government the best combination of performance, costs, and delivery for the systems or products being acquired.[41] This is especially true in the case of complex research and development acquisitions, but the FAR recognizes that contractor team arrangements may also be used for acquisitions of production contracts.[42]

Pre-award teaming agreements, contractor team arrangements, or a contractor's other pre-award activities are not specifically addressed in FAR 3.503-1, FAR 52.203-6, or either statute that these FAR provisions implement. When one looks at the prohibitions in FAR 52.203-6(a), they all seem to revolve around unreasonable restrictions on direct sales of items, processes, and services that have been made or furnished by a subcontractor under that contract or under a follow-on production contract. This has led some to suggest that, because FAR 52.203-6 is a contract clause and not a solicitation provision, its prohibitions only come into play after a prime contract is awarded. Some have even suggested that, as a contract clause, FAR 52.203-6 has no applicability to pre-award exclusive teaming agreements at all.

FAR 52.203-6 and FAR 52.203-6 (Alternate I) may be contract clauses, but it must be emphasized that the prohibitions focus on entering into agreements and taking other actions, which necessarily involve future events. Nothing in paragraph (a) suggests that the prohibited agreements or actions are limited to only post-award activities—as long as they have or may have the effect of restricting direct subcontrac-

tor sales to the Government. Indeed, in addition to prohibiting agreements with actual subcontractors that may restrict direct sales of items, processes, or probably services to the Government, FAR 52.203-6(a) prohibits agreements with an "actual or prospective subcontractor."[43] It, therefore, is a mistake to simply ignore FAR 52.203-6's prohibitions before award. Exclusivity agreements entered into prior to award, joint ventures, and teaming arrangements could have far-reaching implications beyond preparation and submission of a proposal and frequently include provisions addressing the team members' roles and responsibilities following award and throughout performance of the prime contract.[44]

Since pre-award teaming agreements frequently entail the sharing of proprietary and confidential information among team members, the development of joint strategies and proposal preparation approaches to pursue an opportunity, and discuss which team members will be responsible for post-award activities, including the team members' roles and responsibilities for performance of any contract awarded by the Government, teaming agreements often include restrictive provisions like non-disclosure agreements (NDAs), non-solicitation or "no-poach" provisions, and provisions limiting the team members' ability to deal or interact with other potential competitors. Because the selection of team members depends largely on what competitive advantages each member brings to the team, teaming agreements frequently include provisions that specify the degree of "exclusivity" required in the teaming relationship—*i.e.*, whether one or more team members may concurrently team with other firms during the competition or after award of the Government prime contract, act as subcontractors to competitors, or independently submit bids or proposals in response to a Government solicitation. They may even include provisions limiting a team member's marketing or performance activities following the award of a prime contract or subcontract outside the teaming arrangement.[45]

The issue that this creates is that, on the one hand FAR 52.203-6(a) and FAR 52.203-6(b) (Alternate I) would seem to impose limits on such provisions—at least to the extent they limit post-award activities by a team member under its subcontract. On the other hand, FAR Subpart 9.6's encourages pre-award contractor team arrangements. The FAR does state that FAR Subpart 9.6's policy of encouragement does not authorize contractor team arrangements in violation of antitrust laws and does not limit the Government's right to pursue competitive contracting, subcontracting, or component breakout after initial production or at any other time.[46] At the same time, FAR Subpart 9.6 also provides that "[t]he Government will recognize the integrity and validity of contractor team arrangements; provided, the arrangements and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of such contractor team arrangements."[47]

This presents a dilemma for team members when drafting effective teaming agreements, while also taking into account those restrictions in FAR 52.203-6. An all-encompassing reading of FAR 52.203-6(a)'s prohibitions would have a chilling effect on teaming arrangements since it would inhibit the sharing of proprietary or confidential information, bidding strategies, and even competitive advantages associated with selecting individual team members without the fear of having those members misappropriate information or "game the process" by joining multiple teams to better their chances of participating in any contract that would result from a procurement. Yet, beyond the foregoing, there is no regulatory guidance in FAR Subpart 9.6 on the use of exclusive teaming arrangements or the standards by which the Government is to review such arrangements in the context of alleged anticompetitive behavior.

Government officials have expressed concerns about the potential for misuse of exclusivity provisions in teaming agreements under federal antitrust laws. As early as 1999, concerns regarding the use of exclusivity provisions in Government teaming agreements and their anticompetitive effects led DoD to

consider adding "exclusive teaming arrangements" in which one or more combinations of companies participating on the team would be the sole provider of a product or service that is essential for contract performance to FAR 3.303(c)'s list of examples of practices that may evidence an antitrust violation.[48] In 2001, DoD went so far as to issue a proposed rule that would have accomplished this,[49] but it was withdrawn in 2002 after comments received by DoD showed that there was no need for such guidance in the DFARS.[50]

Yet, even without a regulation, some DoD agencies issued or proposed their own guidance that could restrict or even prohibit the use of exclusive teaming agreements. In 2004, the National Reconnaissance Office (NRO) adopted a solicitation provision that prohibited offerors on NRO procurements from entering into exclusive teaming agreements, based upon its determination that "such arrangements unduly limit competition."[51] In 2005, Naval Air Systems Command (NAVAIR) also developed a proposed solicitation provision providing guidance on how it would evaluate exclusive teaming arrangements.[52] The current status of these provisions is unclear, but the fact that agencies may have their own solicitation provisions makes it imperative that any offeror considering an exclusive teaming agreement carefully review a solicitation to determine if there are any restrictions that might affect what may be permitted.

Indeed, the Defense Contract Audit Agency's (DCAA) Contract Audit Manual (CAM) lists as an example of anti-competitive procurement practices, an exclusive teaming arrangement in which one company teams exclusively with another company that other potential offerors consider essential for contract performance. The CAM does states that the potential for an antitrust violation is present "only if one or a combination of the companies participating in an exclusive teaming arrangement is the sole provider of a product or service that is essential for contract performance, and the Government's efforts to eliminate the exclusive teaming arrangement are unsuccessful." Yet, DCAA auditors are instructed to notify the contracting officer of the presence of such arrangements, and, if the auditor believes that the contracting officer's efforts to resolve the issue have been unsuccessful, the auditor is to consult with DCAA's Headquarters' General Counsel.[53]

None of the guidance in the CAM, the earlier attempts by DoD to add exclusive teaming agreements to the list of anticompetitive conduct under FAR 3.303(c), or any other solicitation provisions discussed in this Briefing Paper mentions FAR 52.203-6. Yet, that does not mean that prohibitions in FAR 52.203-6(a) would have no effect on such pre-award business arrangements, even if they were not found to present antitrust concerns. While there are only a few reported legal decisions involving the application of FAR 52.203-6, three cases have dealt with this clause when dealing with exclusivity provisions in teaming agreements. One case was a bid protest at the U.S. Court of Federal Claims filed by an unsuccessful offeror that challenged the Government's handling of an exclusivity provision in a teaming agreement entered into in advance of a Government prime contract.[54] In another bid protest filed at the Government Accountability Office (GAO), two offerors, whose proposals had been rejected by the agency, alleged that a pre-award arrangement between the awardee and other concerns violated FAR 52.203-6.[55] The third case was a lawsuit filed in federal district court in which FAR 52.203-6 was invoked in an attempt to invalidate a pre-award agreement with another subcontractor to compete for and be awarded a first-tier subcontract under an existing Government prime contract.[56] All three of these cases were dismissed or denied due to procedural defects or a lack of proof, but they re-emphasize the need to take into account limitations imposed on a prime contractor and its subcontractor by FAR 52.203-6(a) or FAR 52.203-6(b) (Alternate I) when drafting pre-award agreements.

At the same time, depending on the form a team takes, how the team members will perform under any resulting contract awarded by the Government, and how the restrictions on one or more team members'

pre-award and post-award activities are structured, it may be possible to draft an effective exclusivity provision that protects the team members' interests, while remaining compliant with any future restrictions in FAR 52.203-6(a) or FAR 52.203-6(b) (Alternate I) that come into play after award.

First, how the "team" will bid and how a particular team member will perform its work after award is important when determining the extent to which FAR 52.203-6(a)'s prohibitions or FAR 52.203-6(b) (Alternate I)'s limitations apply. These prohibitions and limitations only apply to "subcontractors" that make or furnish items, processes, and services under a prime contract. However, contractor teaming arrangements may also exist where "[t]wo or more companies form a partnership or a joint venture to act as a potential prime contractor."[57] If a party is not considered to be a "subcontractor" and is not expected to be awarded a "subcontract" under a prime contract or higher-tier subcontract, nothing in FAR 52.203-6 or the statutes that the clause implements would prohibit an exclusivity agreement. Yet, caution must be exercised. If the work of a member under a future prime contract will be performed via a "subcontract" to the joint venture, FAR 52.203-6 may apply and limit the scope of such exclusivity provisions.

Second, FAR 52.203-6(a)'s and FAR 52.203-6(b) (Alternate I)'s prohibitions and limitations only apply to agreements and actions that have the effect of restricting direct sales of items, processes, and services made or furnished by subcontractors under a contract.[58] A non-compete or exclusive teaming provision could be narrowly tailored to limit any restrictions imposed on the team members to proposal or bidding activities before award or before performance of any subcontract issued to a team member without violating FAR 52.203-6.

Third, because FAR 52.203-6(a) only prohibits agreements or actions restricting a subcontractor from making sales of items or processes "directly to the Government," nothing in FAR 52.203-6 would preclude the parties to a teaming arrangement limiting a potential subcontractor from joining with other teams to act as either a subcontractor of another prime contractor or a member of a separately formed joint venture to compete under a solicitation or to offer its supplies, processes, or services as a subcontractor to another competing offeror or team.

Finally, nothing in FAR 52.203-6 would preclude a member of a team from enforcing its other legal rights under federal or state law against another member's threatened or actual breaches of NDAs, non-solicitation agreements, or any other type of restrictions that are not prohibited by FAR 52.203-6, whether it be through an injunction, damages, or both and regardless of whether the NDA or non-solicitation agreement is part of the teaming agreement or another agreement entered into by the parties.

Thus, while the post-award effect of FAR 52.203-6(a)'s prohibitions and FAR 52.203-6(b) (Alternate I)'s limitations on exclusivity agreements must be considered when making pre-award decisions and when drafting any exclusive teaming agreement, it is possible to agree to provisions protecting the team member's proprietary and confidential information and approaches, while staying within the limits of paragraph (a) or Alternate I's paragraph (b). At the same time, there are unanswered questions regarding the scope of FAR 52.203-6's restrictions and the extent to which its limitations could affect a prime contractor's and its actual or prospective subcontractors' abilities to enter into an exclusivity arrangement before award.

First, it is common for teaming agreements to limit a team member not only from joining other teams, but also from submitting a proposal directly to the Government as an independent offeror under that solicitation. The question is whether such proscriptive language would violate FAR 52.2036(a)'s prohibition against "otherwise act[ing] in any manner, which has or may have the effect of restricting" direct sales by a subcontractor directly to the Government. Since the clause focuses on items, processes, and probably services actually made or furnished under a yet-to-be awarded subcontract, it is doubtful that

these prohibitions would apply to a team member's bidding practices unless the procurement were for a follow-on production contract, but it is unclear how a court or administrative body might rule on this issue.

Second, the Government often conducts mini-competitions for orders under multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts, including Federal Supply Schedule (FSS) contracts issued by the U.S. General Services Administration (GSA) using FAR Subpart 8.4, and Government-wide acquisition contracts (GWACs), or other agency-specific multiple-award contracts issued pursuant to FAR Subpart 16.5. Unlike a teaming agreement that precedes any contract, teaming agreements entered into in pursuit of one or more orders under an existing multiple-award contract would already be subject to FAR 52.203-6. This leads to the question whether such agreements or other actions that have or may have the effect of restricting sales by one or more team members directly to the Government would run afoul of the prohibitions or restrictions in the clause. Since any items, processes, or services that are the subject of that mini-competition may have already been delivered by the team member under another task order or delivery order previously issued under the ID/IQ contract, it makes the use of an exclusivity agreement under a future order even more problematic. One potential safe-harbor, however, is that, if a team member that will act as a subcontractor does not have its own ID/IQ contract, that member would not be able to submit a proposal or quote to make direct sales of such products or services to the Government under the ID/IQ contract. In those cases, restricting the team member from responding to a solicitation for a task order or delivery order would not violate FAR 52.203-6—provided that it did not restrict that team member from making direct sales of those items, processes, or services under some other contract.

These questions cannot easily be answered. There are too many variables, and, given the language of the clause and the way task orders and delivery orders are issued under multiple-award ID/IQ contracts, the use of an exclusivity provision and the scope of its restrictions would need to be examined on a case-by-case basis.

Applicability Of FAR 52.203-6 To Prime Contracts

When the Federal Acquisition Regulatory Council (FAR Council) promulgated FAR 3.502-2, that provision required Government contracting officials to insert FAR 52.203-6 in all solicitations and contracts for supplies or services without regard to the value of the procurement.[59] This was revised in 1994, when Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA). The purpose of FASA was to promote efficiency and economy in contracting and avoid unnecessary burdens for both agencies and contractors when procuring goods or services. One of FASA's procurement reforms was the replacement of an existing $25,000 small purchase threshold that had been established in the mid-1980s with the simplified acquisition threshold (SAT) that was applicable to both civilian agency and DoD procurements and that was significantly higher.[60]

FASA not only established simplified acquisition procedures to be used by Government officials when acquiring goods and services at or below the SAT, which appear at FAR Part 13, "Simplified Acquisition Procedures," but it also required the FAR Council to develop a list of provisions of law within the FAR that were inapplicable to contracts and subcontracts in amounts not greater than the SAT.[61] Importantly, §§ 4102(f) and 4103(b) of FASA specifically identified the prohibition against limiting subcontractor direct sales to the Government as one of these provisions of law that were not applicable to civilian and DoD contracts valued at or below the SAT.[62] As a result, FAR 3.503-2 now only requires that FAR 52.203-6 or FAR 52.203-6(b) (Alternate I) be inserted in solicitations and contracts exceeding the SAT as defined in FAR 2.101.[63] Because this same SAT limitation was also applied to the need to flow down FAR 52.203-6 to subcontracts,[64] FASA opened up a wide array of possibilities to avoid application of FAR 52.203-6 at different levels within the supply chain.

The prescriptive language for the clause appearing in FAR 3.503-2 may seem straightforward, but there are several nuances in the definition of the SAT and how contracting officials and contractors go about determining what the SAT is in different types of procurements that sometimes leads to confusion. The first nuance of which Government officials and contractors must be aware when deciding whether to incorporate FAR 52.203-6 or FAR 52.203-6(b) (Alternate I) into a solicitation or resulting contract, or, for that matter, flowing FAR 52.203-6 down to a subcontract, is that there is no single SAT defined by FAR 2.101. The SAT varies depending on the purposes for which the contract is awarded, as well as where that contract is issued and performed. When determining whether to include FAR 52.203-6 in a solicitation or prime contract, or whether to flow that FAR clause down to any first-tier or lower tier subcontract, one must determine which of these SATs apply.

For most federal procurements, the SAT is currently $250,000.[65] However, the SAT for acquisitions of supplies or services to be used to support contingency operations, facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attacks, a request from the Secretary of State or the Administrator for the U.S. Agency for International Development (USAID) to facilitate the provision of international assistance pursuant to 22 U.S.C.A. § 2292, or a response to an emergency or major disaster under 42 U.S.C.A. 5122 or 41 U.S.C.A. § 1903 ranges from $800,000 to $1.5 million. The SAT for those acquisitions depends on whether the contract is awarded and performed inside or outside the United States.[66] In addition, if the acquisition of supplies or services is to be used to support a humanitarian or peacekeeping operation as provided in 10 U.S.C.A. § 3015, the SAT for that procurement is $500,000 if the contract is to be awarded and performed, or purchases made, outside the United States. If a humanitarian or peacekeeping operation support contract is either awarded or performed in or the purchase is made inside the United States, the larger $500,000 SAT would not be applicable. Instead, the basic $250,000 SAT would apply to that acquisition.[67]

A second nuance in determining whether the value of a contract is expected to exceed the SAT is that, unless otherwise specified, if an action establishes a maximum quantity of supplies or services to be acquired or establishes a ceiling price or final price based on future events, the final anticipated dollar value and, thus, applicability of FAR 52.203-6, must be based on the "highest final price alternative to the Government, including the dollar value of all options."[68] This would apply to indefinite-delivery contracts, such as requirements contracts and ID/IQ contracts issued pursuant to FAR Subpart 16.5. While the final value of such contracts depends on the number of task orders or delivery orders placed by the ordering activity, it is not the value of individual delivery orders or task orders, or even an ID/IQ contract's minimum guarantee that determines whether FAR 52.203-6 applies to that order. The same is true of time-and-materials (T&M) and labor-hour (L-H) contracts issued pursuant to FAR Subpart 16.6 and level-of-effort (LOE) term contracts issued pursuant to FAR 16.207. FAR 1.108(c) requires contracting officials to look to the maximum quantity of services to determine if such contracts are valued at more than the SAT, even though the amount of services needed to complete performance may be far less than the estimated quantity upon which the contract award amount was based.[69]

At the same time, the FAR's convention of looking at the highest final price alternative to determine applicability of FAR clauses based on specified dollar thresholds does not govern every procurement vehicle. That convention would not apply to a basic agreement (BA) or basic ordering agreement (BOA) issued under FAR Subpart 16.7 or a blanket purchase agreement (BPA) issued pursuant to FAR 13.303 or DFARS 213.303.[70] BAs, BOAs, and BPAs may resemble ID/IQ contracts or requirements contracts in that they may reference various FAR and FAR Supplement clauses, establish ordering procedures, and even include pricing provisions, but they are not contracts.[71] They are "agreements" or "instruments

of understanding" between a contracting activity and a contractor. Individual orders issued under BAs, BOAs, and BPAs form the contracts between the agency and contractor. So, even though a BA, BOA, or BPA may incorporate FAR 52.203-6, its application must be determined based on the value of each order issued under that vehicle and whether the order is below, at or above the applicable SAT.[72]

Regardless of which SAT applies to a specific procurement or the type of vehicle being used to acquire items, processes, or services, the determination of whether the estimated value of a procurement for a prime contract is below, at, or above the applicable SAT is primarily within the contracting officer's discretion. There are, however, some limits on the exercise of that discretion. Contracting officials are prohibited from breaking up a requirement into several different purchases or contracts simply to make the contract fall below the SAT in order to use the simplified acquisition procedures prescribed by FAR Part 13, or avoid application of any FAR clauses or requirements that would otherwise apply to higher value contracts.[73] This would include the clause appearing at FAR 52.203-6.

