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Key Considerations When Licensing Commercial Software to the US Government

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Introduction

In the rapidly evolving landscape of military technology, software licensing is crucial for ensuring the operational effectiveness and security of defense systems. The US Department of Defense (DoD) and other federal agencies increasingly rely on commercial software solutions to meet mission-critical needs, addressing key issues such as intellectual property rights, cybersecurity, and compliance with federal regulations. Effective software licensing provides a legal framework for the use, modification, and distribution of software, helping to prevent unauthorized use and ensuring maintenance and updates according to the latest security standards. This is particularly important in the defense sector, where outdated or insecure

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ISSUE HIGHLIGHTS

News from the CHAIR

BY JASON N. WORKMASTER

In my last column, I shared my excitement about the year ahead for members of the Section of Public Contract Law. I am happy to report that, since then, the Section has been busy and successful, with more good news and activities to come.

I begin with a shout-out to Kara Sacilotto (Wiley Rein LLP), who served as the Conference Director for the Section's Fall Forum in November in Reston, Virginia, along with the Conference Co-Chairs Stephen Bacon (Rogers Joseph O'Donnell PC), Ann McRitchie (Amentum Inc.), Andrew Smith (US Army Legal Services Agency), and Abigail Stokes (The Boeing Company, Boeing Defense Space & Security), who did an absolutely stellar job planning and conducting the conference—supported by our indefatigable Section Director Patty Brennan and Program Specialist Sean Dickerson. Moving our Fall educational conference to the Beltway area was in direct response to feedback the Section received over the last several years about the time and travel commitments preventing our government and in-house counsel members from attending—and the move to Reston worked! It was wonderful to see so many of our government and in-house counsel colleagues at the Forum. I received positive feedback from attendees that they appreciated the Section's efforts to relocate the Forum, the proximity to where they work and live, and the walkability of the Reston Town Center shops, restaurants, and the no-host dinners—bringing an old Section tradition to a new location. The Section reception was a highlight as well. I, for one, was deeply moved to be with my professional "family," just a few days after such a contentious election, and see the George Mason Army ROTC Color Guard post and present the colors and hear the National Anthem played in honor of our Armed Services government contracting professionals. Last, but certainly not least, the substantive content of the programming was simply second-to-none—again, thanks to the planning team and our outstanding slate of speakers and moderators, including luncheon speaker, Craig Whitlock of *The Washington Post*, whose discussion of his books on the Afghanistan war and the Fat Leonard scandal was simply fascinating. The meeting was very well-received and the Fall Forum will return to Reston in November 2025. You can read an article from Kara Saciilotto summarizing the Fall Forum in this issue of *The Procurement Lawyer*.

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Shining Light on *Loper Bright*: Why the Recent Supreme Court Decision Leaves Government Contracts Disputes Unchanged

BY MARIT D. BANK, KELLY A. DULGARIAN, ADRIANNE L. GOINS, JOSEPH P. MCCOOL, AND EDWARD R. MURRAY

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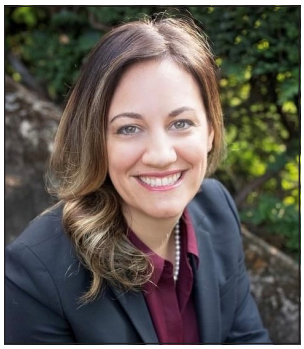

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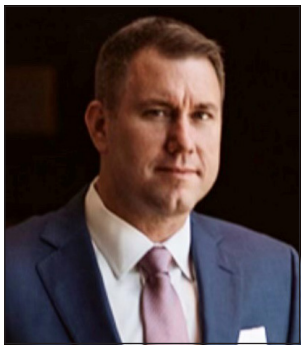

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In light of the US Supreme Court's decision in *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al.*,[1] which overruled the long-standing precedent of *Chevron, U.S.A., Inc. v. NRDC, Inc.*,[2] some in the government contracts bar are heralding a new era of contract disputes in which courts will entertain requests to invalidate regulations governing the federal government's acquisition of goods and services—specifically, provisions of the Federal Acquisition Regulation (FAR), agency supplements such as the Defense Federal Acquisition Regulation Supplement (DFARS), and the Cost Accounting Standards (CAS)—that are incorporated as contract clauses into the terms and conditions of government contracts.[3] Those celebrating the demise of *Chevron* predict that courts will uphold contractors' challenges to agency interpretations of government contracting regulations.[4]

In this article, after reviewing *Chevron* deference and its application to government contracting regulations, we explain why the Supreme Court's conclusion in *Loper Bright*—that courts should not defer to agency interpretations of ambiguous statutes—is unlikely to affect government contract disputes.[5] First, in *Loper Bright*, the Supreme Court focused on a specific provision of the Administrative Procedure Act (APA), which is not applicable to the resolution of government contract disputes. Second, courts should not apply the Court's reasoning in *Loper Bright* to government contract disputes because the policy considerations that arise when the government promulgates regulations in its sovereign capacity, such as the regulation at issue in *Loper Bright*, differ significantly from the policy considerations that arise when the government acts as a contracting partner. Third, even if courts were to entertain challenges to government contracting regulations in this new era, courts should continue to defer to regulations based on unambiguous statutory delegations of rulemaking authority. Finally, *Loper Bright* does not change the doctrine under which courts defer to agency interpretations of ambiguous regulations.

The authors serve as attorneys with the Defense Contract Management Agency (DCMA). The opinions expressed in this article are their personal opinions and do not reflect the views of the US Government, the Department of Defense, or DCMA.

Chevron Deference and Its Application to Government Contracting Regulations

Review of Chevron *Deference*

On June 28, 2024, the US Supreme Court decided *Loper Bright*,[6] overruling *Chevron*.[7] To understand the impact of the *Loper Bright* decision, it is necessary to first understand the *Chevron* decision.