Also, any determination by a contracting officer that the value of a procurement is below, at, or above the SAT must be supported by the record. That determination may be protested by a potential offeror that objects to the way the procurement is being conducted or the use of different FAR and FAR Supplement clauses and provisions to which it and other potential offerors are being subjected.[74] If the agency's estimates are reasonable and supported, GAO will defer to the agency's decision regarding the type of acquisition being conducted and the FAR clauses that are applicable to that procurement. For example, in one bid protest, GAO denied a protest challenging the inclusion of FAR 52.203-6 and other clauses in a solicitation where the agency's independent Government estimate showed that the value of the contract would likely exceed the SAT. As GAO noted, although the protester disagreed with the agency's judgment, that did not demonstrate that the agency had acted unreasonably by including FAR 52.203-6 and the other protested clauses in the request for quotations (RFQs).[75]

One way to determine whether the Government has concluded that a procurement is valued below, at, or above the SAT is whether the Government is using FAR Part 13 to acquire the products or services. If the value of a contract is expected to fall at or below the SAT, Government officials must use FAR Part 13 to the maximum extent practicable to acquire those goods and services.[76] Pursuant to FASA, FAR 13.006 lists FAR 52.203-6 as one of seven FAR provisions and clauses that are inapplicable to contracts and subcontracts at or below the SAT.[77] Thus, FAR 52.213-4, "Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services)," omits any reference to FAR 52.203-6 as being among the clauses that apply to the contract.[78] In such cases, there would be no FAR-based restrictions under FAR 52.203-6 on the use of exclusivity agreements.

Yet, just because the Government may issue an RFQ or other procurement vehicle using FAR Part 13's simplified acquisition procedures, that does not always mean that the contract is expected to be valued at or below the SAT. FAR Subpart 13.5 allows Government officials to use FAR Part 13's simplified acquisition procedures to acquire goods and services in amounts up to $7.5 million if the contracting officer reasonably expects that offers will include only commercial products or commercial services based on the nature of the supplies or services being procured and on market research.[79] FAR Part 13's simplified acquisition procedures may even be used for acquisitions up to $15 million if the commercial products or commercial services are to be used in support of a contingency operation, to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack, to support a request from the Secretary of State or the Administrator of USAID to facilitate provision of international disaster assistance, or to support a response to an emergency or major disaster. This $15 million ceiling also applies to any acquisition acquired as

commercial products or commercial services for any products or services used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack pursuant to FAR 12.102(f)(1).[80]

While FAR Subpart 13.5 gives the Government greater ability to use FAR Part 13's simplified acquisition procedures for higher value procurements, nothing in the FAR increases the SAT or otherwise dispenses with the need to incorporate FAR clauses that would otherwise apply to such acquisitions. To the contrary, the requirements of FAR Part 12 would apply to those procurements, including any provisions and clauses in FAR Subpart 12.3.[81] In those cases, contracting officials must insert, "Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services," into the solicitation.[82] That clause requires contractors to comply with the restrictions imposed by FAR 52.203-6 together with Alternate I of the clause (if they are checked)—even if the procurement is conducted using FAR 13.500.[83] It, therefore, is important to focus on which clause appears in the RFQ, and, in particular, whether it references FAR 52.203-6.

FAR 52.203-6's Applicability To Future Contracts

When Congress passed the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act, one of its goals was to improve contracting procedures in order to encourage effective competition and obtain fair and reasonable pricing for spare and replenishment parts.[84] While these goals suggest that Congress intended FAR 52.203-6(a) to apply to future contracts—not just those contracts in which the clause appears, the prohibitions of FAR 52.203-6(a) and the statutes that the clause is intended to implement fall far short of those goals. They are, at best, unclear and ambiguous.

The clause and statutes reference not only "this contract" but also "any follow-on production contract," which by itself might suggest that the prohibitions and restrictions in FAR 52.203-6 apply to future procurements—at least future production contracts. Yet, when one reads these statutes and FAR 52.203-6(a) more closely, those terms are only used to describe the "item or process . . . made or furnished by the subcontractor under the contract (or any follow-on production contract)."[85] Nothing in the clause or statutes describes how long the contractor's agreement not to enter into an agreement with a subcontractor that has the effect of unreasonably restricting sales by that subcontractor directly to the Government lasts.

There is no question that, if a future Government solicitation or contract incorporates FAR 52.203-6 and involves items that are made or furnished under that contract, it would effectively extend any prohibitions in a prior contract throughout the life of that contract as well. At the same time, automatically applying the same restrictions not only to a current contract but also to any item and processes that have not yet been made or furnished but will be made or furnished under some future follow-on production contract is problematic. It would make little sense to continue to enforce previous prohibitions since a contractor or higher-tier subcontractor have no way of knowing what items or processes may be delivered under a follow-on contract until it has been awarded. Also, when one further considers that a future contract may fall at or below the SAT, or that items or processes previously furnished by a subcontractor may be purchased in the future using FAR Part 12 as a "commercial product" or "commercial service" after they meet FAR 2.101's definitions, it makes little sense to preclude a contractor from taking advantage of FAR 52.203-6(b) (Alternate I)'s limited restrictions at that time, just because an earlier contract may include the basic version of FAR 52.203-6 prohibiting any such agreement.

These and similar questions regarding the extent to which FAR 52.203-6's prohibition apply to future procurements must remain unanswered until a court or administrative body issues a decision or until

Congress and the FAR Council take some action to address the ambiguous wording of FAR 52.203-6(a).

Dissecting FAR 52.203-6(a), (b), And (c)—What Is And Is Not Permissible.

It may not be necessary or desirable to enter into an exclusivity agreement with a subcontractor or potential subcontractor in every circumstance. It may be possible to accomplish many of the same purposes a prime contractor or higher-tier subcontractor may wish to achieve through some other type of agreement, like a properly tailored NDA, non-solicitation agreement, or licensing agreement—none of which are prohibited by FAR 52.203-6.

Moreover, one of the shortcomings of FAR 52.203-6 is that it presumes that all subcontractors are eager to do business with the Government as prime contractors. Many are, but just as many do not want to be subjected to the morass of regulatory requirements with which a prime contractor must deal—requirements that necessarily drive prices up and reduce profitability. There is a need for subcontractors to comply with applicable flow-down provisions from the FAR, DFARS, or other FAR Supplements, but generally subcontractors have less "red tape" to wade through than a prime contractor—especially if the subcontractor is selling commercial products or commercial services. In fact, a 2023 article in the JOURNAL OF BUSINESS LOGISTICS suggests that, while contracting with the Government may result in short-term gains for a vendor, it ultimately has a negative long-term effect on a supplier's financial performance.[86] That article goes on to suggest that one way to mitigate such negative effects is to partner with other companies that have substantial Government contracting experience that increases short term benefits and limits losses.[87]

In any event, to minimize compliance risks under FAR 52.203-6 or FAR 52.203-6(b) (Alternate I)[88] and to dispel some of the confusion surrounding the scope of the clause's prohibitions and restrictions, let us examine each of the paragraphs that make up that clause.

FAR 52.203-6(a)'s Basic Prohibitions

FAR 52.203-6(a) sets forth the basic prohibition against prime contractors from entering into agreements with an actual or potential subcontractor that have or may have the effect of restricting that subcontractor from making direct sales to the Government of any items or processes (including computer software) that are made or furnished by the subcontractor under that contract or under any follow-on production contract.[89] Paragraph (a) goes on to prohibit a contractor from otherwise acting in any manner that has or may have the effect of restricting such subcontractor sales directly to the Government.[90]

These prohibitions may seem far-reaching, but when one examines the words used in paragraph (a) more closely in conjunction with other statutory, FAR, and DFARS provisions and agency guidance, the circumstances under which they may apply are more limited—all of which open up a number of possibilities for contractors and subcontractors to enter into exclusivity agreements without violating the clause.

FAR 52.203-6(a)'s Prohibitions Only Apply To Exclusive Supply Agreements

As previously discussed, exclusivity agreements can be divided into "exclusive purchase agreements," and "exclusive supply agreements." FAR 52.203-6(a) only prohibits the use of exclusive supply agreements that have the effect of restricting sales of items, processes, and probably services by subcontractors directly to the Government. Nothing in FAR 52.203-6(a) or the statutes that the clause implements imposes any restrictions on or prohibitions against the use of exclusive purchase agreements between a manufacturer or other supplier of goods and services and its dealers, distributors, or resellers—even if the dealer, distributor, or reseller happens to be a prime contractor or higher-tier subcontractor under a Government contract.

Exclusive purchase agreements must still comply with applicable state law, as well as federal antitrust laws, but this leaves open the possibility for subcontractors or manufacturers to prohibit a higher-tier subcontractor or a prime contractor from marketing or selling products or services of other suppliers. So long as an exclusive purchase agreement is not reciprocal (*i.e.*, it does not consist of both an exclusive purchase and an exclusive supply agreement), the agreement would not be prohibited by FAR 52.203-6(a). Nor would it need to comply with the more limited restrictions under FAR 52.203-6(b) (Alternate I). Indeed, even if such an agreement were reciprocal, so long as it does not prevent a subcontractor from making direct sales of those items, processes, or services directly to the Government, it would not violate any prohibitions in FAR 52.203-6(a) of FAR 52.203-6(b) (Alternate I)—even if the agreement were to restrict sales to other non-governmental entities.

FAR 52.203-6(a)'s Prohibitions Only Apply To Items Or Processes Made Or Furnished By A Subcontractor, But What Is A Subcontractor?

The prohibitions in FAR 52.203-6(a) and more limited restrictions in FAR 52.203-6(b) (Alternate I) only apply to agreements or actions that have or may have the effect of restricting sales by "subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract."[91] By limiting these prohibitions to items or processes actually made or furnished under the contract, it leaves open the possibility for parties to enter into exclusivity agreements with one another regarding other "items" or "processes" that have not been made or furnished under a contract containing FAR 52.203-6.

The limited nature of FAR 52.203-6(a) is evidenced in the legislative history surrounding this prohibition. When the Defense Spare Parts Procurement Reform Bill, an earlier version of the Defense Procurement Reform Act, was introduced in the Senate and House of Representatives, it stated that the foregoing prohibitions applied to any "item or process (including computer software) *like those made*, or services *like those furnished*, by the subcontractor under the contract or any follow-on production contract."[92] Yet, when the Conference Report on House Bill No. H.R. 5167 was issued on September 26, 1984, the references to "like those," as well as the reference to "services," had been deleted.[93] A less onerous prohibition against agreements or actions "restricting sales by the subcontractor directly to the Government of any item or process (including computer software) *made or furnished* by the subcontractor" appears in FAR 52.203-6(a), as well as in the statutes that the clause implements.[94] Of course, once a subcontractor makes or furnishes an item or process under a contract in which FAR 52.203-6 or its Alternate I appears, reliance on this limitation is no longer an option. The prohibitions in paragraph (a) would apply to direct sales of such items or processes—at least during the life of the contract and any follow-on production contract. There may be other exceptions upon which contractors and subcontractors may rely, but not this one.

A more difficult question regarding the scope of FAR 52.203-6(a)'s prohibitions that cannot be answered is what is a "subcontractor" for purposes of the clause. Federal courts have long held that the term "subcontractor" has no "single exact meaning."[95] As of 2018, there were 27 different definitions of "subcontract" and 21 different definitions of "subcontractor" in the FAR—none of which are necessarily applicable to FAR 3.503 or FAR 52.203-6.[96]

FAR 44.101 does state that the term "subcontract" means any contract, as defined by FAR Subpart 2.1,[97] that is entered into with a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract, including, but not limited to purchase orders, and changes and modifications to purchase orders. It goes on to define the term "subcontractor" as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor." Yet, there

continues to be a substantial amount of uncertainty just how far down the chain of supply or how remotely a supplier of materials, common components, or a service provider's activities with a Government contractor or higher-tier subcontractor should be considered a "subcontractor." The fact that the prohibitions in FAR 52.203-6 focus on items and processes "made or furnished" by a subcontractor under the contract does little to resolve this question since such terms would not necessarily be tied to an actual deliverable to the Government. Again, the poor wording of the statutes and FAR 52.203-6(a) leaves open the question of whether such support services, processes, or items that were not delivered to the Government are covered by FAR 52.203-6(a). This issue has never been the subject of any reported court decision or ruling by an administrative body.

Congress has made some effort to resolve the issue of what is a "subcontract," at least with regard to procurements for commercial products and commercial services, by excluding from the definition of "subcontract," agreements entered into by a contractor for the supply of "commodities" that are intended for use in the performance of multiple contracts with the Government and other parties and are not identifiable to any particular contract.[98] Yet, even there, it is unclear what "commodities" are. That term is not defined in the FAR or DFARS, and despite the fact that Congress passed these statutes more than six years ago, the FAR Council and Defense Acquisition Regulations Council (DAR Council) have yet to issue proposed regulations implementing them.[99]

FAR 52.203-6(a)'s Prohibitions Only Apply To Direct Sales Of Items, Processes, And Services By Subcontractors

Another important limitation on FAR 52.203-6(a) is that the clause only prohibits agreements and actions that have or may have the effect of restricting "direct sales" to the Government.[100] Nothing in FAR 52.203-6 or in either statute prohibits agreements or actions restricting a subcontractor's sales of items, processes, or services to non-governmental parties. This would be true regardless of whether the potential buyer or customer is a commercial entity, a consumer, or another non-governmental end user. It would even be true where that third party may wish to purchase those items, processes, or services for resale to the Government as end items, services, or components of another end item and regardless of whether the prospective buyer wanted to do so as a prime contractor or as a higher-tier subcontractor to another entity. None of those prospective sales to a non-governmental entity could be considered "direct sales."

It, therefore, is possible to enter into an exclusivity agreement restricting an actual or potential subcontractor under a federal contract from making "indirect sales" to the Government via another party or for other non-governmental purposes. Such exclusivity agreements would not run afoul of FAR 52.203-6(a)—provided that they do not prohibit the subcontractor from making direct sales to the Government as a prime contractor. To avoid any confusion or allegations that such an agreement has the "effect" of precluding direct sales by the subcontractor, any agreements restricting such third-party sales should include language that expressly reserves the ability of the subcontractor to make direct sales of any items, processes, or services made or furnished under that contract to the Government in the future.

FAR 52.203-6(a) Covers Items, Processes (Including Computer Software), And Contracts For Services, But What Do Those Terms Mean?

FAR 52.203-6(a) states that the prohibitions against agreements and actions that have or may have the effect of restricting direct subcontractor sales to the Government apply to an "item or process (including computer software)." Yet, nothing in the clause or FAR 3.503-1, which sets forth the statutory policy,[101] defines either term. Furthermore, while FAR 3.503-1 mentions "services," FAR 52.203-6(a) contains no reference to that word when describing the prohibitions in that paragraph. The lack of definitions and omission of the word "services" from the clause has led and continues to lead to a substantial

amount of confusion over the types of supplies, services, or processes that are covered by the clause and, more importantly, to what items, processes, or services the prohibitions in FAR 52.203-6(a) apply.

● *Items of Supply and Components*. The issues upon which Congress focused when debating the need to promote competition and provide the Government with the ability to access subcontracted items in the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act revolved around concerns over DoD's acquisition of spare and replenishment parts and the need to be able to purchase those items of supply directly from those subcontractors that originally made or furnished them to the Government via another prime contractor.[102] Notwithstanding Congress' focus on spare and replenishment parts, 41 U.S.C.A. § 4704, 10 U.S.C.A. § 4655, and FAR 52.203-6(a) apply to any "items" made or furnished by that subcontractor under the contract in question or any follow-on production contract.[103]

Nothing in the clause, FAR 3.503-1, or FAR 2.101 defines the term "item." The statutory language that the clause is intended to implement is also of no use in helping to define that term. 41 U.S.C.A. § 4704(a) and 10 U.S.C.A. § 4655(a) simply refer to the requirement that each contract for the purchase of "property" made by an executive agency include this prohibition. This has led some to suggest that the term "item" in FAR 52.203-6(a) should be construed to mean only an "end item" or an "end product" furnished to the Government, rather than component parts of that end item. Such a narrow interpretation ignores definitions contained elsewhere in Title 41 of the U.S. Code and FAR 2.101—all of which show that the term "item" encompasses not only complete end items, but also spare parts and components thereof.