In *Chevron*, the question presented to the Supreme Court was whether the interpretation of the Clean Air Act Amendments of 1977 by the Environmental Protection Agency (EPA), as reflected in certain regulations, was reasonable.[8] The Court explained that in reviewing an agency's interpretation of a statute, the first step is to ask "whether Congress has directly spoken to the precise question at issue."[9] If Congress's intent is clear, the inquiry ends because "the court, as well as the agency, must give effect to the unambiguously expressed intent

of Congress."[10] The Court explained that *Chevron* deference arose at a second step, only if "Congress had not directly addressed the precise question at issue."[11] When "the statute is silent or ambiguous" on the issue, a court would determine "whether the agency's answer is based on a permissible construction of the statute."[12] If the agency's interpretation was reasonable, a court would defer to the agency's interpretation under the doctrine that became known as "*Chevron* deference." In *Chevron*, the Court explained that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and "a court may not substitute its own construction of a statutory provision for a reasonable [agency] interpretation."[13] The Court held that the interpretation of the statute by the EPA was permissible because it was reasonable and entitled to deference.[14]

Though the EPA promulgated the rules at issue in *Chevron* under the procedures required by the APA,[15] the Supreme Court did not rely on the APA in creating the doctrine of *Chevron* deference.[16] The Supreme Court later explained that *Chevron* deference applied where "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency followed formal procedures in doing so.[17] Federal courts employed *Chevron* deference to assess the validity of regulations promulgated under the APA and other rulemaking procedures with similar notice-and-comment requirements.[18]

Chevron *Deference and Government Contracting Regulations*

In deciding government contracts disputes, the US Court of Appeals for the Federal Circuit, the US Court of Federal Claims, and the boards of contract appeals applied *Chevron* deference and upheld government contracting regulations incorporated into government contracts when the court or board determined that an agency's interpretation of the relevant statute was reasonable.[19]

For instance, the Federal Circuit applied *Chevron* deference to the cost disallowance provisions in the FAR known as the "cost principles." The cost principles are incorporated into government contracts through the FAR's Allowable Cost and Payment Clause.[20] Contracting officers' disallowances of costs under the cost principles frequently lead to contract disputes with contractors. In *Brownlee v. DynCorp*, the Federal Circuit applied *Chevron* deference to review the cost principle disallowing reimbursement of a contractor's legal costs related to criminal proceedings.[21] The court asked whether the interpretation of the definition of "contractor" by the Secretary of Defense was consistent with 10 U.S.C. § 2324, the statute addressing allowable costs under defense contracts, as amended by the Major Fraud Act of 1988.[22] The Federal Circuit found the statute to be ambiguous. Applying *Chevron* deference, the court held that the cost principle was a "reasonable interpretation" of the statutory language.[23] The court emphasized that "FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference."[24]

The Court of Federal Claims also accorded *Chevron* deference to government contracting regulations.[25] For example, in *AEY, Inc. v. United States*, the court considered a DFARS clause prohibiting the contractor from acquiring supplies "'from a Communist Chinese military company.'"[26] Relying on *Chevron*, the court explained that though the relevant statutory language was "open to varying interpretations," "the government's interpretation . . . is entirely reasonable and well within the boundaries of the text."[27] The court held that because the contractor breached the DFARS clause "explicitly incorporated" into the contract, the Army was entitled to terminate for default.[28]

Like federal courts, the boards of contract appeals applied *Chevron* deference to determine whether agencies' interpretations of statutes were permissible and therefore enforceable.[29] For example, in *Sundstrand Corporation*, the Armed Services Board of Contract Appeals (ASBCA) applied *Chevron* deference in determining that the FAR Council properly implemented provisions of the Federal Acquisition Streamlining Act of 1994 when the FAR Council issued a standard contract clause on installment payments under commercial contracts.[30]

With *Chevron* deference eliminated by the Supreme Court in *Loper Bright*, the question becomes: What effect, if any, will *Loper Bright* have on judicial review of FAR clauses and other regulations incorporated into government contracts? As noted above, many commentators predict that *Loper Bright* heralds a new era of challenges to government contracting regulations. For several reasons, we disagree.

The *Loper Bright* Decision Should Not Affect Obligations Under Government Contracts

Loper Bright *Is Based on the APA and Is Inapplicable to Government Contracting Disputes*

In *Loper Bright*, the Supreme Court focused on the "Scope of Review" provision of the APA, 5 U.S.C. § 706, which provides the parameters for judicial review of agency action under the APA. The Court's decision is explicitly based on the APA and grounded in the Court's reading of this provision in particular.

The petitioners in *Loper Bright* were commercial fishing companies subject to the Magnuson-Stevens Fishery Conservation and Management Act (MSA).[31] The MSA allowed the National Marine Fisheries Service to require that "one or more observers be carried on board" fishing vessels "for the purpose of collecting data necessary for the conservation and management of the fishery."[32] The Service published a rule requiring that, where the agency declined to provide a government-paid observer, the companies were required to contract with and pay for

a government-certified observer.[33] The companies challenged the rule, which had been promulgated under the APA.[34] The below courts, relying on *Chevron*, found the Service's interpretation of the MSA to be reasonable.[35]

In *Loper Bright*, the Supreme Court overruled *Chevron* and vacated and remanded the decision below. The Supreme Court relied entirely on the APA, declaring: "The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[36] The Court focused on the Scope of Review provision of the APA, 5 U.S.C. § 706, noting that, "[i]n addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action."[37] The Court observed that the APA "prescribes no deferential standard for courts to employ" in reviewing agency actions.[38] Instead, the Court explained, the APA's Scope of Review provision "requires courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.'"[39] The Court ultimately concluded that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[40]

Loper Bright relies entirely on the text of the APA and does not address whether its holding overruling *Chevron* impacts cases beyond those brought under the APA. The APA is not applicable to the resolution of government contracting disputes.[41] Different statutes—the Contract Disputes Act and the Tucker Act[42]—give contractors the right to bring contract claims against the government and provide jurisdiction to courts and boards to decide such disputes. Because it is cabined to the APA, the *Loper Bright* decision should have no impact on government contracts disputes.