Specifically, 41 U.S.C.A. § 108 states that the terms "item" and "item of supply" mean "an individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, including spare parts and replenishment spare parts."[104] 41 U.S.C.A. § 115 further provides that the term "supplies" has the same meaning as the term "item" and "item of supply."[105] Indeed, while the FAR may not define the word "item," FAR 2.101 does use that word in the definition of "component"—*i.e.*, "any item supplied to the Government as part of an end item or of another component."[106] This is the same as the definition of "component" in 41 U.S.C.A. § 105.[107] All these definitions apply to 10 U.S.C.A. § 4655 since they have been incorporated into Title 10 of the U.S. Code.[108]

Although the wording of the clause might lead to different interpretations, any attempt to delimit application of the restrictions in FAR 52.203-6(a) to only completed end items, end products, or systems made or furnished by a subcontractor is incongruous with these statutes and FAR 2.101. Also, such interpretations overlook the fact that several items of supply to which Congress pointed during the debates leading up to passage of 41 U.S.C.A. § 4704 and 10 U.S.C.A. § 4655 involved purchases of components of much larger systems.[109]

Nor are the prohibitions in FAR 52.203-6(a) against restrictions on direct sales by subcontractors limited to "items" that may have been manufactured by an original equipment manufacturer (OEM). Much of the congressional debates surrounding 41 U.S.C.A. § 4704 and 10 U.S.C.A. § 4655 revolved around the need for the Government to be able to "cut out the middle man" and procure parts directly from a manufacturer to achieve cost savings, but the language of the statute and the clause itself is much broader than that. FAR 52.203-6(a)'s prohibitions apply to any "item or process . . . made or furnished by the subcontractor."[110] Use of both "made" and "furnished" shows that paragraph (a) applies to direct sales by OEMs and items, "furnished" by dealers, distributors, or resellers that were "made" by others.

● *Contracts for "Services."* Another point of confusion that arises regarding the scope of FAR 52.203-6(a)'s prohibitions is whether they apply to services, or whether the prohibitions are limited to

items of supply or a process, whatever a "process" may be. FAR 3.503-1, "Policy," does state that 10 U.S.C.A. § 4655 and 41 U.S.C.A. § 4704 prohibit unreasonable restrictions against making direct sales to the Government of "services" that are made or furnished by a subcontractor under a contract.[111] At the same time, FAR 52.203-6(a) itself makes no mention of "services."[112] Nor, contrary to FAR 3.503-1, do 10 U.S.C.A. § 4655(a)(1) or 41 U.S.C.A. § 4704(a)(1)—the two statutory prohibitions against unreasonable restrictions on sales by subcontractors directly to the Government. Like FAR 52.203-6(a), both statutes focus only on "any item or process (including computer software) made or furnished by the subcontractor."[113]

As previously discussed, earlier bills leading up to the passage of the Defense Procurement Reform Act did prohibit restrictions on direct sales by subcontractors of "services like those furnished" by a subcontractor, but that reference was removed from the final version of the bill. [114] The only statutory references to "services" appears in (1) the prescriptive language of 10 U.S.C.A. § 4655(a) and 41 U.S.C.A. § 4704(a), which state that each contract for the purchase of "property or services" include such restrictions, and (2) 10 U.S.C.A. § 4655(d) and 41 U.S.C.A. § 4704(d), which state that any agreement between a contractor and a subcontractor of "commercial products" or "commercial services" that does not impose more restive provisions on the Government than other potential purchasers may not be considered an unreasonable restriction in violation of that provision.[115] Even there, until 2021, FAR 52.203-6(b) (Alternate I) only referred to agreements involving acquisitions of "commercial items,"[116] and the FAR Council stated that the decision to provide separate definitions for "commercial product" and "commercial service" did not expand or shrink the universe of products or services the Government could procure using FAR Part 12, nor did it change the terms and conditions with which contractors must comply.[117]

This leaves open the question of what Congress meant when it said that the prohibition in the statutes and FAR 52.203-6 needed to be included in "[e]ach contract for the purchase of property or services."[118] That does not explain why Congress' final version of House of Representatives Bill No. H.R. 5167 omitted the bill's earlier reference to "services like those furnished" by the subcontractor under the contract or any follow-on production contract. Nothing in the Conference Report provides any rationale for the omission, and nothing in either statute attempts to reconcile the conflict between the prescription to include the clause in contracts for "services" and the fact that the prohibitions only mention "item" and "processes" like "computer software."[119] Despite FAR 3.503-1's statement of policy, there is a lingering question of what contracts for "services" means and to what degree are the services provided under those contracts covered by FAR 52.203-6(a).

An even more troubling issue is that, unlike the definition of "item," nothing in those portions of Title 41 of the U.S. Code governing procurements includes a definition for the term "service," "services," or "contracts for the purchase of services."[120] Nor do those procurement-related sections of Title 10 of the U.S. Code.[121] While FAR 2.101 uses the word "services" in several of its definitions, the FAR also does not define "service" or "services."[122] FAR 37.101 does state that the term "service contract" means a contract that directly engages the time and effort of a contractor whose "primary purpose" is to perform an identifiable task rather than to furnish an end item of supply.[123] The FAR goes on to provide a number of examples of services that are subject to FAR Part 37's policies and procedures, some of which may also be governed in part by other FAR Parts and Subparts including:

- Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment;
- Routine recurring maintenance of real property;
- Housekeeping and base services;
- Advisory and assistance services, which are ser-

vices provided by a non-governmental source to support or improve organizational policy development; decisionmaking; management and administration; program and/or project management and administration; or research and development activities; and can also consist of furnishing of professional advice or assistance rendered to improve the effectiveness of federal management processes or procedures (including those of an engineering and technical nature);[124]

- Operation of Government-owned equipment, real property, and systems;
- Communications services;
- Architect-engineering services, which are also governed by FAR Subpart 36.6;
- Transportation and related services, which are also governed by FAR Subpart 47; and
- Research and development, which is also governed by FAR Part 35.[125]

There are, however, other "services" that are purchased by the Government that are not referenced in FAR Part 37 at all and may not even be subject to the policies and procedures in that FAR Part, including (1) construction services, which are subject to FAR Part 36; (2) information technology services, which are subject to FAR Part 39; and (3) utility services, which are covered by FAR Part 41.[126] The question that this presents is whether Congress' direction to include the language appearing at FAR 52.203-6 in "[e]ach contract for the purchase of property or services" and FAR 3.503-1's policy statement that these statutes apply to "services" means that the clause should apply to all contracts for "services" or to only certain types of "service contracts" like those appearing in FAR 37.101.

An expansive reading of the language in FAR 3.503-1 would suggest that the prohibitions in FAR 52.203-6(a) apply to contracts for all services, regardless of the type or the method used to acquire them. Yet, guidance provided by the Government to its own contracting officials suggests a narrower interpretation of the FAR Council's reference to "service contracts." That guidance is not even uniform, and shows that there is substantial confusion about the applicability of FAR 52.203-6 to different types of services within the Government itself. It is a problem for which no clear answer can be provided.

This conflicting guidance revolves around four matrices developed by Government officials as tools to help contracting officers draft solicitations and contracts for different types of services and supplies: (1) the FAR's "Matrix of Solicitation Provisions and Contract Clauses" (FAR Matrix),[127] (2) "FAR Smart Matrix," a searchable and filterable web-based version of that matrix appearing on the Acquisition.gov website;[128] (3) the Department of Energy's (DOE's) "Federal Acquisition Regulation Clause Usage Guide";[129] and (4) the Defense Acquisition University's (DAU's) "DAU Provisions and Clauses Matrix"[130]—another online web-based interactive tool suggested for use by DoD contracting officials.[131] All four matrices rely on identification codes for FAR and FAR Supplement provisions or clauses listed in the matrix to show when each applies to different contract types for varying types of supplies and services.

With regard to service contracts, the FAR Matrix and the FAR Smart Matrix state that FAR 52.203-6 is "Required" ("R") for non-commercial fixed-price and cost-reimbursement service contracts and contracts for the delivery of utility services issued pursuant to FAR Part 41.[132] At the same time, both matrices state that the clause is not "Required" ("R"), "Applicable when Required" ("A"), or even "Optional" ("O") for any of the following types of solicitations and contracts—most, if not all of which unquestionably entail the provision of "services":

- Leases of motor vehicles;
- Fixed-price and cost-reimbursement contracts for research and development;
- Fixed-price and cost-reimbursement contracts for construction;

- Contracts for architect and engineering services;
- Contracts for dismantling, demolition, or removal of improvements (see FAR Subpart 37.3);
- Contracts for communication services;
- Facilities contracts;[133] and
- Contracts for transportation services.

Furthermore, while the FAR Matrix and FAR Smart Matrix state that FAR 52.203-6 applies to fixed-price and cost-reimbursement service contracts, as well as indefinite-delivery contracts, they go on to state that the clause is not a "Required," "Required when Applicable," or "Optional" clause in T&M or L-H type contracts issued pursuant to FAR Subpart 16.6. Once again, however, T&M and L-H contracts are used to acquire services at fixed hourly rates.[134] In any event, despite FAR 3.503-2's language, a contracting officer developing a solicitation or contract based on this guidance should not include FAR 52.203-6 in any of these contract vehicles, even though they are service-oriented contracts.

To make matters worse, the DOE's Federal Acquisition Clause Usage Guide states that FAR 52.203-6 is "Not Applicable" ("N/A") to Construction Contracts or Architect & Engineering Contracts, but unlike the FAR Matrix and FAR Smart Matrix, the DOE's Guide indicates that the clause is "Required" for T&M and L-H Contracts.[135] If this were not confusing enough, the DAU's Provision and Clause Matrix provides guidance to contracting officials that conflicts with all of the other matrices. The DAU's Provision and Clause Matrix states that the basic version of FAR 52.203-6 is "Required when Applicable" ("A") for every one of the foregoing types of contracts and services, even though the prescription section of that matrix says that contracting officer's must "insert the clause . . . , in solicitations and contracts exceeding the simplified acquisition threshold."[136] It even states that FAR 52.203-6 is only "Required when Applicable" in fixed-price and cost-reimbursement solicitations and contracts for non-commercial supplies and services that exceed the SAT, simply directing the reader to the prescriptive language for the clause.[137] Thus, while DAU's Matrix has been touted as an effective tool for DoD contracting officials,[138] it may be the least useful of all four matrices—at least when it comes to providing any useful guidance regarding the applicability of FAR 52.203-6 to different types of acquisitions for "services."

In any event, the fact that those Government officials responsible for creation of the FAR Matrix, the FAR Smart Matrix, and the DOE's Guide appear to have interpreted the applicability of FAR 52.203-6 to contracts for "services" more narrowly could be important. Courts and other tribunals generally review the provisions of the FAR, including clauses and solicitation provisions in federal contracts in light of the U.S. Supreme Court's ruling in *Chevron, USA v. Natural Resources Defense Council*[139] to determine whether the agency's interpretations are entitled to deference (commonly referred to as the "*Chevron* deference"). Under this standard, "if [a] statute speaks clearly 'to the precise question at issue,' " the tribunal "must give effect to the unambiguously expressed intent of Congress," regardless of what the agency regulation provides.[140] If "the statute is silent or ambiguous with respect to the specific issue," the court or tribunal "must sustain the [a]gency's interpretation if it is 'based on a permissible construction' of the Act."[141] FAR provisions that are either contrary to the intent of Congress, as "unambiguously expressed" by statute, or that are based on an impermissible construction of the statute will not be enforced.[142] The fact that FAR 52.203-6(a) and operative language of the statutes does not mention "services" when viewed against the prescriptive language of the statutes and FAR 3.503-1 is a problem for Government contracting officials, making this issue ripe for a *Chevron* analysis.

The lack of uniformity among the foregoing matrices and conflicting guidance about the application of FAR 52.203-6 to different types of service contracts

is not just a problem for the Government. In many respects, it is an even bigger problem for contractors. Under the *Christian* doctrine,[143] mandatory FAR clauses and other provisions of law that represent "significant or deeply ingrained strands of public procurement policy" will be read into a Government contract by a court or administrative tribunal by operation of law—even if those clauses were intentionally omitted by Government procurement officials.[144] This could subject a contractor and its subcontractors to potential compliance issues and other legal difficulties after a contract has been awarded, despite the fact that the contractor relied on the Government's omission of that clause from a solicitation or resulting contract.[145] At least one federal district court has held that FAR 52.203-6 is one of the FAR clauses that should be deemed to be inserted into a federal contract as a matter of law pursuant to the *Christian* doctrine even if the prime contract omits it.[146] That decision carries no precedential value, and whether other courts would apply the *Christian* doctrine and read into a contract FAR 52.203-6 remains unsettled, but this is an issue that must be considered by contractors and subcontractors before committing to an exclusivity agreement in the absence of any clear reference to FAR 52.203-6 in a solicitation or contract—especially one that unquestionably will be for "services."

Since the four matrices discussed above are nonregulatory "tools" and conflict with one another in various respects, it increases the possibility that contracting officers in different agencies may apply different standards to determine whether to include or omit FAR 52.203-6—all of which could lead to complications. The matrices only add to the confusion over whether Congress intended 41 U.S.C.A. § 4704 and 10 U.S.C.A. § 4655 to apply to all contracts for "services" or just contracts for some types of "services." All that can be said is that FAR 52.203-6 is prescribed for contracts for "services"—at least those contracts exceeding the SAT.

● *Process (Including Software)*. An even more difficult question revolves around the prohibitions in FAR 52.203-6(a), 41 U.S.C.A. § 4704(a)(1) and 10 U.S.C.A. § 4655(a)(1) against agreements and actions by contractors restricting direct sales by subcontractors of a "process (including computer software)." The term "process" is not defined by FAR 3.503-1, FAR 52.203-6, or either statute. Beyond the statement that the term "process" includes "computer software," there is no guidance on what that term might mean in Titles 10 or 41 of the U.S. Code. Nor, with the exception of the terms "information and communication technology (ICT")[147] and "computer software,"[148] does the FAR address how the word "process" might be used in connection with something that may be made or furnished by a subcontractor. There is no legislative or regulatory history, and no decision by a court or administrative body that sheds any light on what this term means and how far it may extend. Given the lack of guidance in the U.S. Code and the FAR, it is unclear just what that term means or how broadly or narrowly it should be construed—beyond the fact that "process" includes "computer software."

Even there, in many respects, the FAR 52.203-6(a)'s references to "computer software" appear to be out of place in the procurement system. The Government almost never acquires ownership in computer software (or for that matter technical data) through a "sale."[149] Instead, the Government relies primarily on license rights in computer software and data under FAR Part 27, DFARS Part 227, and similar Parts in other agency FAR Supplements. The Government has the ability to negotiate nonstandard rights licenses (*i.e.,* special or specifically negotiated rights) in computer software and data, but even there, they are only licenses.[150] Arguably, FAR 52.203-6(a)'s prohibitions on restrictions of subcontractor direct sales of "computer software" could have some impact on the Government's ability to purchase "copies" of individual licenses since the FAR and DFARS limit the Government's ability to make use of computer software on more than one device.[151] Yet, the Government's rights, as well as the rights and obligations of a prime contractor and any subcontractor or supplier under a contract or any follow-on production contract are delineated in far greater detail by the provisions

and clauses prescribed by FAR Part 27 and DFARS Part 227. FAR 52.203-6(a)'s obscure reference to "process (including computer software)" would have little to no impact on those rights or obligations. Nor, according to the congressional history referenced below when addressing those rights reserved under section (b) discussed below, was it ever intended to limit.