In *Loper Bright*, the Supreme Court interpreted Section 706 of the APA, which provides the scope of review for a court deciding a Section 702 action.[43] Section 702 of the APA grants a "right of review" for "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[44] A right of action under Section 702, however, has many limitations: Section 702 is not an independent grant of jurisdiction;[45] Section 702 actions are available only when "there is no other adequate remedy in a court";[46] and Section 702 is expressly limited to actions "seeking relief other than money damages."[47] As the Ninth Circuit summarized in *Tucson Airport Authority v. General Dynamics Corporation*, "the APA waives sovereign immunity for [the contractor's] claims only if three conditions are met: (1) its claims are not for money damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its claims do not seek relief expressly or impliedly forbidden by another statute."[48] Actions brought under Section 702 of the APA are unrelated to disputes arising under government contracts.

Aggrieved federal contractors have an adequate remedy for their claims against the government based on two statutes waiving sovereign immunity. First, the CDA gives a contractor the right to appeal a government contacting officer's final decision to the boards of contract appeals or to bring an action in the Court of Federal Claims.[49] Second, the waiver of sovereign immunity under the Tucker Act confers jurisdiction in the Court of Federal Claims for claims against the United States "founded . . . upon any express or implied contract with the United States."[50] Tucker Act jurisdiction is further limited to cases seeking money damages against the United States.[51] As noted above, Section 702 of the APA applies only to actions seeking relief other than money damages.

Accordingly, courts have repeatedly rejected plaintiffs' attempts to bring government contract actions under the APA. In *Eagle-Picher Industries, Inc. v. United States*, for instance, the US Court of Appeals for the Tenth Circuit opined that "the waiver of sovereign immunity in the APA does not extend to actions founded upon a contract with the United States."[52] Recently, the Federal Circuit reiterated this distinction in *Boeing Company v. United States*, where Boeing challenged the validity of FAR 30.606, a FAR provision implementing the CAS.[53] The Court of Federal Claims had decided it lacked jurisdiction to review the FAR provision under the APA and dismissed the action.[54] The court found that the Court of Federal Claims was only partially correct and reversed, explaining that challenges to non-procurement regulations fall under the APA and must be brought in federal district court, while challenges to government contracting regulations in contract cases must be resolved under the CDA and, per the Tucker Act, may proceed in the Court of Federal Claims:

> The trial court erred when it determined that, pursuant to § 702 of the APA, it lacked jurisdiction to determine the validity of FAR 30.606. The trial court is correct that, in general, for actions that do not involve contract-related claims, the Court of Federal Claims's limited jurisdiction under the Tucker Act does not authorize review of pure challenges to the validity of a regulation. Instead, such regulations are properly challenged in a district court under the APA. *See* 5 U.S.C. §§ 702–06. However, . . . when the action is a contract case—and more importantly, a contract case that is subject to the CDA—the Court of Federal Claims has exclusive jurisdiction to review the validity of the challenged regulation.[55]

Thus, the Federal Circuit found that the Court of Federal Claims had jurisdiction to review Boeing's challenge to the regulation—but under the CDA, not the APA.[56]

The APA provision the Supreme Court interpreted in *Loper Bright*, 5 U.S.C. § 706, is inapplicable to government contract disputes because government contract disputes are brought under different statutes. Rights of action outside of the APA are not addressed in the *Loper Bright* decision.

Government Procurement Policymaking Differs from Sovereign Rulemaking

The preceding analysis explained that *Loper Bright* is not applicable to government contracting disputes brought under the CDA. This begs the question, however, of whether courts *should* extend the reasoning in *Loper Bright*—that courts should not defer to agency interpretation of ambiguous statutes—to the review of government contracting regulations like the FAR and the CAS, under the CDA. We believe that courts should not. Government contracting rules are fundamentally different from rules promulgated under the APA. When the government issues government contracting regulations, it is acting in its contracting capacity, rather than its sovereign capacity.

The Government's Roles as Contractor and Sovereign

In *United States v. Winstar Corporation*,[57] the Supreme Court reiterated "the general principle that, 'when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'"[58] This was not a new or original principle, but one that had been expressed during a series of Supreme Court decisions beginning in the early twentieth century that recognized the "sovereign acts doctrine." In *Horowitz v. United States*,[59] the Court recognized "the two characters which the government possesses as a contractor and as a sovereign."[60] The *Horowitz* Court thus established that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."[61] *Winstar* somewhat modified this understanding, holding that there were instances where these two characters were "fused,"[62] but for purposes here, the point is clear: Government action comes in two flavors—as the sovereign governing the behavior of its citizens and as an entity entering into contracts, where its rights are the same as those of private parties.

This context illuminates the different statutory authorities for rulemaking under the APA, where the government acts as the sovereign, and rulemaking under Title 41 of the US Code, where the government sets its procurement rules and policies.[63] Government contracting regulations are not regulations by which the government limits the freedoms, or regulates the behavior, of its citizens like regulations promulgated under the APA. Rather, procurement rules identify the conditions under which the government, in its commercial capacity, will agree to do business. The government, like any private contracting party, has a right to set the terms and conditions it will agree to in its contracts. Creating standard clauses (and the rules, like the CAS, referenced in those clauses) is not sovereign rulemaking; it is using the government's leverage to set the terms and conditions to which the government requires its contracting partners to agree. Contractors, for their part, receive compensation for agreeing to those terms.

Unlike abiding by regulations promulgated by the government as sovereign, participation in federal procurement is discretionary. If an entity finds untenable the policies and terms it must agree to in order to contract with the government, then it may choose not to enter into federal government contracts. This concept should be familiar to many large private government contractors, who demand that their subcontractors agree to standard terms and conditions to obtain their business.

Undoubtedly, the government cannot create procurement rules that violate the statutes that govern the federal procurement process. If the government is to be treated the same as private contracting parties, however, the procurement rules promulgated by the federal government must continue to be accorded deference, *i.e.*, treated like the procurement policies of private entities, which would be something like *Chevron* deference. In other words, when the government is setting its own procurement policies, those policies should be accepted by the courts as reasonable so long as they do not clearly violate the applicable statutes. A court cannot and should not substitute its judgment for that of the government's procurement policymakers, who are setting policies designed to gain the most advantageous government contracts for the American taxpayer.

The history of the FAR system and the CAS underscores the status of the government as a contracting party and supports the point that government contracting regulations should continue to be accorded deference in the post-*Chevron* era.

The Federal Acquisition Regulation System

Congress has long recognized the need to separate government procurement and contracting regulations from other types of regulations. The modern regulations date back to the period following World War II, when Congress passed the Armed Services Procurement Act of 1947 and consolidated the military departments under a newly created Department of Defense (DoD).[64] The Armed Services Procurement Regulations (ASPR) were promulgated shortly thereafter, in 1949. Although the ASPR provided some guidance, agencies largely followed their own procurement procedures, often adopting different practices that evolved due to the culture within an agency and the types of requirements involved.

Decades later, Congress began to pursue standardization of federal contracting with uniform and predictable rules. In 1974, Congress created the Office of Federal Procurement Policy (OFPP) "to provide overall direction of procurement policies, regulations, procedures, and forms for the executive agencies."[65] In 1978, the OFPP began establishing what would become the FAR system, which encompasses the FAR and agency supplemental acquisition regulations.[66] In 1979, Congress took the first step in expanding the authority it delegated to the OFPP by authorizing the

Administrator to issue policies promoting the implementation of a more uniform procurement system.[67] The OFPP issued guidance in 1980 providing that the General Services Administration (GSA), DoD, and the National Aeronautics and Space Administration (NASA) would jointly issue one FAR system and other executive agencies would issue supplementing acquisition regulations.[68] This issuance also established a FAR Council with responsibility for the development of the procurement regulations composed of the principal acquisition officials of the major procuring agencies and chaired by the OFPP Administrator.

In 1983, Congress again increased the powers of the OFPP with the passage of the Office of Federal Procurement Policy Act Amendments of 1983.[69] The OFPP exercises significant regulatory authority through issuance of the FAR. The FAR, in its current form, was established on September 19, 1983, with an effective date of April 1, 1984.[70] In 1988, the FAR Council was formally created to issue the FAR and ensure it remained effective in meeting the procurement needs of the federal government and complying with legislative and policy changes.[71]

The Federal Acquisition Policy Division of GSA, working with DoD and NASA, writes and maintains the FAR. The division coordinates with the OFPP and other agencies to implement laws, executive orders, other agency regulations, and government-wide policies into the FAR. The FAR Council plays a critical role in this continuous process, collaborating with various stakeholders to ensure the FAR remains effective and relevant, adapting to changes in laws, policies, and procurement needs, to ensure the government's acquisition system operates smoothly and effectively.[72]

The Cost Accounting Standards

The CAS—the rules under which contractors accumulate and report their costs on government contracts—also deserve deference by courts considering the validity of government contracting regulations.[73] Congress granted the CAS Board "exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of the standards, designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the Federal Government."[74] Between 1972 and 1980, the Board promulgated 19 Cost Accounting Standards.[75]

The original CAS Board was dissolved in 1980 and later reestablished by Congress as an independent Board within the OFPP.[76] The application of the CAS was expanded from defense contracts to civilian agency contracts, with the goal of achieving greater consistency across federal contracting.[77]

Congress's delegation of authority to the CAS Board remains unchanged. In the National Defense Authorization Act for Fiscal Year 2017,[78] Congress included a provision amending 41 U.S.C. § 1501, requiring the CAS Board to meet quarterly, to review CAS-related disputes, and to conform the CAS with generally accepted accounting principles (GAAP) where practicable.[79] While directing the CAS Board to make compliance less burdensome for industry, Congress did not alter the CAS Board's broad and exclusive authority to use its expertise to determine the extent to which such conformance could be made.

Courts Defer to Government Contracting Regulations Based on Clear Congressional Delegations of Authority

As noted above, *Loper Bright* does not and should not apply to government contracting disputes, given the distinction between the government's sovereign and contracting capacities. But even if a court were to extend the reasoning in *Loper Bright* to government contracting regulations, those regulations would survive without *Chevron* deference because they are based on statutes unambiguously authorizing the executive branch to develop and issue them. Such clear delegations of rulemaking authority "never needed the protections of *Chevron* deference."[80]

In *Loper Bright*, the Court clarified that "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring the agency acts within it."[81] The *Loper Bright* majority acknowledged:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977) (emphasis deleted). Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015), such as "appropriate" or "reasonable."
>
> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, *Michigan*, 576 U.S., at 750 (quoting *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 374 (1998)); see also *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.[82]

In the very paragraph where the Supreme Court announces "*Chevron* is overruled," the Court recognizes an exception that "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."[83] In the months since the Supreme Court issued the *Loper Bright* decision, lower courts have interpreted *Loper Bright* consistent with this direction, recognizing that the decision does not affect judicial review of an agency's interpretation of a statute that expressly delegates interpretive authority to the agency.[84]

As explained above, most, if not all, FAR, DFARS, and CAS provisions are derived from these types of express statutory delegations from Congress. In fact, this exception appears to apply to government contracting regulations as a whole. As discussed above, the Federal Procurement Policy Act includes a mandate to the executive branch to "establish policies, procedures and practices" to ensure that the government acquired property and services "of the requisite quality and within the time needed at the lowest reasonable cost."[85] The FAR system was born from this direct delegation from Congress. Arguably then, government contracting regulations fall within the express delegation exception identified in *Loper Bright*.