These licenses do not specify the type, quantity, or quality of data or computer software to be delivered under a contract, but they do delineate the rights and obligations of the Government, prime contractors, and subcontractors regarding the use, reproduction, and disclosure of computer software.[152] Clauses prescribed by both FAR Part 27 and DFARS Part 227 impose specific obligations on a prime contractor to acquire from its subcontractors such rights and data or computer software that are necessary to fulfill the contractor's obligations.[153] DFARS 227.7203-15(a) and (d) even provide that subcontractors and suppliers at all tiers should be provided the same protections for their rights in computer software and computer software documentation that is provided to prime contractors and prohibits the Government from requiring prime contractors to have those subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, to a higher-tier subcontractor, or to the Government as a condition for award of any contract, subcontract, purchase order, or similar instrument except as already provided in applicable DFARS provisions.[154]

In view of this, there appears to be little, if any need, to impose additional prohibitions on prime contractors or higher-tier subcontractors that have or may have the effect of restricting subcontractor direct "sales" of such software to the Government. One could, in fact, argue that this generic prohibition conflicts with the more detailed policies, procedures, and restrictions contained elsewhere in the FAR and DFARS that establish the Government's, a prime contractor's, and its subcontractor's ability to use modify, reproduce, release, perform, display, disclose, or to demand any greater rights in such software than the subcontract may have—all of which are spelled out in detail in FAR Part 27 and DFARS Part 227.[155] This is especially true since a subcontractor or supplier that "makes" or "furnishes" such software or technical data may not actually own the rights to such deliverables. Ownership may belong to a prime contractor or a third party under the "works made for hire" provisions of copyright law and that owner may have simply licensed the subcontractor to use that data or software when performing its subcontract—none of which is prohibited, according to Congress' legislative history.[156]

Whatever Congress may have intended by the phrase "process (including computer software)," given the scope of regulatory coverage in FAR Part 27 and DFARS Part 227, as well as the clauses and solicitation provisions prescribed by those Parts, it is more likely those provisions and clauses would provide FAR more relevant to determining the ability of the Government, a prime contractor, or a subcontractor to require or restrict the "sale" of computer software than FAR 52.203-6(a)'s generic reference to "process (including computer software)."

FAR 52.203-6(a)'s Prohibition Against "Actions" Having The Effect Of Restricting Direct Subcontractor Sales To The Government

Thus far, this Briefing Paper has focused primarily on FAR 52.203-6(a)'s prohibition against "agreements" between a prime contractor and its actual or prospective subcontractors, but paragraph (a) also precludes contractors from otherwise acting in any manner that has or may have the effect of restricting sales by those subcontractors directly to the Government of any items, processes, and probably services that have been made or furnished under the contract or under any follow-on production contract.[157] Nothing in the FAR or the statutes provides any guidance on what such actions might entail or what Congress' concerns may have been when including this prohibition in the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act.

The reference of "action" may have been intended

to address some "oblique references" made during the congressional hearings regarding major defense contractors dissuading or exercising economic duress over their subcontractors from selling components that they manufactured directly to the Government to fulfill spare parts requirements.[158] At the same time, no direct allegations were ever presented to Congress. This led to the following exchange between Senator Lowell Weicker and the Associate Director for National Security and International Affairs Division, who represented the GAO at a hearing on Senate Bill No. S. 2489:

> *Question:* We have heard that some major contractors make clear to their subcontractors and suppliers that any direct sales to the government will not be looked upon favorably and might adversely affect the possibility of future business with the major prime contractor.
>
> Has any GAO's audit work uncovered any hard evidence of this?
>
> *Answer.* We have not uncovered any document evidence of prime contractors making threats or otherwise implying that future business would be withheld from subcontractors or suppliers who sell spare parts directly to the Government.
>
> We have, however, found letters from prime contractors to subcontractors indicating that technical data they may have in their possession is proprietary to the prime and the subcontractor is not free to use such data in making the product for direct sales to the Government.[159]

As discussed below, Congress stated that it did not intend to preclude a contractor from exercising its rights to protect any of its intellectual property, and one would be hard-pressed to allege that sending a letter to a subcontractor informing the subcontractor that it was not free to use proprietary information would be a prohibited "act." Nonetheless, this appears to be the only "evidence" of such "acts." Congress' concerns over references to economic duress or threats may have been as much a myth as the $435 hammer, but those kinds of actions would be among the types of "acts" that are prohibited by the Acts. It remains unclear to what extent a contractor's or higher-tier subcontractor's other actions might also violate FAR 52.203-6(a).

FAR 52.203-6(b)'s Caveats And Exceptions

Despite FAR 52.203-6's prohibitions, paragraph (b) of the basic clause and Alternate I affords prime contractors and higher-tier subcontractors some leeway when dealing with lower-tier subcontractors that may be considering or that may make direct sales to the Government.

First, paragraph (b) of the basic version of FAR 52.203-6 states that the prohibitions in paragraph (a) do not preclude a contractor from "asserting rights that are otherwise authorized by law or regulation."[160] This caveat does not authorize the use of exclusivity agreements or other actions that have the effect of restricting direct subcontractor sales to the Government, but it does afford contractors and higher-tier subcontractors the ability to exercise other rights they may have against a subcontractor attempting to make direct sales to the Government or a third party.

Second, Alternate I to FAR 52.203-6, which was promulgated to implement one of FASA's reforms[161] and applies to FAR Part 12 acquisitions, substitutes paragraph (b) of the basic clause. After reiterating that paragraph (a) of the clause does not preclude a contractor from "asserting rights that are otherwise authorized by law or regulation," Alternate I states that the prohibitions in paragraph (a) only apply to the extent that any agreement restricting sales by subcontractors results in the Government being treated differently from other prospective purchasers for the sale of commercial products or commercial services.[162]

Reservations Of Rights Otherwise Authorized By Law Or Regulation

FAR 52.203-6(b) and FAR 52.203-6(b) (Alternate I) state that paragraph (a) does not preclude contractors from "asserting rights that are otherwise authorized by law or regulation."[163] Even if paragraph (a)'s or paragraph (b) of Alternate I's prohibitions or restrictions apply, a prime contractor or higher-tier subcontractor would still be able to exercise these

rights. Paragraph (b) itself does not discuss what these laws or regulations might be, the parties against whom such rights may be pursued, whether these rights are limited to legal or regulatory rights established by federal law, or whether they might also encompass rights established by other jurisdictions, like state law. This has led to some confusion over the scope of these rights.

The confusion surrounding paragraph (b) is made worse by the fact that this is one of the areas in which the FAR Council's version of FAR 3.503-1 and FAR 52.203-6(b) differs from the statutory language those FAR provisions are intended to implement. Both 10 U.S.C.A. § 4655 and 41 U.S.C.A. § 4704 provide that the prohibitions against exclusive sales agreements do not preclude a contractor from "asserting rights it otherwise has under law."[164] Neither statute mentions "regulations" or the need for a contractor to be "authorized" by such laws or regulations to assert these rights. Whether the FAR Council intended any substantive difference between these statutory caveats and FAR 52.203-6 is unclear. There is no published regulatory history of the clause. Nor have there been any reported decisions by a court or administrative body addressing these differences, much less whether the FAR Council would even have the authority to narrow the statutes' reservation of rights when promulgating FAR 52.203-6.

Despite this, when Congress was considering the prohibitions against agreements and actions restricting subcontractor direct sales to the Government, it provided some guidance on paragraph (b)'s purpose. An April 18, 1984 Report of the House Armed Services Committee explaining the purpose of the prohibitions against restricting direct subcontractor sales stated:

> The committee does not intend to preclude lawful restraints on subcontractors' sales (for example, when a prime contractor has supplied tooling, dies or other equipment for the subcontractors' use in providing parts to it alone, or when restrictions such as to a license have been placed on the use of technical data or know-how provided by the prime contractor).[165]

That Report went on to state:

> The committee is also aware that commercial licensing practices often serve to increase the number of available supplies and enhance the quality of products available. It is not the intent of this bill that license agreements should be discouraged, rendered unenforceable or otherwise affected by any regulations or contract provisions imposing a time limit on restrictions on the government's authority to disclose data.[166]

Finally, the Report stated:

> Section 5 would amend chapter 141 of Title 10, United States Code, by adding a new section which would prohibit unlawful restrictions on subcontractor sales directly to the United States. Subsection (b) provides that this language is not intended to prohibit valid, prime-subcontractor relationships in which a subcontractor may agree not to sell to other than the prime contractor because the prime contractor retained rights in technical data or processes which the subcontractor was authorized to use for limited purposes only, or the prime has provided special tools or dies to the subcontractor.[167]

A statement also appears in a May 31, 1984 Report from the Senate Armed Services Committee explaining similar language in the Omnibus Defense Authorization Act 1985, Senate Bill No. S. 2723:

> This section requires that each contract for the purchase of supplies or services by the Department of Defense shall provide that the contractor not enter into any agreement with a subcontractor that has the effect of restricting sales by the subcontractor directly to the United States. This section is not intended to prohibit a contractor from asserting rights protected by patent, licensing agreement, or any preexisting agreement involving the subcontractor's performance under a commercial contract.[168]

These bills underwent several amendments before becoming law, but nothing in the legislative history suggests that Congress changed its mind or decided to impose additional limitations on the kind of rights under the law that were otherwise available to a contractor. So, despite the lack of specificity in FAR 52.203-6(b), the foregoing provides insights into what rights a prime contractor or higher-tier subcontractor may be able to exercise under the law.

Indeed, while some may be led to believe that

paragraph (b)'s reference to rights authorized by law or regulation are limited to legal actions, the legislative history shows that these rights include the right to enter into other types of licenses and agreements, the purpose of which may be to protect a vital interest in which the prime contractor or higher-tier subcontractor may possess. Although exclusivity agreements restricting direct sales to the Government may be prohibited or curtailed under FAR 52.203-6(a) or FAR 52.203-6(b) (Alternate I), nothing would preclude a prime contractor or higher-tier subcontractor from entering into an agreement to protect its proprietary or confidential information via an NDA or to protect its employees from being poached via a non-solicitation agreement.[169] Nor would FAR 52.203-6(a) or FAR 52.203-6(b) (Alternate I) preclude a prime contractor or higher-tier subcontractor from licensing a subcontractor to use its patented inventions, copyrighted materials, or trade secrets (including limited rights data and restricted computer software) in order to make direct sales to the Government in exchange for payment of a royalty or fee. These are only a few types of permissible agreements under FAR 52.203-6(b)—provided that they do not rise to the level of an "agreement" or an "act" that has or could have the effect of unreasonably restricting sales of subcontractors directly to the Government.[170]

If a team member or subcontractor threatened to violate or actually breached its obligations under one or more of these agreements, or infringed on some other right a party may have under law or regulation, the non-breaching party could also institute legal action to protect its rights pursuant to paragraph (b). Such actions could be brought against a subcontractor, as well as a third party—including the Government where the Government has waived its sovereign immunity. The Government has done so for various types of claims arising out of federal contracts through the Contract Disputes Act of 1978 (CDA),[171] the Tucker Act,[172] and other statutes.[173]

A number of the remedies available against the Government involve issues surrounding its or its contractors use of intellectual property of a third party when the Government acquires goods or services. Among the more important for purposes of a discussion of contractors and higher-tier subcontractors' rights under FAR 52.203-6(b), businesses or individuals may bring suit against the Government at the U.S. Court of Federal Claims under 28 U.S.C.A. §§ 1498(a) or (b), seeking monetary compensation for "infringement" of patents or copyrights if inventions or copyrighted works are used by the Government, an unauthorized contractor or subcontractor, or any other person, firm, or corporation acting for the Government with the Government's authorization and consent.[174] The owner of the invention or copyrighted work may not be able to enjoin such uses, but it can recover compensatory damages against the Government.

Even where intellectual property is not otherwise patented or copyrighted, a contractor or higher-tier subcontractor may also be able to exercise various regulatory and legal rights against the Government for misappropriation of technical data protected by "limited rights" licenses, computer software protected by "restricted rights" licenses, or intellectual property protected by other types of specialty licenses under FAR Part 27, DFARS Part 227, or similar FAR Supplement provisions. These include:

- Administrative and legal remedies surrounding challenges to a contractor's or subcontractor's markings of such data or software under the FAR's and DFARS' validation process;[175]

- A claim under the CDA, if a direct sale by a subcontractor involves a violation of the contractor or higher-tier subcontractor's trade secrets—including trade secrets that may have been disclosed in technical data or computer software delivered to the Government based on licensing restrictions described in FAR Part 27 and DFARS Part 227. Such data or software may only be used, disclosed, or reproduced by the Government in accord with the terms of that license. Use or disclosure of such data or computer software for purposes of manufacturing by the Government or another contractor is limited by the terms of each license unless a

special license has been negotiated with the owner of that data or software;

- A Fifth-Amendment "Takings" action involving the Government's use of a contractor's proprietary interests in data or software, to the extent it may be protected by copyright or trade secrets law;[176] and

- In some cases, even legal actions in federal district court under the Administrative Procedure Act[177] (in conjunction with the Trade Secrets Act)[178] or a "reverse-FOIA case" under the Freedom of Information Act.[179]

Other potential pre-award and post-award legal or administrative remedies against the Government that are available to a contractor, higher-tier subcontractor, or even a potential offeror negatively affected by FAR 52.203-6 include claims under the CDA, the Tucker Act, or bid protests filed with the agency, the GAO, or the Court of Federal Claims.[180]

The ability of a contractor to bring any of these actions directly against the Government depends on the facts and circumstances, the substantive theories on which those actions are grounded, and the procedural aspects of each statute or regulation, but there are a plethora of federal laws and regulations that authorize parties adversely affected by actions by the Government to pursue those rights—regardless of FAR 52.203-6.

Some have suggested that FAR 52.203-6(b) is limited to rights that are authorized by federal law or regulation—not the laws of some other jurisdiction, like states or other countries. Yet, nothing in the statutes or, for that matter, in the FAR makes such a distinction. A more reasonable interpretation of paragraph (b) would allow contractors and higher-tier subcontractors to exercise whatever substantive rights they may have under any jurisdiction's applicable laws or regulations, whether they be federal or state law or a law or regulation of some other jurisdiction.

Much like the statutes and regulations referenced above, there are a number of rights arising under federal and state laws and regulations that a prime contractor or higher-tier subcontractor may be able to assert against a lower-tier subcontractor, or even other private parties. Depending on the jurisdiction, some of the more common causes of action that may apply to an actual or threatened breach of an exclusivity agreement or some other acts of a subcontractor or team member include (1) breach of an express exclusivity provision, an NDA, non-solicitation, or other provision in the agreement between the parties;[181] (2) breach of implied contract; (3) unjust enrichment (a quasi-contract claim); (4) breach of fiduciary duty; (5) breach of the implied covenant of good faith and fair dealing; [182] (5) promissory or equitable estoppel;[183] (6) fraud in the inducement to enter into the contract or in its performance; (7) tortious interference with contract or with a prospective economic advantage, whether based on common law theories or a state statute;[184] (8) misappropriation of a trade secret under state trade secrets laws based on the state's adoption of the Uniform Trade Secrets Act with the 1985 Amendments (USTA), similar statutes, or common law; [185] and (9) misappropriation of trade secrets under the Economic Espionage Act/Defend Trade Secrets Act (EEA), which makes the theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means actionable under federal law.[186]

A contractor may be able to obtain equitable relief via a temporary restraining order or an injunction, either on a preliminary or permanent basis, to enjoin a party from engaging in an anticipatory breach, as well as monetary damages. In addition, it may be possible for one party to an exclusivity agreement to request a declaratory judgment from a court under the Declaratory Judgment Act, which provides that any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.[187]

Of course, except for the EEA, not every jurisdic-

tion may recognize all of the foregoing causes of action,[188] and each jurisdiction may require different elements of proof, apply different statutes of limitation, and have its own unique procedural requirements that must be met to successfully invoke any rights under any of these causes of action. Also, some states may be more circumspect about enforcing certain terms of pre-award teaming agreements than they would be if the provision appeared in a contract or subcontract.[189] Finally, to be enforceable, a contract provision must be for a definitive, legal objective and not violate public policy. If a provision or other agreement violates FAR 52.203-6 or some aspect of federal or state antitrust laws or similar laws governing unreasonable restraints of trade, it may not be possible to bring a viable cause of action against another party based on a threatened or actual breach of that provision. Defendants have raised FAR 52.203-6 as a challenge to attempts to enforce the terms of an exclusivity agreement or similar provision in several lawsuits—although only have been successful due to procedural or other defects.[190] In the end, it may not be possible to discuss all the rights that every jurisdiction might afford a contractor or subcontractor under its law or regulations, but a wide array of contractual, legal, and administrative remedies are available under FAR 52.203-6(b), as well as FAR 52.203-6(b) (Alternate I).

Exclusivity Agreements Involving Commercial Products And Commercial Services Under FAR 52.203-6(b) (Alternate I)

The second caveat to FAR 52.203-6(a) appears in Alternate I of that clause. FAR 52.203-6(b) (Alternate I) states that the "prohibition in paragraph (a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial product(s) and commercial service(s)."[191] So, unless a prime contractor or higher-tier subcontractor tries to impose different, more restrictive exclusivity provisions on subcontractor direct sales to the Government, FAR 52.203-6 (Alternate I) would allow that contractor to apply the same kind of limitations on sales to the Government that it and its subcontractors would apply to sales of commercial products or commercial services to any other potential purchasers.

Any exclusivity agreements would still have to comply with applicable antitrust laws to avoid possible complications under FAR Subpart 3.3, as well as other state-law based limitations on their use, scope, and duration to be enforceable. Moreover, from a practical standpoint, it may be difficult for anyone, except a distributor or regular dealer of another party's commercial products or commercial services, to convince a subcontractor making or furnishing such products or services to agree to such an exclusivity provision. Nonetheless, Alternate I does give parties substantially greater leeway to enter into a viable agreement that protects and furthers their respective interests—at least in theory. Since it is the Government's policy not only to acquire commercial products and commercial services as end items, but also to "[r]equire prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency,"[192] it makes consideration of this caveat all the more important.