Even if the entire FAR system does not fall within this exception, many of its individual regulations unquestionably do. Many FAR and agency supplement provisions and clauses result from express direction by Congress to regulate. The annual National Defense Authorization Act (NDAA) is replete with this type of direction to agencies in the area of procurement. For example, Section 893 of the 2011 NDAA mandated the development of the Contractor Business Systems DFARS regulations.[86] This resulted in the creation of numerous DFARS provisions and mandatory clauses implementing this direction.[87] Under *Loper Bright*, courts "must respect" the Defense Acquisition Regulations Council's interpretation and implementation of these DFARS clauses and provisions.

For the CAS, as explained above, there is no ambiguity in the statute to interpret—Congress's delegation to the CAS Board is broad, express, and unambiguous. This is equally true of the statutes governing the allowability of costs, which are addressed in FAR Part 31. The Allowable Costs Statute identifies 16 types of contractor costs that are unallowable, and also states that "[t]he provisions of the Federal Acquisition Regulation implementing this chapter may establish appropriate definitions, exclusions, limitations, and qualifications."[88] The statute then grants broad authority to the drafters of the FAR cost principles, stating that "[t]he Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Those provisions shall define in detail and in specific terms the costs that are unallowable, in whole or in part, under covered contracts."[89] It is difficult to imagine a more express delegation of authority to agency rulemaking than the statutes governing the CAS and the cost principles. Accordingly, as recognized by the Supreme Court in *Loper Bright*, the interpretations provided in the CAS and the cost principles must be accorded deference by reviewing courts and boards.[90]

Courts Defer to Agency Interpretations of Ambiguous Regulations

Finally, it is important to remember that *Loper Bright* is about how agencies interpret statutes in the rules they promulgate. Under the separate doctrine of "*Auer* deference," courts defer to agency interpretations of ambiguous *regulations*.[91] The doctrine of *Auer* deference provides that an agency's interpretation of its regulations is controlling unless it is plainly inconsistent with the regulation.[92] An agency is free to resolve ambiguities and construe its own regulations, so long as the regulations themselves were written consistent with statutory limits.[93]

This doctrine was articulated a half century before *Auer*, in *Bowles v. Seminole Rock & Sand Co.*, in which the Supreme Court explained that an agency's interpretation of a regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[94] The Supreme Court has consistently distinguished regulatory interpretation from statutory interpretation, explaining: "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[95]

The Supreme Court recently reaffirmed and clarified *Auer* deference in *Kisor v. Wilkie*.[96] First, the Court explained that *Auer* deference applies only if the regulation being interpreted is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."[97] "If uncertainty does not exist, there is no plausible reason for deference."[98] Second, the Court explained that *Auer* deference is based on the presumption "that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules."[99] This presumption applies—and courts follow *Auer* deference—when the agency's regulatory interpretation is "authoritative," implicates the agency's "substantive expertise," and reflects the agency's "'fair and considered judgment.'"[100] When that presumption does not apply, the Court explained, a court should defer to an agency's interpretation of a regulation only if it is persuasive.[101]

In *Perry v. Martin Marietta Corporation*, the Federal Circuit deferred to the intent of the CAS Board when it reviewed CAS clauses incorporated into government contracts through FAR clauses.[102] Interpreting FAR 52.230-3 and FAR 52.230-4, through which the CAS were incorporated into the contractor's CAS-covered contracts, the court explained that because "the CAS [was] the source for the language and authority for these provisions of the FAR," the court's "task in interpreting the meaning of these FAR provisions [was] ultimately to ascertain the CAS [Board]'s intended meaning when it promulgated the CAS."[103] The court looked to guidance from the CAS Board "to aid in interpretation."[104]

The Court of Federal Claims applied the same deferential standard for reviewing CAS clauses in *General Electric Co. v. United States*[105] and *Raytheon Company v. United States*.[106] In *Raytheon*, the court determined that even the CAS Board's failure to regulate—its decision not to promulgate a proposed rule on allocation of post-retirement benefit costs—was entitled to deference.[107] While recognizing that generally proposed regulations have no legal effect and are not entitled to deference, the court noted that the CAS Board issued a final agency decision explaining its decision not to finalize the rule. The court explained, "a reasoned decision of an agency to maintain the status quo and not to regulate is entitled to deference."[108]

Government contract disputes about the interpretation of FAR, DFARS, and CAS provisions, or the standard clauses incorporated into contracts, typically do not involve the interpretation of statutes. Instead, they focus on the meaning of the regulations. Where a court or board finds a regulation to be ambiguous, the doctrine of *Auer* deference requires the court or board to defer to an agency's reasonable interpretation of the regulation. This approach is unaffected by the Supreme Court's *Loper Bright* decision overruling *Chevron*.

Conclusion

While the Supreme Court's decision in *Loper Bright* represents a monumental shift in judicial review of sovereign rulemaking, the decision is unlikely to significantly impact government contract disputes. The decision, focused on the APA, does not apply to the adjudication of government contract disputes governed by the CDA. Government contracting rules, rooted in the government's role as a contracting partner rather than a sovereign regulator, are premised on distinct statutory frameworks and policy considerations. Moreover, even if the *Loper Bright* reasoning were extended to procurement rules, the vast majority of regulations would withstand scrutiny because they were created based on unambiguous statutory authority. Importantly, the doctrine of *Auer* deference, which governs the interpretation of ambiguous regulations, remains unaffected. Consequently, while *Loper Bright* shines brightly in the realm of administrative law and sovereign rulemaking, its glow fades when it comes to disrupting the established principles underpinning government contracting disputes. PL

Endnotes

1. 144 S. Ct. 2244 (2024).
2. 467 U.S. 837 (1984).
3. This article focuses on litigation involving challenges to regulations that are incorporated into federal government contracts. We refer to these contract clauses as "government contracting regulations" to distinguish them from other regulations governing the formation (procurement) of government contracts. We address only post-award contract litigation under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109,U.S. and not contract formation issues, such as pre- or post-award protests, or post-award informal requests, such as requests for equitable adjustments. We offer no opinion on whether *Loper Bright* will affect the extent to which prospective offerors can challenge agency rulemaking through protests against solicitation terms and conditions.
4. *See, e.g.*, *The CAFC Revives Boeing's Challenge to FAR's Implementation of CAS Offset Rules: Impacts for Government Contractors Subject to CAS and Future Implications Under* Loper Bright, Dentons (Oct. 16, 2024), www.dentons.com/en/insights/alerts/2024/october/16/the-cafc-revives-boeings-challenge-to-fars-implementation-of-cas-offset-rules ("contractors may have leeway to challenge the validity of FAR and [DFARS] that are implicated in contract disputes"); Christopher Griesedieck Jr. & Kyle McCollum, *A "Tsunami of Lawsuits Against Agencies"? Taking Stock of the Post-Chevron Government Contracting World*, Venable (Oct. 8, 2024), www.jdsupra.com/legalnews/a-tsunami-of-lawsuits-against-agencies-8035956/; *Legal Updates: Loper Bright's Impact on Government Contract Litigation*, Thompson Hine LLP (July 23, 2024), www.thompsonhine.com/insights/loper-brights-impact-on-government-contract-litigation/.
5. As a preface to our analysis of *Loper Bright*'s impact, it is important to note that the decision will not impact most government contract disputes because those disputes typically do not focus on the interpretation of government contracting regulations or standard clauses. The meaning of many, if not most, of these regulations and standard clauses are settled based on decades of case law. Consequently, government contract disputes tend to focus on questions of fact rather than questions of law. For example, most constructive changes disputes focus on the fact-based question of whether the government directed the contractor to perform work outside the scope of the contract, rather than how to interpret the language in the Changes clause. Disputes about differing site conditions focus on the conditions at the construction site rather than the language in the relevant standard contract clause. *Loper Bright* is thus unlikely to significantly affect most government contract disputes for the simple reason that, in general, those disputes focus on questions of fact rather than questions of law.
6. 144 S. Ct. 2244.
7. 467 U.S. 837.
8. *Id.* at 840.
9. *Id.* at 842.
10. *Id.* at 842–43.
11. *Id.* at 843.
12. *Id.*
13. *Id.* at 844.
14. *Id.* at 845, 865.
15. *See* Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans (Final Rule), 46 Fed. Reg. 50,766 (Oct. 14, 1981) (cited in *Chevron*, 467 U.S. at 840–41).
16. The Supreme Court acknowledged this in *Loper Bright*, noting: "Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA." Loper Bright Enter. v. Raimondo, Sec'y of Com., 144 S. Ct. 2244, 2265 (2024).
17. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). *Chevron* deference also applied to agency adjudications, an aspect of the doctrine not addressed in this article.
18. Courts declined to defer when less formal agency processes were implicated. *See, e.g.*, Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1365 (Fed. Cir. 2005) (declining to defer to agency interpretation of statute not adopted "through the issuance of a regulation or through other formal process of the sort normally required to invoke *Chevron* deference"); Pharm. Rsch. & Mfrs. of Am. v. Thompson, 259 F. Supp. 2d 39, 70 (D.C. Cir. 2003) (explaining informal agency determination "stands in marked contrast to the classic *Chevron* scenario of notice-and-comment rulemaking").
19. Few courts squarely addressed whether *Chevron* deference

was properly applied to regulations incorporated into government contracts. Several recognized that the regulation at issue was incorporated into the contract. *See, e.g.*, Perry v. Martin Marietta Corp., 47 F.3d 1134, 1137 (Fed. Cir. 1995) ("This case requires the interpretation of two FAR provisions, FAR 52.230-3 and FAR 52.230-4, which were incorporated into MMC's CAS-covered contracts."); Boeing Co. v. United States, 480 F.2d 854, 865 (Ct. Cl. 1973) (noting that the regulation on allowability of tax costs "was incorporated into the contacts"). That fact, however, usually did not provoke analysis of whether such clauses were interpreted under rules of contract interpretation or rules of regulatory interpretation, including *Chevron* deference. The Court of Federal Claims addressed this question directly in *Indiana Michigan Power Co. v. United States*, 57 Fed. Cl. 88, 94–97 (2003), a case about the Department of Energy's breach of a contract requiring it to remove nuclear waste. After reviewing principles of contract interpretation and *Chevron* deference, the court concluded, "We interpret the Standard Contract according to established contract principles, aided in this case by evidence of congressional intent." *Id.* at 96. That articulation suggests *Chevron* deference may not have ever been properly applied in addressing disputes about government contracting regulations.

20. The Allowable Cost and Payment Clause, FAR 52.216-7, provides that the government will make payments to the contractor in amounts determined to be allowable under the cost principles at FAR subpart 31.2.

21. 349 F.3d 1343, 1354 (Fed. Cir. 2003) (examining FAR 31.205-47(b)).

22. *Id.* at 1355. At that time, the statute on allowable costs under defense contracts was codified at 10 U.S.C. § 2324; it is now found at 10 U.S.C. § 3744.