The key to understanding the scope of Alternate I's caveat to the clause's general prohibitions turns on the definitions of a "commercial product" and "commercial service." Both definitions are very broad. "Commercial products" include not only products (other than real property) that are of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes and have been sold, leased, or licensed, or offered for sale, lease, or license, to the general public. They also include products that have evolved from those items, that have not yet been made available in the commercial market place, products that have undergone modifications that are of a type customarily available in the commercial marketplace, and products that have undergone minor modifications to meet the Government's needs. Com-

mercial products even include mixing and matching any of the foregoing that are customarily combined and sold in combination to the general public. They may even be a "nondevelopmental item" if the procuring agency determines, in accordance with conditions in the FAR, that the product in question was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple state and local governments.[193] This same definition applies to "commercial components," and "commercial computer software," which is defined as either a commercial product or a commercial service.[194]

The definition of "commercial services" is equally broad and includes any of the following services: installation services, maintenance services, repair services, training services, and other services if those services are procured for support of a "commercial product," regardless of whether the services are provided by the same source or at the same time as the commercial product, and the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government. Commercial services also include other services of a type offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices, for specific tasks performed or specific outcomes to be achieved, and under standard commercial terms and conditions.[195]

The FAR's expansive definitions provide prime contractors and subcontractors a number of options when considering the use of exclusivity provisions. Yet, in spite of FAR 52.203-6(b) (Alternate I)'s statement that the prohibitions in paragraph (a) apply only to the extent that any agreement restricting sales by subcontractors results in the Government being treated differently from any other prospective purchaser, there are some additional restrictions to consider.

First, FAR 52.203-6(b) (Alternate I) only applies to prime contracts for commercial products or commercial services awarded using FAR Part 12. If the prime contract is awarded under any other acquisition procedures, the basic version of FAR 52.203-6 would apply. In such cases, the paragraph (a) would prohibit the parties from relying on any exclusivity agreement that has or may have the effect of restricting at least the first-tier subcontractor's sales to the Government, even if a vendor claims that the items of supply, components, processes, or services might qualify as a commercial product, a commercial component, or a commercial service.

Second, Alternate I only exempts exclusivity agreements between a prime contractor and those subcontractors selling commercial products or commercial services as defined by FAR 2.101 to other prospective purchasers. Not all components, subsystems, or services delivered or furnished to the prime contractor will necessarily qualify as a "commercial product" or a "commercial service." If not, the prohibitions in paragraph (a) would continue to apply to that subcontract—even if the end items or services themselves may meet those definitions. Contractors need to make individual determinations as to what subcontracted components, items, processes, or services qualify as "commercial products" or "commercial services"—even if there may already be an agreement that applies to prospective buyers other than the Government.

FAR 52.203-6(c)'s Flow-Down Requirements

Nothing in the Defense Procurement Reform Act[196] or the Small Business and Federal Procurement Competition Enhancement Act[197] required that the prohibitions against agreements or actions restricting direct subcontractor sales to the Government to be applied to any party other than a prime contractor. Yet, when the FAR Council promulgated FAR 52.203-6, it added paragraph (c). That paragraph originally required prime contractors to flow down the substance of that clause to all its subcontracts.[198] It also included a requirement to flow down paragraph (c) itself, making the restrictions against prohibiting direct subcontractor sales to the Government under FAR 52.203-

6(a) and reservation of rights authorized by law or regulation in 52.203-6(b) applicable to all lower-tier subcontracts under the contract regardless of their value.

As a result of FASA's creation of the SAT in 1994, FAR 52.203-6(c) was amended to only require prime contractors and higher-tier subcontractors to include FAR 52.203-6 in a lower-tier subcontract if the value of that subcontract exceeds the SAT, as defined in FAR 2.101 on the date of subcontract award.[199] Importantly, it is not the value of the prime contract or any higher-tier subcontract that determines whether the clause must be flowed down. So, the lower down on the supply chain a subcontractor falls, the less likely it is that FAR 52.203-6 would need to be included in its subcontract. Once that chain is broken, there is no prohibition against that subcontractor from entering into an exclusivity agreement with any lower-tier subcontractor.

That in itself is an important limitation, but there are other exceptions located elsewhere in the FAR and DFARS that should also be considered before incorporating FAR 52.203-6 into a subcontract even if the value of that subcontract may exceed the SAT. These exceptions revolve around the fact that clauses prescribed by FAR Part 12 and FAR Part 44 limit the number and type of FAR clauses that need to be flowed down to subcontracts for commercial products and commercial services. FAR 52.203-6 is not among those clauses. Because this exception is not readily apparent from FAR 52.203-6 itself and even appears to conflict with the flow-down requirements in paragraph (c) of that clause, prime contractors and subcontractors sometimes overlook this. However, just because FAR 52.203-6(c) states that the clause must be included in all subcontracts for supplies or services exceeding the SAT is not controlling. Even if a contract for a commercial product or commercial service may be subject to a policy in other parts of the FAR, if it is inconsistent with the policies in FAR Part 12, FAR Part 12 takes precedence.[200]

The exception to the requirement to flow down FAR 52.203-6 is the result of another one of FASA's reforms—one that required the FAR to provide a list of laws that were inapplicable to the acquisition of "commercial items"—later redefined as "commercial products" and "commercial services."[201] FASA not only required this listing for prime contracts for commercial items issued under FAR Part 12, but it also directed the FAR Council to identify and list those provisions of law that are inapplicable to subcontracts issued under a prime contract or higher-tier subcontract for the procurement of commercial products or commercial services.[202] There are two variations of this exception to FAR 52.203-6(c)'s general flow-down requirement—neither of which is mentioned in the clause itself.

The first applies to prime contracts for commercial products or commercial services that have been awarded using FAR Part 12. All FAR Part 12 solicitations and contracts must include the clause at FAR 52.212-5, "Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services."[203] Paragraph (e)(1) of that clause provides that "[n]otwithstanding the requirements of the clauses in paragraphs (a), (b), (c), and (d) of this clause, the Contractor is not required to flow down any FAR clause, other than those in this paragraph (e)(1), in a subcontract for commercial products or commercial services."[204] Neither FAR 52.203-6, nor its Alternate I is listed in paragraph (e)(1).

The second applies to prime contracts for noncommercial items of supplies or services that were awarded using some other procurement technique than FAR Part 12. The clause at FAR 52.244-6, "Subcontracts for Commercial Products and Commercial Services," appears in all of those contracts,[205] and in paragraph (c)(1) it identifies 23 FAR clauses that must be flowed down to subcontracts for commercial products or commercial services. [206] Once again, FAR 52.203-6 is not among the clauses identified in FAR 52.244-6(c)(1). Prime contractors and higher-tier subcontractors would still need to include FAR 52.203-6 in subcontracts for non-commercial products and non-commercial services valued at

more than the applicable SAT, but the FAR provides that there is no requirement to insert any other FAR clause beyond those specified in FAR 52.244-6(c)(1) in a subcontract for commercial products or commercial services at any tier.[207]

Both variants provide a substantial amount of flexibility for higher-tier subcontractors and lower-tier subcontractors supplying commercial products or services to negotiate exclusivity provisions without having to be concerned about FAR 52.203-6. While a prime contractor may be subject to the restrictions on exclusivity agreements imposed by either FAR 52.203-6(a) or FAR 52.203-6(b) (Alternate I) with its first-tier subcontractors, its first-tier subcontractors would not be subject to these prohibitions when dealing with potential or actual lower-tier subcontractors that make or furnish commercial products or commercial services to them. The same exception would apply to every lower-tier subcontractor making or furnishing commercial products, commercial components, or commercial services to a higher-tier subcontractor. Indeed, a higher-tier subcontractors also need not accept such restrictions from a prime contractor when dealing with their lower-tier subcontractors making or furnishing commercial products or commercial services to them.

There is one important difference between FAR 52.244-6 and FAR 52.212-5. FAR 52.244-6 does not excuse a prime contractor or higher-tier subcontractor from flowing down FAR 52.244-6 to any subcontract over the SAT that is for products or services that do not meet the definition of "commercial products" or "commercial services." As such, the prime contractor or higher-tier subcontractor under a non-FAR Part 12 prime contract needs to determine which subcontractors are subject to FAR 52.203-6 and which are not. Conversely, FAR 52.212-5 contains no similar flow-down requirement.[208] Subcontractors under a FAR Part 12 prime contract need not incorporate any flow-down requirement for FAR 52.203-6 (Alternative I) to subcontracts involving products or services even if they do not meet the definition of a commercial product or commercial service. In either case, the prime contractor would be prohibited from entering into the kind of exclusivity agreements or engaging in acts that are prohibited by FAR 52.203-6 or FAR 52.203-6 (Alternate I). At the same time, its subcontractors have far more options when dealing with their lower-tier subcontractors.

Any prime contractor or higher-tier subcontractor wishing to take advantage of these exceptions to FAR 52.203-6(c)'s flow-down requirements must be able to support any determination that an item, a component, a process (including computer software), or a service meets the FAR 2.101's definition of a "commercial product" or "commercial service." Yet, even there, the amendment in a November 17, 2023 final rule to the clause at DFARS 252.244-7000, "Subcontracts for Commercial Products or Commercial Services," makes it much easier to establish this—at least when it comes to common products that ultimately may be used in performance of a Government prime contract.[209] DFARS 252.244-7000(b)(1) now requires prime contractors to treat as commercial products any items valued at less than $10,000 per item that were purchased by the contractor for use in performance of multiple contracts with DoD and other parties that were not identifiable to any particular Government contract when purchased. Such items need not separately meet any of FAR 2.101's definitions of a "commercial product" discussed above. [210] DFARS 252.244-7000(c) of the revised clause imposes this same requirement to treat items valued at less than $10,000 as commercial products on subcontracts awarded under a contract, including any subcontracts for the acquisition of commercial products or services. This effectively makes this exception applicable to any subcontractor at every level of the supply chain.[211] The fact that the $10,000 ceiling applies to each item, rather than to a contract or purchase order for items that were not identifiable to a particular Government contract makes the use of this exception all the more important—at least to the extent that its use might later be linked to a DoD contract, rather than a civilian agency contract. However, if such items are ultimately used as an item or component in performance of a civilian agency contract, it must still qualify as a commercial product

under FAR 2.101's definition to avoid the application of FAR 52.203-6(a).

Given the number of scenarios, attempting to map out when FAR 52.203-6 must be flowed down to a particular subcontract under FAR 52.244-6 is difficult enough. However, there is one more issue that must be considered in determining a subcontractor's rights and obligations are under FAR 52.203-6 that applies to civilian agency contracts. FAR 52.212-5(e)(1) and FAR 52.244-6(c)(1) only provide that a contractor is not "required" to flow down clauses not listed in those paragraphs. However, both clauses allow contractors to include in their subcontracts "a minimal number of additional cluses necessary to satisfy [their] contractual obligations."[212]

These provisions have been and continue to be highly controversial. Many prime contractors and higher-tier subcontractors flow down numerous clauses to their subcontractors without any apparent regard to whether the clauses are needed to satisfy the prime contractor or higher-tier subcontractor's obligations in contravention of FAR 52.212-5(e)(2)'s and FAR 52.244-6(c)(2)'s reference to a "minimal number" of such clauses. This practice undercuts one of the fundamental tenets of FASA's reforms, and subcontractors that might otherwise be exempt from these requirements should be diligent when reviewing proposed subcontracts to ensure that prime contractors and higher tier subcontractors are not overreaching.

To stop these questionable practices and limit the number of regulatory requirements with which commercial vendors must deal, in 2016, Congress passed § 874, "Inapplicability of Certain Laws and Regulations to the Acquisition of Commercial Item and Commercially Available Off-The-Shelf-Items," as part of the National Defense Authorization Act for Fiscal Year 2017. [213] Section 874 amended 10 U.S.C.A. § 2375 (redesignated as 10 U.S.C.A. § 3452) to require DoD to restrict inclusion of FAR contract clauses in contracts for commercial products, commercial services, and commercially available off-the-shelf (COTS) items as well as in subcontracts under contracts for such items.

The DOD's November 17, 2023 final rule implemented § 874 by adding a new sentence to DFARS 212.301(f) that prohibits DoD contracting officers from inserting any FAR or DFARS provisions or clauses in solicitations and contracts for commercial products or commercial services that are not specified in DFARS 212.301 unless required by the FAR or DFARS, or their inclusion is consistent with customary commercial practices.[214] While DFARS 212.301 lists a number of DFARS clauses and even one FAR clause—FAR 52.203-3, "Gratuities," FAR 52.203-6 is not identified as one of the clauses that may be used in subcontracts for commercial products or commercial services.[215]

This does not mean that, DoD officials may ignore FAR 52.203-6. FAR 3.503-2 still requires contracting officers to insert that clause, along with its Alternate I in all solicitations and prime contracts for the acquisition of commercial products or commercial services that are expected to have a value exceeding the applicable SAT. Nonetheless, the final rule amended DFARS 252.244-7000(a) to prohibit a prime contractor or higher-tier subcontractor from including any FAR or DFARS clause in subcontracts for commercial products or services at any tier unless (1) otherwise specified in a particular DFARS clause, or (2) in the case of a FAR clause, the clause is listed at FAR 12.301(d) or is specified as a flow-down provision in FAR 52.212-5(e)(1) or FAR 52.244-6(c)(1).[216] FAR 52.203-6 does not appear any of these paragraphs.[217]

The recent changes to the DFARS only affect DoD contracts—not contracts awarded by civilian agencies. FAR 52.212-5 and FAR 52.244-6 continue to allow prime contractors and subcontractors under a civilian agency contract to flow down a "minimal number" of FAR clauses to their subcontracts for commercial products or commercial services that may be needed to satisfy any of the prime contractor's or higher-tier subcontractors' contractual obligations. There is, however, no legitimate reason to include FAR 52.203-6 in any lower-tier subcontract for commercial products or commercial services. Nothing in that clause imposes any affirmative duties on a prime

contractor or higher-tier subcontractors that relates to any aspect of performance under a contract in which it appears. It only restricts agreements and actions affecting future direct sales by affected subcontractors. Given FAR 52.212-5(e)(1)'s and FAR 52.244-6(c)(1)'s statements that FAR 52.203-6 or Alternate I need not be flowed down to any subcontractors making or furnishing commercial products or services, a subcontractor may want to take exception to its inclusion—especially if that subcontractor already has or is considering an exclusivity arrangement with one or more of its lower-tier subcontractors.

Conclusion

The long-term effects that the Defense Procurement Reform Act and the Small Business and Federal Procurement Competition Enhancement Act have had on the procurement process is unclear. Since their enactment in 1984, various changes have been made to the laws and regulations governing rights in data and computer software, and FASA placed a number of limits on those Acts that allowed for a number of exceptions—at least with regard to contracts and subcontracts for commercial products and commercial services and to contracts and subcontracts valued at or below the SAT. Indeed, despite all the rhetoric at the time about the $435 claw hammer and a $640 toilet seat cover for use on C-5 Galaxy cargo aircraft,[218] as recently as 2018 the Air Force appears to have been willing to spend $10,000 for the same C-5 plastic toilet seat cover until that purchase came to Congress' and the public's attention.[219]

Nonetheless, any prime contractor or subcontractor weighing the benefits and risks of an exclusivity agreement or an exclusive teaming agreement in the context of a sale of items, processes, or services to the Government must consider the limitations imposed by these Acts and FAR 52.203-6 on the use and scope of such agreements. There are several nuances, limitations, caveats, and exceptions that would permit the use of narrowly tailored agreements, which vary from case to case. To minimize any compliance risks and avoid problems, offerors, prime contractors, subcontractors at every tier, and Government procurement professionals should make every effort to understand not only the clause's terms, but also how those terms are affected by other federal statutes and regulations. The clause's restrictions, as well as the nuances, caveats, limitations, and exceptions discussed throughout this Briefing Paper should be considered when deciding whether an exclusivity agreement is appropriate in a federal procurement and when drafting the terms of any such exclusivity agreement that could be impacted by FAR 52.203-6.

Finally, irrespective of FAR 52.203-6(a)'s and FAR 52.203-6(b) (Alternate I)'s prohibitions and limitations, contractors and higher-tier subcontractors always have the ability to assert rights that they otherwise have as authorized by law or regulation. So, even if it may not be possible to enter into a broad exclusivity arrangement with one or more team members or subcontractors, contractors may be able to enforce other aspects of their agreements or take legal action through any number of federal, state, and other laws or regulations.

Guidelines

These *Guidelines* are intended to assist you in understanding the basic concepts regarding the use and limitations on exclusivity agreements under FAR 52.203-6 and Alternate I of that clause. They are not a substitute for professional legal advice or representation in any specific situation. Nevertheless, the following core concepts can be applied to minimize the risks that parties considering the use of an exclusivity provision in a federal procurement, contract, or subcontract issued thereunder and should be considered.

1. FAR 52.203-6 does not prohibit all exclusivity agreements. It only prohibits exclusive supply agreements that have or may have the effect of unreasonably restricting direct subcontractor sales to the Government of items, processes (including software), and probably services made or delivered by that subcontractor under the contract or a follow-on production contract.

2. FAR 52.203-6 is a contract clause, but its effect

must be considered prior to award. Any teaming agreement that includes an exclusivity provision or similar pre-award agreement must be drafted in a way that complies with the clause's limitations on restricting future subcontractor direct sales to the Government as well as any agency-specific limitations imposed by a particular solicitation.

3. Exclusivity agreements restricting direct sales to the Government of commercial products or commercial services made or furnished by a subcontractor under a FAR Part 12 contract are permissible under FAR 52.203-6(b) (Alternate I), but they may not be written in a way that results in the Government being treated any differently than other prospective purchasers.

4. FAR 52.203-6's prohibitions against exclusivity agreements restricting direct subcontractor sales must be included in subcontracts for non-commercial products or services that are valued at more than the applicable SAT, but the clause need not be flowed down to subcontracts for commercial items or commercial services, regardless of their value.

5. Even if an exclusivity agreement is permissible under FAR 52.203-6 or its Alternate I, it must be carefully drafted to further the parties' interests, identify the scope of the restrictions, as well as the products or services covered by the agreement, and specify a duration to avoid problems with its enforcement.

6. Exclusivity agreements must be narrowly tailored and be for a proper purpose to minimize the risk that it may be found by a court or administrative agency to violate federal and state antitrust laws, as well as state laws governing unreasonable restraints of trade.

7. Whether or not FAR 52.203-6 precludes the use of an exclusivity agreement, prime contractors and higher-tier subcontractors may exercise other rights that they may have under law or regulation. This includes legal and administrative actions against the Government, a subcontractor, and even third parties.

8. Remember that the prohibitions in FAR 52.203-6(a) apply not only to agreements, but also to other actions. Prime contractors and higher-tier subcontractors may not "act in any manner" that has or may have the effect of restricting direct subcontractor sales to the Government.

9. Because of inartful wording used in FAR 52.203-6, the statutes that it is intended to implement, and conflicting agency guidance, not every question regarding the clause's use, scope, and limits can be answered. Such matters have yet to be addressed by future revisions to the statutes or regulations or determined by a court or other administrative body.

ENDNOTES:

[1]FAR 52.203-6, "Restrictions on Subcontractor Sales to the Government."

[2]FAR 3.503-1 (citing 10 U.S.C.A. § 4655 and 41 U.S.C.A. § 4704).

[3]Compare FAR 52.203-6(a) and (b) with FAR 52.203-6(b) (Alternate I).

[4]Federal Trade Comm'n, Guide to Antitrust Laws, Exclusive Supply or Purchase Agreements, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or-purchase-agreements (last visited Feb. 11, 2024).

[5]William E. Kovacic, "Illegal Agreements With Competitors," 57 Antitrust L.J. 517 (1988); John W. Chierichella, "Antitrust Considerations Affecting Teaming Agreements," 57 Antitrust L.J. 555, 560 (1988) (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961)) (in the context of antitrust laws, exclusivity arrangements pose the same issues as long-term exclusive dealing arrangements). See also Maj. Francis Dymond, "Proposed Procedures for Integrating Antitrust Law, Procurement Law, and Purchasing Decisions," 172 Mil. L. Rev. 96 (2002); Robert R. Main, The Effects of Exclusive Teaming Arrangements on the Department of Defense Acquisition Process (June 1999) (unpublished Master's thesis, Naval Post Graduate School), https://apps.dtic.mil/sti/tr/pdf/ADA368054.pdf (last visited Feb. 11, 2024) (for further discussions of federal antitrust issues in Government procurements).

[6]Kovacic, 57 Antitrust L.J. at 523 n.22 (citing United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945); Michael J. Shockro, "An Antitrust Analysis of the Relationship Between Prime

Contractors and Their Subcontractors Under a Government Contract," 51 Antitrust L.J. 725, 727–30 (1982).

[7]15 U.S.C.A. §§ 1–38.

[8]15 U.S.C A. §§ 12–27.

[9]See generally FAR subpt. 3.3, "Reports of Suspected Antitrust Violations" (implementing and 10 U.S.C.A. § 3307 and 41 U.S.C.A. § 3707).

[10]Federal Trade Comm'n, Guide to Antitrust Laws, Exclusive Supply or Purchase Agreements, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or-purchase-agreements (last visited Feb. 11, 2024).

[11]Note that for purposes of this statute, a "joint venture" is narrowly defined by 15 U.S.C.A. § 4301(a)(6). Furthermore, 15 U.S.C.A. § 4301(b) excludes certain activities from the term "joint venture," including agreements to restrict or require the sale, licensing or sharing of inventions, developments, products, processes, or services that have not been developed through or produced by the joint venture. See also Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

[12]Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.3 (Apr. 2000), https://www.justice.gov/atr/page/file/1098461/dl?inline (last visited Feb. 11, 2024). The purpose of these Guidelines is to assist businesses in assessing whether these agencies may challenge a competitor collaboration or any of the agreements of which it is comprised. Id. § 1.1. Exclusivity agreements can be both procompetitive and anti-competitive at the same time. See, e.g., Standard Oil Co. v. United States, 337 U. S. 293, 306–07 (1949) (listing pro-competitive aspects of exclusive dealing agreements). However, if such agreements are used to raise a competitor's costs, exclude competition, or facilitate tacit collusion, they would be considered anti-competitive.

[13]Wendy A. Polk, "Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations," 28 Pub. Cont. L.J. 415, 427 (1999) (citing Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 20, 24 (1979)); see also Jonathan M. Jacobson, "Exclusive Dealing, 'Foreclosure,' and Consumer Harm," 70 Antitrust L.J. 311 (2002).

[14]Federal Trade Comm'n, Guide to Antitrust Laws, Exclusive Supply or Purchase Agreements, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or-purchase-agreements (last visited Feb. 11, 2024).

[15]See, e.g., Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal 5th 1130, 1162, 266 Cal. Rptr. 3d 655, 687, 470 P.3d 571, 590 (2020) (applying a "rule of reason" test to determine the validity of contractual provisions that restrain a business from engaging in lawful trade or business activities with another business under Cal Bus & Prof. Code § 16660).

[16]See, e.g., Darton Envtl., Inc. v. FJUVO Collections, LLC, 332 F. Supp. 3d 1022, 1028 (W.D. Va. 2018) (under Virginia law, non-compete agreements between businesses are strictly construed).

[17]See, e.g., Preferred Sys. Sols., Inc. v. GP Consulting, LLC, 284 Va. 382, 392–93, 732 S.E.2d 676, 681 (2012) (involving an exclusive teaming agreement between a Government prime contractor and subcontractor); cf. Simmons v. Miller, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001) (considering the "function, geographical scope, and duration" of a non-compete agreement).

[18]See, e.g., AGMA Sec. Serv., Inc. v. United States, 158 Fed. Cl. 611, 632 n.10 (2022) (pointing to the existence of a severability provision in a teaming agreement to conclude that, even "if any part of the teaming agreement violated FAR 52.203-6, it would be severed from the agreement").

[19]Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, tit. XII, § 1234, 98 Stat. 2492, 2601–02.

[20]Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, § 206(a), 98 Stat. 3066, 3073–74 (adding § 303H(a)(1) to the Federal Property & Administrative Services Act of 1949).

[21]74 Fed. Reg. 2713, 2718 (Jan. 15, 2009) (discussing the FAR Council's rationale for refusing to waive FAR 52.203-6 for COTS items); see also DOD Advisory Panel on Streamlining and Codifying Acquisition Laws, Streamlining Defense Acquisition Laws: Report of the Advisory Panel on Streamlining and Codifying Acquisition Laws 3-407, 3-408 (Jan. 1993) ("Section 800 Panel Report"), 199303_Section_800_Panel_Report.pdf (procurementroundtable.org (last visited Feb. 11, 2024).

[22]Competition in Contracting Act of 1984, Pub. L. No. 98–369, div. B, tit. VII, §§ 2701–2751, 98 Stat. 494, 1175–03.

[23]See generally Failure To Implement Effectively the Defense Department's High Dollar Spare Parts

Breakout Program Is Costly, Fifteenth Report by the Comm. on Gov't Operations, H.R. Rep. No. 98-512 (1983) (discussing hearings and findings going back to April 19, 1983).

[24]See 130 Cong. Rec. 12,287–88 (1984) (statement by Rep. Bedell) (outlining Congress' concerns from 1968 to 1982 about DoD's spare parts procurement procedures).

[25]130 Cong. Rec. 14,452 (1984) (statement by Rep. Addabbo) (complaining about the lack of action by DoD to procure spare parts competitively and reign in overpricing).

[26]U.S. Gov't Accounting Off., GAO/NSIAD-86-52, Procurement: DOD Initiatives To Improve the Acquisition of Spare Parts 21–25 (Mar. 11, 1986).

[27]Maj. Airon A. Mothershed, "The $435 Hammer and $640 Toilet Seat Scandals: Does Media Coverage of Procurement Scandals Lead to Procurement Reform?," 41 Pub. Cont. L.J. 855, 862 (2012) (citing James Barron, "High Cost of Military Parts: Contracts, Lax Controls Blamed," N.Y. Times, Sept. 1, 1983, at D1).

[28]Mothershed, 41 Pub. Cont. L.J. at 862–63 (citing "Capitalism for the Pentagon," N.Y. Times, Nov. 15, 1983, at A34; William H. Miller, "DoD Opens War on Spare-Parts Cost," Indus. Wk., Sept. 19, 1983, at 21; William H. Miller, "DoD Opens War on Spare-Parts Costs," Indus. Wk., Sept. 19, 1983, at 21; Brad Knickerbocker, "Pentagon Steps Up Its War on Unscrupulous Defense Contractors," Christian Sci. Monitor, Mar. 15, 1984, at 4)).

[29]Sydney J. Freedburg, Jr., "The Myth of the $600 Hammer," Gov't Exec., Dec. 7, 1998, https://www.govexec.com/federal-news/1998/12/the-myth-of-the-600-hammer/5271/ (last visited Feb. 11, 2024) (quoting Steven Kelman, public policy professor at Harvard University's John F. Kennedy School of Government and former administrator of the Office of Federal Procurement Policy); see also Mothershed, 41 Pub. Cont. L.J. at 861.

[30]130 Cong. Rec. 23,582–83 (1984) (statement of Rep. Dorgan) (complaining about the Government's decision to pay $400 for a hammer that only costs $7 at a hardware store, outrageous sums of money to buy Allen wrenches that should cost no more than a half dollar, and a remark that Rep. Bedell had been able to purchase tools for around $92 at a drugstore for which DoD paid $10,000); 130 Cong. Rec. 23,591 (1984) (statement by Rep. Bedell).

[31]Pub. L. No. 98-525, § 1234(a)(1), 98 Stat. at 2601(adding 10 U.S.C.A. § 2402(a)(1)); Pub. L. No. 98-577, § 206(a), 98 Stat. at 3073–74 (adding § 303H(a)(1) to the Federal Property & Administrative Services Act of 1949 (41 U.S.C.A. § 253g(g)(1)).

[32]Pub. L. No. 98-525, § 1234(a)(2), 98 Stat. at 2601 (adding 10 U.S.C.A. § 2402(a)(2)); Pub. L. No. 98-577, § 206(a), 98 Stat. 3066, 3074 (adding § 303H(a)(2) (41 U.S.C.A. § 253(g)(2)).

[33]FAR 3.503-1; FAR 3.503-2; FAR 52.203-6(b); see also 50 Fed. Reg. 35205, 35474, 35475, 35479 (Aug. 30, 1985) (interim rule); 51 Fed. Reg. 27114, 27115 (July 29, 1986) (final rule).

[34]FAR 52.102.

[35]FAR 52.252-2, "Clauses Incorporated by Reference."

[36]See generally Brian A. Darst, "Subcontract Incorporation by Reference and Flow-Down Clauses Under Federal Construction Projects," 05-07 Briefing Papers 1 (June 2005).

[37]FAR 3.503-2.

[38]FAR 2.101 (definition of "Contract clause" or "Clause").

[39]FAR 9.601 (definition of "Contractor team arrangement").

[40]Wendy A. Polk, "Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations," 28 Pub. Cont. L.J. 415, 445 (1999) (citing Howard Addler, Jr. & David P. Metzger, "Government Contractor Teaming Arrangements and the Antitrust Laws," Antitrust & Trade Reg. Daily (BNA), Apr. 4, 1994, at D6; William B. Burnett & William E. Kovacic, "Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual Sourcing," 6 Yale J. on Reg. 249, 279 (1989)).

[41]FAR 9.602(a)(1) & (2).

[42]FAR 9.602(b).

[43]FAR 52.203-6(a). FAR 52.203-6(a)'s use of the phrase "actual or prospective subcontractor" differs from the statutory prohibitions in 10 U.S.C.A. § 4655(a)(1) and 41 U.S.C.A. § 4704(a)(1). Neither statute mentions the term "actual or prospective subcontractor"—focusing instead on restrictions on agreements with and sales by "a subcontractor." There is no regulatory history explaining why the FAR Council made this change.

[44]William E. Kovacic, "Antitrust Analysis of Joint Venture and Teaming Arrangements Involving Government Contractors," 58 Antitrust L.J. 1059, 1068 (1989) (discussing the implications of FAR 52.203-6 on joint enterprises, since participants to a joint venture or teaming arrangement are often aligned in a prime contractor/subcontractor relationship, and noting that as the subcontractor gains

expertise in the course of that agreement, it may become able to compete against one or more of its co-venturers to perform the prime contractor's role).

[45]Brent E. Newton, "The Legal Effect of Government Contractor Teaming Agreements: A Proposal for Determining Liability and Assessing Damages in Event of Breach," 91 Colum. L. Rev. 1990, 1999 (1991) (citing John. W. Chierichella & Donald C. Holmes, Advanced Subcontracting and Teaming Agreements B-28 (1990); John W. Chierichella, "Antitrust Considerations Affecting Teaming Agreements," 57 Antitrust L.J. 555, 557 (1988)).

[46]FAR 9.604(d).

[47]FAR 9.603.

[48]Wendy A. Polk, "Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations," 28 Pub. Cont. L.J. 415, 445 (1999).

[49]66 Fed. Reg. 55157 (Nov. 1, 2001).

[50]67 Fed Reg. 18160 (Apr. 15, 2002).

[51]George D. Ruttinger, "NRO Prohibits Exclusive Teaming Agreements," Crowell Client Alert (June 6, 2004) (quoting N15.209-70(i), which prescribed Solicitation Provision N52.215-020, "Exclusive Teaming Prohibition (May 2004)"), https://www.crowell.com/print/v2/content/50182/nro-prohibits-exclusive-teaming-agreements.pdf (last visited Feb. 11, 2024).

[52]NAVAIR Clause 5252.215-9505, "Exclusive Teaming Arrangements Which Inhibit Competition (NAVAIR) (OCT 2005)," (farclause, a Unison Solution, Clause Library), https://farclause.com/FARregulation/Clause/NAVY5252.215-9505_Basic-exclusive-teaming-arrangements-which-inhibit#gsc.tab=0 (last visited Feb. 11, 2024).

[53]Defense Contract Audit Agency, Contract Audit Manual, DCAA Manual 7640.1, § 4-705, "Suspected Anticompetitive Procurement Practices" (July 2023) https://www.dcaa.mil/Portals/88/Documents/Guidance/CAM/Chapter%204%20General%20Audit%20Requirements.pdf?ver=myJm2AmEs05d9UeMIkmBBw%3d%3d (last visited Feb. 11, 2024) (as of January 2013, the CAM is only available on the Internet).

[54]AGMA Sec. Serv., Inc. v. United States, 158 Fed. Cl. 611, 632 (2022).

[55]Superior Optical Labs, Inc., Comp. Gen. Dec. B-294662, B-294662.2, Dec. 9, 2004, 2005 CPD ¶ 4, at 7-8.

[56]Marion Weinreb & Assocs., Inc. v. VaLogic, LLC, No. JFM-04-3836, 2006 WL 890724, at *3 (D. Md. Mar. 29, 2006).

[57]FAR 9.601(1). Other regulatory provisions may force the members to act as subcontractors. See, e.g., 13 C.F.R. § 121.103(h)(1) (2023) (prohibiting joint ventures that exist as a formal separate legal entity from being populated with individuals intended to perform a contract set aside for small business—effectively requiring the joint venture to subcontract with individual member companies to perform the work).

[58]FAR 52.203-6(a).

[59]FAR 3.503-2 (1987); see also 50 Fed. Reg. 35205, 35475 (Aug. 30, 1985); 51 Fed. Reg. 27017, 27116 (July 29, 1986). Originally, the Defense Spare Parts Procurement Reform Act, H.R. 5064, 98th Cong. § 5(a) (as introduced in the House of Representatives, March 7, 1984), limited the prohibition against restricting direct subcontractor sales to the Government to contracts valued at $25,000 or more. H.R. 5064 Defense Spare Parts Procurement Reform Act, & H.R. 4842, To Amend Title 10, United States Code, To Promote Cost Savings in Defense Procurement Contracts Include a Clause Giving the Government a Right to Technical Data and Computer Software Necessary To Obtain Spare Parts Under the Contract From Other Manufacturers: Hearing Before the Investigations Subcomm. of the H Comm. on Armed Services Mar. 13 & 21, 1984, H.A.S.C. No. 98-47, at 5 (1984). That limitation was later removed.