23. *Brownlee*, 349 F.3d at 1355.

24. *Id.* at 1354.

25. Congress created the Court of Federal Claims (originally, the "United States Court of Claims") to hear monetary claims against the government and expanded the court's jurisdiction several times, most significantly under the Tucker Act, 28 U.S.C. § 1491.

26. 99 Fed. Cl. 300, 307–09 (2011) (quoting DFARS 252.225-7007 (Sept. 2006)).

27. *Id.* at 309.

28. *Id.*

29. Congress established the boards of contract appeals in the Contract Disputes Act of 1978, 41 U.S.C. § 7105, to resolve disputes arising under federal government contracts. The Armed Services Board of Contract Appeals has jurisdiction over post-award contract disputes between contractors and the Department of Defense, the Military Departments, the National Aeronautics and Space Administration, the Central Intelligence Agency, and other government entities by agreement. 41 U.S.C. § 7105(e)(1)(A). The Civilian Board of Contract Appeals handles appeals for most other government agencies. *Id.* § 7105(e)(1)(B). The boards' decisions can be appealed to the Federal Circuit. *Id.*§ 7107.

30. ASBCA No. 51572, 01-1 BCA ¶ 31,167, at 153, 954–56 ("*Chevron* is governing here as to whether the regulation is an enforceable implementation of" the statute). Ironically, in *Sundstrand*, the *contractor* sought enforcement of the regulation while DCMA asked the board to find it invalid. *Id.* at 153,954; *see also* The Boeing Company, ASBCA No. 60373, 18-1 BCA ¶ 37,112, at 180,625–26 (rejecting Army's challenge to regulation because regulation was "a reasonable interpretation of statute").

31. Loper Bright Enters. v. Raimondo, Sec'y of Com., 144 S. Ct. 2244, 2255 (2024); *see also* MSA, 16 U.S.C. § 1801 *et seq.*

32. *Id.* (discussing 16 U.S.C. § 1881b).

33. *Id.* at 2255.

34. *Id.* at 2256.

35. *Id.* at 2256–57; *see also* Loper Bright Enters. v. Raimondo, 544 F. Supp. 3d 82, 107 (D.D.C. 2021), *aff'd*, 45 F.4th 359, 370 (2022) ("Under the well-established *Chevron* Step Two framework, the Service's interpretation of the Act to allow industry-funded monitoring was reasonable."), *vacated and remanded*, 144 S. Ct. 2244.

36. *Loper Bright*, 144 S. Ct. at 2261–66.

37. *Id.* at 2261.

38 *Id.*

39. *Id.* (quoting 5 U.S.C. § 706). In pertinent part, 5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

40. *Loper Bright*, 144 S. Ct. at 2271.

41. Government contracting regulations such as the FAR, its supplements such as the DFARS, and the CAS are not promulgated under the APA. The APA's rulemaking provision expressly does not apply to matters related to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). Government contracting regulations are promulgated under Title 41 of the U.S. Code, which governs public contracts. FAR provisions, including those incorporated into government contracts, are published in accordance with 41 U.S.C. § 1707, which is less prescriptive than the APA. The CAS are promulgated under the CAS statute, 41 U.S.C. § 1502, and incorporated into government contracts through FAR clauses. *See* FAR 52.230-2 (incorporating CAS into government contract unless exemption applies); FAR 52.230-3 (requiring contractor to follow CAS and disclose accounting practices). The CAS statute expressly states that the functions of the CAS Board "are not subject to" either the rulemaking requirements or the judicial review provisions of the APA. 41 U.S.C. § 1502(g).

42. Contract Disputes Act, 41 U.S.C. § 7104; Tucker Act, 28 U.S.C. § 1491.

43. *Loper Bright*, 144 S. Ct. at 2261.

44. 5 U.S.C. § 7102.

45. Califano v. Sanders, 430 U.S. 99, 105 (1977); *see also* 5 A. Jacob Stein et al., Administrative Law § 45.02 (Matthew Bender).

46. 5 U.S.C. § 704.

47. *Id.* § 702.

48. 136 F.3d 641, 645 (9th Cir. 1998).

49. 41 U.S.C. § 7104.

50. 28 U.S.C. § 1491.

51. United States v. Mitchell, 463 U.S. 206, 216–18 (1983).

52. 901 F.2d 1530, 1532 (10th Cir. 1990) (also stating, "Under the Tucker Act, as amended by the Contract Disputes Act of 1978, the Claims Court has exclusive jurisdiction over any suit against the United States which is 'founded upon any express or implied

contract with the United States.'"); *see also Tucson Airport Auth.*, 136 F.3d at 646 (rejecting contract claim in federal district court because Tucker Act forbids declaratory and injunctive relief and precludes waiver of sovereign immunity under APA § 702); Am. Sci. & Eng'g, Inc. v. Califano, 571 F.2d 58, 62–63 (1st Cir. 1978) (rejecting attempt to bring federal contract dispute in federal district court under Section 702 of the APA because "review by the Court of Claims has consistently been held to provide an adequate remedy for an alleged breach of contract by a federal agency").

53. 119 F.4th 17 (Fed. Cir. 2024).

54. *Id.* at 22.

55. *Id.* at 24 (citations omitted).