[60]Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §§ 4001–4003, 108 Stat. 3243, 3338. When first established by FASA, the SAT was $100,000. The SAT was last increased in 2018 to $250,000. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 805, 131 Stat. 1283, 1456 (codified as amended at 41 U.S.C.A. § 134).

[61]Pub. L. No. 103-355, §§ 4102(f), 4103(b), 108 Stat. at 3340, 3341 (codified as amended at 41 U.S.C.A. § 1901(a)).

[62]Pub. L. No. 103-355, §§ 4101, 4102(b), 4103(b), 108 Stat. at 3339–41. Section 4102(d) also made inapplicable to DoD procurements at or below the SAT the Defense Procurement Reform Act's requirement to identify suppliers and sources of supply.

[63]FAR 3.502-3; 60 Fed. Reg. 48231, 48235–36 (Sept. 18, 1995) (as amended by 61 Fed. Reg. 39189, 39190 (July 26, 1996)).

[64]FAR 52.203-6(c).

[65]FAR 2.101 (definition of "Simplified acquisition threshold"). The SAT for acquisitions in support of contingency operations or to facilitate defense against certain attacks was increased from $750,000 to $800,000 in 2020, but no increase was made to the basic $250,000 SAT because there had insufficient

inflation to merit an increase at the time. 85 Fed. Reg. 62485, 62486 (Oct. 2, 2020).

[66]FAR 2.101 (definition of "Simplified acquisition threshold").

[67]FAR 2.101 (definition of "Simplified acquisition threshold").

[68]FAR 1.108(c).

[69]FAR 1.108(c).

[70]BPAs issued under FAR Subpart 13.303 must not be confused with blanket purchase agreements, which are also commonly referred to as "BPAs," but which are used in Federal Supply Schedule (FSS) contracts to address terms and conditions that are not already in the FSS contract or to provide better pricing pursuant to FAR 8.405-3. Because this type of BPA is issued under an existing FSS contract, any orders placed under that BPA are subject to all of the terms and conditions of the FSS contract—including FAR 52.203-6 and its Alternate I. FAR 16.702(d)(2).

[71]FAR 16.702(a); FAR 16.703(a); see also FAR 13.303-3(a)(2 (requiring that each BPA under FAR Part 13 include a statement that the Government is obligated only to the extent of authorized purchases actually made under the BPA).

[72]FAR 13.303-4(b).

[73]41 U.S.C.A. § 1901(b); 10 U.S.C.A. § 3205(b); FAR 13.003(c)(2).

[74]Cf. Global Commc'ns Sols., Inc., Comp. Gen. Dec. B-299044, B-299044.2, Jan. 29, 2007, 2007 CPD ¶ 30, at 3, 49 GC ¶ 97 (sustaining a protest challenging an agency's authority to use simplified acquisition procedures to acquire a commercial item under FAR Subpart 13.5 where the anticipated contract value exceeded the SAT).

[75]Jacqueline R. Sims, dba JRS Staffing Servs., Comp. Gen. Dec. B-409613, B-409613.2, June 16, 2014, 2014 CPD ¶ 181, at 5.

[76]FAR 13.003(a).

[77]FAR 13.006.

[78]See generally FAR 52.213-4, "Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services)."

[79]FAR 13.500(a).

[80]FAR 13.501(c)(1) & (2).

[81]FAR 13.000; FAR 13.500(b).

[82]FAR 12.301(b)(4).

[83]FAR 52.212-5(b)(1).

[84]Pub. L. No. 98-525, § 1202 "Congressional Findings and Policy," 98 Stat. 2492, 2588–89; Pub. L. No. 98-577, § 101 "Purposes," 98 Stat. 3066, 3066–67.

[85]FAR 52.203-6(a), 10 U.S.C.A. § 4655(a)(1); 41 U.S.C.A. § 4704(a)(1).

[86]Elle C. Falcone, Steven Carnovale, Brian S. Fugate & Brent D. Williams, "When the Chickens Come Home To Roost: The Short-Versus Long-Term Performance Implications of Government Contracting and Supplier Network Structure," 44 J. of Bus. Logistics 480 (2023).

[87]Id.

[88]Unlike other contract clauses prescribed by FAR Part 3, FAR 52.203-6 does not include any provision discussing what may happen to a noncompliant prime contractor or subcontractor. There is no reference to potential criminal, civil, or administrative penalties. Nor does FAR 52.203-6 prescribe any contractual actions that can be taken against a contractor or subcontractor for an alleged violation. This does not mean that the Government could not use one of its many statutory, administrative, or contractual tools to enforce the clause. Nevertheless, the absence of specified remedies in the clause has led one federal court to dismiss and refuse to allow a refiling of an amended complaint in a qui tam lawsuit filed pursuant to the Civil False Claims Act, 31 U.S.C.A. § 3729, based on an argument that the prime contractor and its subcontractors had failed to disclose to the Government an unlawful oral agreement in violation of FAR 52.203-6. United States ex rel. Compton v. Circle B Enters, No. 7:07-cv-32 (HL), 2010 WL 942293 (M.D. Ga. Mar. 11, 2010).

[89]FAR 52.203-6(a); see also 10 U.S.C.A. § 4655(a)(1); 41 U.S.C.A. § 4704(a)(1).

[90]FAR 52.203-6(a); see also 10 U.S.C.A. § 4655(a)(2); 41 U.S.C.A. § 4704(a)(2).

[91]FAR 52.203-6(a).

[92]Defense Spare Parts Procurement Reform Act, S. 2572, 98th Cong. § 5(a) (1984), as reprinted in 130 Cong. Rec. 9,284, 9,285 (1984) (as approved by the H. Armed Services Comm., Apr. 12, 1984) (emphasis added); see also Defense Spare Parts Procurement Reform Act, H.R. 5167, 98th Cong. § 805(a) (1984) as reprinted in 130 Cong. Rec. 14,443, 14,444 (as amended, May 30, 1984) (emphasis added).

[93]H.R. Rep. No. 98-1080, at 115–16 (1984) (Conf. Rep.), as reprinted in 130 Cong. Rec. 27,188, 27,223 (Sept. 26, 1984). There was no explanation for this amendment in the Conference Report. H.R. Rep. No. 98-1080, at 323.

[94]FAR 52.203-6(a) (emphasis added); see also 10 U.S.C.A. § 4655(a)(1); 41 U.S.C.A. § 4704(a)(1).

[95]See, e.g., Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co., 322 U.S. 102, 108 (1944) (in which the U.S. Supreme Court judicially defined the term "subcontractor" under what was known as the "Miller Act," 40 U.S.C.A. § 3131); Liberty Mut. Ins. Co. v, Friedman, 485 F. Supp. 695 (D. Md. 1979), rev'd, 639 F.2d 164 (4th Cir. 1981) (discussing different definitions of "subcontract" and "subcontractor" under various procurement-related statutes and regulations); see also Robert T. Ebert, Joseph W.C. Warren & Kris D. Meade, "The Impact of Procurement Reform Legislation on Subcontracting for Commercial Items: Easing But Not Eliminating the Burdens," 27 Pub. Cont. L.J. 343, 346–50 (1998) (discussing the lack of a workable definition of "subcontract").

[96]Advisory Panel on Streamlining and Codifying Acquisition Regulations, Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Vol. 1 of 3, at 26, A-29 through A-34 (Appendix F, Table F-3) and A-35 through A-38 (Appendix F, Table F-4) (Jan. 2018) ("Section 809 Panel Report"), https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Sec809Panel_Vol1-Report_Jan2018.pdf. (last visited Feb. 11, 2024).

[97]Under FAR 2.101, "contract" means any mutually binding legal relationship obligating a seller to furnish supplies or services (including construction) and a buyer to pay for them. Contracts include all types of commitments, including not only bilateral instruments, but also awards and notices of awards, job orders or task letters issued under a BOA, letter contracts, orders, such as purchase orders, and bilateral contract modifications.

[98]National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 874, 130 Stat. 2000, 2309 (codified at 10 U.S.C.A. § 3452(c)(3)); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 820, 131 Stat. 1283, 1484 (codified at 41 U.S.C.A. § 1906(c)(1)).

[99]FAR Case No. 2018-006 implementing Pub. L. No. 115-91, § 820, has been placed on hold pending a "legislative proposal." See Open FAR Cases as of 3/1/2024, at 16, https://www.acq.osd.mil/DPAP/dars/opencases/farcasenum/far.pdf (last visited Mar. 7, 2024). DFARS Case No. 2023-D022 has also been placed on hold until the proposed rule has been issued by the FAR Council. See Open DFARS Cases as of 3/1/2024, at 5, https://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf (last visited Mar. 7, 2024); see also 88 Fed. Reg. 80462, 80462–63 (Nov. 17, 2023).

[100]FAR 52.203-6(a). The statutes' and clause's references to direct sales by subcontractors is confusing. Subcontractors have no privity of contract; they cannot make "direct sales" to the Government. FAR 44.101 (definition of "Subcontractor"). Only prime contractors make a direct sale to the Government. The two concepts are mutually exclusive. Reading FAR 52.203-6(a) literally would render this clause meaningless. Yet, in X Techs., Inc. v. Marvin Test Sys., 719 F.3d 406, 415 n.4 (5th Cir. 2013), the court seemed to do exactly that, conflating prime contractors' and subcontractor's roles in the contracting process based on the language of FAR 52.203-6.

[101]FAR 3.503-1; see also FAR 52.203-6.

[102]130 Cong. Rec. 9,288 (1984) (statement of Sen. Levin) (criticizing defense contractors for burdening spare parts with indirect expenses without adding any value and DoD's mistaken belief that only the original prime contractor of a system understood the needs of the Government); 130 Cong. Rec. 27,309 (1984) (statement by Rep. Nichols) (reiterating the purpose of the prohibitions against restrictions on direct subcontractor sales to the Government); 130 Cong. Rec. 14,446 (1984) (statement by Rep. Nichols); 130 Cong. Rec. 14,447 (1984) (statement of Rep. Hopkins) (expressing the public's frustration that that spare parts sold to the Government were "200, 300, 400, even 500 percent in excess of what the Government should have paid for them"); 130 Cong. Rec. 14,457 (1984) (statement by Rep. Kasich (accusing prime contractors of directing their subcontractors not to tell the Government that they were making the part for the prime contractor).

[103]FAR 52.203-6(a).

[104]41 U.S.C.A. § 108.

[105]41 U.S.C.A. § 115.

[106]FAR 2.101 (definition of "Component").

[107]41 U.S.C.A. § 105.

[108]10 U.S.C.A. § 3011.

[109]See, e.g., 130 Cong. Rec. 4,807 (1984) (statement of Rep. Mavroules); 130 Cong. Rec. 14,452 & 14,454 (1984) (statements by Rep. Addabbo and Rep. Bedell) ($104 or $110 paid for an electric diode that should only have cost four cents); 130 Cong. Rec. 9,282-83 (1984) (statement by Sen. Levin) ($3,100 paid to a prime contractor for three plastic caps for the legs of a stool used on AWACS aircraft that a commercial supplier would sell for only 34 cents each).

[110]FAR 52.203-6(a).

[111]FAR 3.503-1.

[112]FAR 52.203-6(a); FAR 52.203-6(b) (Alternate I).

[113]10 U.S.C.A. § 4655(a)(1); 41 U.S.C.A. § 4704(a)(1).

[114]Compare H. Rep. No. 98-1080 (Conf. Rep.), as reprinted in 130 Cong. Rec. 27,223 (1984), with Defense Spare Parts Procurement Reform Act, S. 2572, 98th Cong. § 5(a) (1984), as reprinted in 130 Cong. Rec. 9,285 (1984), and Defense Spare Parts Procurement Reform Act, H.R. 5167, 98th Cong. § 805(a) (1984), as reprinted in 130 Cong. Rec. 14,444 (1984).

[115]10 U.S.C.A. § 4655(d); 41 U.S.C.A. § 4704(d). Before 2018, the statutes referred to "commercial items." That term was bifurcated into "commercial products" and "commercial services" by the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 836(b)(19) & (e)(4), 132 Stat. 1636, 1864, 1869; see also 41 U.S.C.A. § 103 ("commercial product"); 41 U.S.C.A. § 103a ("commercial service").

[116]86 Fed. Reg. 61017 (Nov. 4, 2021).

[117]86 Fed. Reg. 61017 (Nov. 4, 2021).

[118]10 U.S.C.A. § 4655(a); 41 U.S.C.A. § 4704(a).

[119]It has long been held that "[s]ilence or omission in a statute is an intentional act and can be just as significant as specific statutory direction." Beres v. United States, 64 Fed. Cl. 403, 416 (2005); cf. Ebert v. Poston, 266 U.S. 548, 554 (1935) ("A casus omissus does not justify judicial legislation.").

[120]See generally 41 U.S.C.A. §§ 101–116.

[121]See generally 10 U.S.C.A. §§ 3011–3016.

[122]See generally FAR 2.101.

[123]FAR 37.101.

[124]FAR 2.101 (definition of "Advisory and assistance services"). Advisory and assistance services are further divided into "Management and professional support services," "Studies, analyses and evaluations," and "Engineering and technical services." FAR 2.101.

[125]FAR 37.101.

[126]DoD has established its own taxonomy of different types of services based on nine different Service Portfolio Groups consisting of 40 different Service Portfolios that map to different Product and Service Codes (PSC) described in the Federal Procurement Data System Product and Services Codes (PSC) Manual. See Office of the Under Secretary of Defense, Defense Procurement and Acquisition Policy Memorandum, Taxonomy for the Acquisition of Services and Supplies & Equipment (Aug. 27, 2012) (referenced in DFARS Procedures, Guidance and Information (PGI) 237.102-74).

[127]FAR 52.101(e); FAR subpt. 52.3. The FAR Matrix was developed in 1983 as a reference tool to help contracting officials determine clause applicability. See 48 Fed. Reg. 42,102, 42,483 (Sept 18, 1983). The Matrix itself is not in the published version of the C.F.R. See online version at https://www.acquisition.gov/far/part-52. It has come under criticism on several occasions over the years.

[128]FAR Smart Matrix, https://www.acquisition.gov/smart-matrix (last visited Feb. 11, 2024).

[129]Department of Energy, Office of Management, Department of Energy Acquisition Regulation, Federal Acquisition Regulation Clause Usage Guide, https://www.energy.gov/sites/default/files/PF2012-09a.pdf (last visited Feb. 12, 2024).

[130]Defense Acquisition University, DAU Provisions and Clauses Matrix, https://www.dau.edu/tools/dau-provision-and-clause-matrix (last visited Feb. 11, 2024). A DAU professor created this Matrix. Mark Jenkins, DAU Provisions and Clause Matrix Tool (May 31, 2022), https://www.dau.edu/blogs/dau-provision-and-clause-matrix-tool (last visited Feb. 12, 2024).

[131]Other agencies may use different tools to help them determine which clauses and provisions should be included in a solicitation or contract. See, e.g., Department of Homeland Security, HSAR Provision and Clause Matrix https://www.dhs.gov/publication/hsar-provision-and-clause-matrix (last visited Feb. 11, 2024).

[132]The FAR Matrix states that Alternate I to FAR 52.203-6 is to be used in commercial items acquisitions.

[133]There is no FAR Part or Subpart or FAR clauses or provisions governing the award or administration of facilities contracts and no distinct contract type addressing such services. Prior to 2007, facilities contracts were covered in FAR Subpart 45.3. Coverage of such contracts was omitted as part of revisions to FAR Part 45 and corresponding parts of the FAR that related to those contracts. 72 Fed. Reg. 27,364, 27,380–81 (May 15, 2007).

[134]See generally FAR 16.601; FAR 16.602.

[135]Department of Energy, Office of Management, Department of Energy Acquisition Regulation, Federal Acquisition Regulation Clause Usage Guide 2, https://www.energy.gov/sites/default/files/PF2012-09a.pdf (last visited Feb. 12, 2024). The DOE's Guide states that FAR 52.203-6 is "Required" for management and operating (M&O) and other facilities contracts, even though the FAR Matrix does not include a similar designator for "facilities contracts."

[136]Defense Acquisition University, DAU Provi-

sions and Clauses Matrix, https://www.dau.edu/tools/dau-provision-and-clause-matrix (last visited Feb. 11, 2024).

[137]Defense Acquisition University, DAU Provisions and Clauses Matrix, https://www.dau.edu/tools/dau-provision-and-clause-matrix (last visited Feb. 11, 2024).

[138]In October 2023, DAU and the Air Force announced that the Air Force's "CON-IT" contract writing system, which is being deployed across the Air Force to replace aging legacy systems to streamline and standardize contract drafting across disparate contracting communities, would use the DAU Provisions and Clauses Matrix. The news release stated that this tool has been viewed more than 100,000 times and has directly assisted thousands of individual contracting actions each year. See Mark Jenkins & Schatten Douglas, "Air Force To Use DAU Provisions & Clause Matrix With Disconnected and Classified CON-IT" (Oct. 6, 2023), https://www.dau.edu/news/air-force-use-dau-provision-clause-matrix-disconnected-and-classified-con-it (last visited Feb. 11, 2024).

[139]Chevron, USA, Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); Newport News Shipbldg. & Dry Dock Co. v. Garrett, 6 F.3d 1547, 1552 (Fed. Cir. 1993), 35 GC ¶ 640 ("[W]e must accord 'considerable weight' to the agency's interpretation of a statute it is responsible to implement."); Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1321 (Fed. Cir. 2003), 45 GC ¶ 30 ("Where, as here, an agency has adopted a regulation by notice-and-comment rulemaking, the Chevron standard of deference applies to that regulation."). Chevron is being reviewed by the U.S. Supreme Court in Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 366 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023) (Mem.), and Relentless, Inc. v. Dep't of Com., .62 F.4th 621 (1st Cir.), cert. granted, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (Mem.) Both plaintiffs have urged the Court to overrule Chevron as a violation of Article III of the Constitution. U.S. Const., art. III, § 2. Oral arguments were held on January 17, 2024. See Transcript of Oral Argument, Loper Bright Enters., Inc. v. Raimondo, No. 22-451 (U.S. Jan. 17, 2024), 2024 WL 250658; Transcript of Oral Argument, Relentless, Inc. v. Dep't of Com., No. 22-1219 (U.S. Jan. 17, 2024), 2024 WL 250638.

[140]Barnhart v. Walton, 535 U.S. 212, 217 (2002) (quoting Chevron, 467 U.S. at 842–43).

[141]535 U.S. at 218 (quoting, in part, Chevron, 467 U.S. at 843).

[142]See, e.g., DGR Assocs., Inc. v. United States, 94 Fed. Cl. 189 (2010); Mission Critical Sols. v. United States, 91 Fed. Cl. 386 (2010), 52 GC ¶ 152, (FAR and SBA regulations that implicitly provided for parity among the small business set-aside programs conflicted with the Small Business Act insofar as the Act required agencies to use a set-aside for HUBZone small businesses in certain circumstances); Engineered Demolition, Inc. v. United States, 60 Fed. Cl. 822 (2004) (certain provisions defining "defective certification" under FAR 33.201 were not entitled to Chevron deference because Congress had not delegated authority to implement them to the executive branch, but rather intended the courts to make such determinations).

[143]G. L. Christian & Assocs. v. United States, 312 F.2d 418, 160 Ct. Cl. 1 (Ct. Cl. 1963), reh'g denied, 320 F.2d 345, 160 Ct. Cl. 58 (Ct. Cl. 1963).

[144]S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072, 1075 (Fed. Cir. 1993), 36 GC ¶ 75 (citing G. L. Christian & Assocs., 312 F.2d at 424, 427).

[145]See generally Brian A. Darst, "The Christian Doctrine at 50: Unraveling the Federal Procurement System's Gordian Knot," 13-11 Briefing Papers 1 (Oct. 2013).

[146]Marion Weinreb & Assocs., Inc. v. VaLogic, LLC, No. JFM-04-3836, 2006 WL 890724, at *3 n.5 (D. Md. Mar. 29, 2006).

[147]"Information and communication technology (ICT)," is defined as "information technology and other equipment, systems, technologies, or *processes*, for which the principal function is the creation, manipulation, storage, display receipt, or transmission of electronic data and information, as well as any associated content." FAR 2.101 (definition of "Information and communication technology (ICT)") (emphasis added).

[148]"Computer software" is defined as "(i) Computer programs that comprise a series of instructions, rules routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and (ii) Recorded information comprising source code listings, design details, algorithms, *processes*, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled." FAR 2.101 (definition of "Computer software") (emphasis added).

[149]See generally FAR pt. 27; DFARS pt. 227.

[150]See, e.g., DFARS 227.7203-2; DFARS 227.7202-1(d).

[151]See FAR 27.404-2(d)(3); FAR 52.227-14(g)(4)(i)(b), "Rights in Data General" (Alternate

III); DFARS 252.227-7014(a)(15), "Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation."

[152]FAR 27.403.

[153]See, e.g., FAR 52.227-14(h); DFARS 227.7203-4(a); see also DFARS 227.7203-1.

[154]DFARS 227.7203-15(a), (d).

[155]When Congress passed the Defense Procurement Reform Act in 1984, the Government had greater ability to require contractors to relinquish to the Government greater rights in intellectual property rights than it does today. Among other things, the Bill's Conference Report explained that the "restrictions on the government's right to release the technical data that would allow other companies to manufacture an item" inhibited re-procurement and resulted in "excessively priced spare parts." Raytheon Co. v. United States, 160 Fed. Cl. 428, 444 (2022) (quoting H.R. Rep. No. 98-1080, at 318 (Conf. Rep.), as reprinted in 1984 U.S.C.C.A.N. 4258, 4296–97). Over the next several years Congress and federal regulators made several revisions to FAR Part 27 and DFARS Part 227—each of which led to more protections for contractors and subcontractors. See generally Flightsafety Int'l, Inc., ASBCA No. 62659, 23-1 BCA ¶ 38,245 (for a more in-depth discussion of the history of these revisions).

[156]17 U.S.C.A. § 201(b). When dealing with software programs, proving which party created the work and whether it qualifies as a "contribution to a collective work," for purposes of the Copyright Act can be particularly difficult. It, therefore, is a common practice to include specific assignment language in a software development agreement to ensure that ownership of the software copyright will be clear.

[157]FAR 52.203-6(a).

[158]For example, in a prepared statement, a representative of the National Tooling & Machining Association stated that, in an April 19, 1983 hearing on repricing abuses, representatives of the Defense Logistics Agency testified that allowing a prime contractor and its subcontractor who actually manufactured the part to bid on the same item was not competition because of economic duress exercised by the prime over its subcontractor. Hearings on H.R. 2545 Defense Procurement Reform Act of 1983: Before the Investigations Subcomm. of the H. Comm. on Armed Services, Apr. 27, Sept. 29 & Oct. 19, 1983, H.A.S.C. No. 98-31, 98th Cong. at 143 (1983). Representative Britt later referred to hearing testimony from "various people" expressing concerns about how some prime contractors, in effect, had captive subcontractors, and that they might exercise some control over them in bidding or perhaps even receiving the bid and selling to the prime contractor. Id. at 203.

[159]Small Business Enhancement Competition Act of 1984: Report of the Committee Small Business, S. Rep. No. 98-523, at 43–44 (1984), as reprinted in 1984 U.S.C.C.A.N. 5347, 5377–78.

[160]FAR 52.203-6(b).

[161]Pub. L. No 103-355, 108 Stat. 3243.

[162]FAR 52.203-6(b) (Alternate I); see also Pub. L. No 103-355, §§ 8105(g), 8204(a) 108 Stat. at 3392-93, 3396.

[163]FAR 52.203-6(b); FAR 52.203-6(b) (Alternate I).

[164]41 U.S.C.A. § 4704(b); 10 U.S.C.A. § 4655(b).

[165]H.R. Rep. No. 98-690, at 13 (1984), as reprinted in 1984 U.S.C.C.A.N. 4237, 4244.

[166]H.R. Rep. No. 98-690, at 16.

[167]H.R. Rep. No. 98-690, at 19.

[168]S. Rep. No. 98-500, at 252 (1984).

[169]Other laws curtail the use of provisions relating to employment and labor issues. See, e.g., Cal. Bus. & Prof. Code § 16600(b)(1); Cal. Lab. Code §§ 23, 433; D.C. Code Ann. § 32-581.01; Va. Code Ann. § 40.1-28.7:8; see also Exec. Order No. 14,036, 3 C.F.R. 609 (2022); 88 Fed. Reg. 3482 (Jan. 19, 2023) (proposed rules to amend 16 C.F.R. pt. 910 issued by the FTC).

[170]FAR 52.203-6(a).

[171]41 U.S.C.A. ch. 71; see also FAR subpt. 33.2; FAR 52.233-1, "Disputes."

[172]28 U.S.C..A. § 1491.

[173]The Federal Tort Claims Act, 28 U.S.C.A. ch. 171, has waived the Government's immunity from suits involving the tortious activities of its employees where, if the Government were a private person, it would be liable according to the law of the place where a particular act or omission occurred. There are a number of limitations on this act, including an exemption for most intentional actions of Government employees and a prohibition against recovering punitive damages.

[174]28 U.S.C.A. § 1498(a), (b); see also Judge Mary Ellen Coster Williams & Diane E. Ghrist, "Intellectual Property Suits in the United States Court of Federal Claims," 10 No. 1 Landslide 30 (Sept./Oct. 2017) (providing a more thorough discussion of procedural and substantive aspects of these causes of action).

[175]See, e.g., FAR 52.227-14(e) (implementing 41

U.S.C.A. § 4703); DFARS 227.7102-3, DFARS 252.227-7019, "Validation of Asserted Restrictions—Computer Software," and DFARS 252.227-7037, "Validation of Restrictive Markings on Technical Data." (implementing 10 U.S.C.A. §§ 3781–3786)); see also Alenia N. Am., Inc., ASBCA No. 57935, 13 BCA ¶ 35,296, 55 GC ¶ 166 (involving a CDA appeal challenging the Government's removal of restrictive legends).

[176]See, e.g. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); R.R. Kwall, "Governmental Use of Copyright Property: The Sovereign's Prerogative," 67 Tex. L. Rev. 685 (1989).

[177]5 U.S.C.A. § 706; see also Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982).

[178]18 U.S.C.A. § 1905.

[179]5 U.S.C.A. § 552.

[180]FAR 33.103; FAR 33.104; 31 U.S.C.A. §§ 3551-3554; FAR 33.105; 28 U.S.C.A. § 1491(b).

[181]X Techs., Inc. v. Marvin Test Sys., 719 F.3d 406 (5th Cir. 2013) (involving an alleged breach of an exclusivity provision in a pre-award teaming agreement under a U.S. Air Force solicitation for the test equipment).

[182]See, e.g., Trianco LLC v. Int'l Bus. Machs. Corp., 466 F. Supp. 2d 600 (E.D. Pa. 2006), aff'd in part, 271 F. App'x 198 (3d Cir. 2008) (dismissing causes of action under New York and Pennsylvania law for an alleged breach of a teaming agreement under a DoD solicitation for computerized check stands used in military commissaries).

[183]See, e.g., Cacchillo v. Insmed, Inc., 551 F. App'x 592, 594 (2d Cir. 2014) (elements of promissory estoppel under New York Law).

[184]See, e.g., Schaecher v. Bouffault, 290 Va. 83, 106, 772 S.E.2d 589, 602 (2015); Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 254 Va. 408, 413, 493 S.E.2d 375, 378 (1997); Va. Code Ann. §§ 18.2-499, 18.2-500.

[185]Every state, except New York (and perhaps North Carolina and Alabama) has adopted the Uniform Trade Secrets Act (USTA) (Unif. Law Comm'n). See Trade Secrets Act, Enactment Map, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792. (last viewed Feb. 11, 2024). On January 3, 2024, bills were introduced into the New York State Assembly (Bill No. A02701) and the New York State Senate (Senate Bill No. S4729) to adopt the USTA. Id.

[186]18 U.S.C.A. §§ 1831–1839; see also Brian T. Yeh, Cong. Rsch. Serv., R43714, Protection of Trade Secrets: Overview of Current Law and Legislation (Apr. 22, 2016), https://sgp.fas.org/crs/secrecy/R43714.pdf (last visited Feb. 12, 2024).

[187]28 U.S.C.A. § 2201(a); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007).

[188]Virginia has declined to adopt promissory estoppel as a cause of action. Mongold v. Woods, 278 Va. 196, 202–03, 677 S.E.2d 288, 292 (2009), W.J. Schafer Assocs., Inc. vs. Cordant, Inc., 254 Va. 514, 521, 493 S.E.2d 512, 516 (1997)

[189]FAR 52.203-6(b). The enforceability of teaming agreements turns primarily on state law. Some states, like Virginia and Maryland, have adopted stringent views on the enforceability of teaming agreements—at least with regard to post-award obligations of the parties. See, e.g., W.J. Schafer Assocs., Inc., 254 Va. at 519–20, 493 S.E.2d at 515; CGI Fed. Inc. v. FCi Fed., Inc., 295 Va. 506, 813 S.E.2d 183 (2018); Advance Telecom Process LLC v. DSFederal, Inc., 224 Md. App. 164, 119 A.3d 175 (2015). Other states have taken a more lenient view on the enforceability of pre-award agreements. See, e.g., Cable & Computer Tech. Inc. v. Lockheed Sanders, Inc., 214 F.3d 1030 (9th Cir. 2000) (applying California law); Air Tech. Corp. v. Gen. Elec. Co., 347 Mass. 613, 199 N.E.2d 538 (1964), ATACS Corp. vs. Trans World Commc'ns, Inc., 155 F.3d 659 (3d Cir. 1998) (applying Pennsylvania law); X Techs., Inc. v. Marvin Test Sys., 719 F.3d 406 (5th Cir. 2013) (applying Texas law).

[190]See, e.g., X Techs., Inc., 719 F.3d at 415 n.4; Marion Weinreb & Assocs., Inc. v. VaLogic, LLC, No. JFM-04-3836, 2006 WL 890724, at *3 (D. Md. Mar. 29, 2006). The author is aware of other cases in which alleged violations of FAR 52.203-6 have been raised as a defense against an attempt to enforce a non-compete agreement, but those have not been reported.

[191]FAR 52.203-6(b) (Alternate I); see also Pub. L. No. 103-355, §§ 8105(g), 8204(a) 108 Stat. 3392–93, 3396.

[192]FAR 12.101(c); 41 U.S.C.A. §§ 1906, 1907, 3307; 10 U.S.C.A. §§ 3451–3453 (establishing a preference for the acquisition of commercial products, including commercial components, and commercial services).

[193]FAR 2.101 (definition of "Commercial product"); 41 U.S.C.A. § 103. This definition also applies to items that are transferred to separate divisions, subsidiaries, or affiliates of a contractor—provided that they meet one of the foregoing criteria.

[194]FAR 2.101 (definitions of "Commercial com-

ponent" and "Commercial computer software").

[195]FAR 2.101 (definition of "Commercial service"); 41 U.S.C.A. § 103a. These can also be considered a commercial service even if that service may be transferred between or among divisions, subsidiaries, or affiliates of a contractor.

[196]Pub. L. No. 98-525, § 1234(a), 98 Stat. 2492, 2601.

[197]Pub. L. No. 98-577, § 206(a), 98 Stat. 3066, 3073-74 (1984).

[198]FAR 52.203-6 (1987); see also 50 Fed. Reg. 35474, 35479 (Aug. 30, 1985); 51 Fed. Reg. 27114, 27116 (July 29, 1986).

[199]FAR 52.203-6(c).

[200]FAR 12.102(c).

[201]41 U.S.C.A. 1906(b)(1).

[202]41 U.S.C.A. 1906(c)(2). In 1993, the DoD Acquisition Law Advisory Panel had recommended that FAR 52.203-6 not be flowed down to subcontracts for commercial items as it was not consistent with commercial practices. DOD Advisory Panel on Streamlining and Codifying Acquisition Laws, Streamlining Defense Acquisition Laws: Report of the Advisory Panel on Streamlining and Codifying Acquisition Laws 4-4, 8-34 (Jan. 1993) ("Section 800 Panel Report"), 199303_Section_800_Panel_Report.pdf (procurementroundtable.org (last visited Feb. 11, 2024).

[203]FAR 12.301(b)(4).

[204]FAR 52.212-5(e)(1), "Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services."

[205]FAR 44.403.

[206]FAR 52.244-6(c)(1), "Subcontracts for Commercial Items."

[207]FAR 44.402(b).

[208]FAR 52.244-6(d); FAR 52.212-5.

[209]88 Fed. Reg. 80462, 80465 (Nov. 17, 2023).

[210]88 Fed. Reg. at 80465; see 10 U.S.C.A. § 3457(c).

[211]88 Fed. Reg. at 80465.

[212]FAR 52.212-5(e)(2); FAR 52.244-6(c)(2).

[213]Pub. L. No. 114-328, § 874(b)(1)(B), 130 Stat. 2000, 2308-09 (codified at 10 U.S.C.A. § 3452).

[214]88 Fed. Reg. at 80464.

[215]See generally DFARS 212.301.

[216]88 Fed. Reg. at 80465. The Federal Register notice for the final rule contains a typographical error. It mistakenly refers to paragraph (b)(1) of FAR 52.244-6. 88 Fed. Reg. at 80465. There is no such paragraph. When read in context with the remainder of DFARS 252.244-7000(a)(2) and the statute, it is apparent that this should be a reference to paragraph (c)(1).

[217]FAR 12.301(d); FAR 52.212-5(e)(1); FAR 52.244-6(c)(1).

[218]The $435 hammer is frequently mentioned in tandem with this $640 toilet seat cover as evidence of waste and abuse in Government procurements. The $640 toilet seat scandal did not emerge until 1985 after Congress passed the Acts that FAR 52.203-6 is designed to implement. Mothershed, 41 Pub. Cont. L.J. at 864–65.

[219]In 2018, Senator Grassley and others raised concerns about the Air Force's purchase of these plastic C-5 toilet seat covers for $10,000 each. 164 Cong. Rec. S4907-08 (daily ed. July 11, 2018) (statement by Sen. Grassley). When confronted, the Air Force announced that it had decided to make these toilet seats itself using a 3-D printer.

NOTES:

NOTES:

NOTES:

BRIEFING PAPERS