56. Courts have stated that in the bid protest context, where no contract has been formed so the CDA does not apply, contractors harmed by a procurement regulation may use the APA to challenge whether the regulation complies with a statute. *See*, *e.g.*, Kingdomware Techs., Inc. v. United States, 754 F.3d 923, 930 (Fed. Cir. 2014), *reversed and remanded on other grounds*, 579 U.S. 162 (2016); Land Shark Shredding, LLC v. United States, 842 F. App'x 589, 593 (Fed. Cir. 2021) (unpublished and nonprecedential); Southfork Sys., Inc. v. United States, 141 F.3d 1124, 1135 (Fed. Cir. 1998). Notably, Chapter 5 of the APA, which governs promulgation of regulations, is separate from Chapter 7 on judicial review. Most government regulations, such as those at issue in *Loper Bright* and *Chevron*, are promulgated under Chapter 5 of the APA. Government contracting regulations are not promulgated under the APA. The FAR, its agency supplements, and the CAS are published in accordance with Title 41 of the US Code, under which the government establishes its procurement and contracting rules. *See* 41 U.S.C. § 1707 (FAR); *id.* § 1502 (CAS). We question whether the fact that government contracting regulations, including those on the solicitation and award of contracts, are not promulgated under APA Chapter 5 means that they should also not be subject to judicial review under APA Chapter 7. No court appears to have considered the issue.

57. 518 U.S. 839 (1996).

58. *Id.* at 895.

59. 267 U.S. 458 (1925).

60. *Id.* at 461 (quoting Jones v. United States, 1 Ct. Cl. 383, 384 (1865)).

61. *Id.*

62. *Winstar* limited the doctrine in those instances where the government acts in its self-interest by shifting costs from the government to the public, rather than acting "merely incidental to the accomplishment of a broader governmental objective." 518 U.S. at 894, 896–98.

63. *See supra* note 38, contrasting rulemaking under the APA with rulemaking under Title 41.

64. 10 U.S.C. §§ 2301–2316.

65. Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (Aug. 30, 1974).

66. To commence this process, on August 7, 1978, the OFPP published a notice in the *Federal Register* seeking review and comments from the public and federal agencies on FAR Subparts 1.1 and 1.3, which address the purpose, authority, and issuance of the acquisition regulations that govern government contracting. Federal Acquisition Regulation Project, 43 Fed. Reg. 34,824 (Aug. 7, 1978).

67. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4(e), 93 Stat. 648. The statute stated that the OFPP Administrator "shall develop . . . a uniform procurement system which shall . . . include uniform policies, regulations, procedures, and forms to be followed by executive agencies."

68. OFPP Policy Letter 80-5, 45 Fed. Reg. 48,074 (July 17, 1980).

69. Office of Federal Procurement Policy Act Amendments of 1983, Pub. L. No. 98-191, 97 Stat. 1326.

70. Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102 (Sept. 19, 1983).

71. The Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, 102 Stat. 4055.

72. Congress established the FAR Council under 41 U.S.C. § 1302(a).

73. The CAS are incorporated into government contracts (unless an exception applies) under contract clause FAR 52.230-2(a).

74. 41 U.S.C. § 1502(a)(1). First established in 1970 under an amendment to the Defense Production Act of 1950, the CAS Board originally operated as an agent of Congress with exclusive authority to establish and interpret the CAS and its applicability to defense contractors. *See* Defense Production Act Amendments, Pub. L. No. 91-379, 84 Stat. 796 (Aug. 15, 1970).

75. Gov't Accountability Off., Cost Accounting Standards: Board Has Taken Initial Steps to Meet Recent Legislative Requirements, GAO-20-266, at 4 (Feb. 2020), www.gao.gov/assets/710/705941.pdf.

76. *Id.* at 5 (citing Pub. L. No. 100-679, § 5 (codified at 41 U.S.C. § 1501)).

77. *Id.* The CAS Board published a Statement of Objectives, Policies, and Concepts in 1992. Cost Accounting Standards Board; Statement of Objectives, Policies and Concepts, 57 Fed. Reg. 31,036 (July 13, 1992).

78. *Formation to Future: The CASB and the Role of the CAS Clause*, Capital Edge Consulting (Mar. 20, 2024), www.capitaledgeconsulting.com/cas-clause/ (discussing the Section 809 Panel recommendations and congressional objectives leading to creation of the Panel to expand access to new sectors of industry and capabilities and reduce burdens on DoD contractors).

79. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 820, 130 Stat. 2000 (Dec. 23, 2016).

80. Nowell D. Bamberger et al., *After Chevron: What the Supreme Court's Loper Bright Decision Changed, And What It Didn't*, Harv. L. Sch. F. on Corp. Governance (July 18, 2024) ("*Loper Bright* only affects rules or agency action that was based on a statutory ambiguity or silence. Clear grants of power by Congress to an agency remain in place, because these never needed the protections of *Chevron* deference."); *see also* Campbell Plastics Eng'g & Mfg. Inc., ASBCA No. 53319, 03-1 BCA ¶ 32,206, at 159,279, *aff'd*, 389 F.3d 1243 (Fed. Cir. 2004) ("where Congress has spoken unmistakably, the Board and the agency implementing the statute through regulation must give effect to that unmistakable intent").

81. Loper Bright Enters. v. Raimondo, Sec'y of Com., 144 S. Ct. 2244, 2273 (2024).

82. *Id.* at 2263.

83. *Id.* at 2273.

84. *See, e.g.*, Hanley v. LeJeune, 2024 US Dist. LEXIS 195167, at *8–9 (D. Minn. Oct. 28, 2024) (noting that *Loper Bright* did not affect statutes that expressly delegate authority to agencies to fill in details of a statutory scheme).

85. Office of Federal Procurement Policy Act, Pub. L. No. 93-400, § 2(1), 88 Stat. 796.

86. NDAA, Pub. L. No. 111-383, 124 Stat. 4137 (Jan. 7, 2011) ("the Secretary of Defense shall develop and initiate a program for the improvement of contractor business systems to ensure that such systems provide timely, reliable information for the management of Department of Defense programs by the contractor and by the Department").

87. *See* DFARS subpts. 234.2, 242.70, 242.72, 242.75 & 244.3; DFARS 215.407-5, 245.105; the implementing contract clauses identified therein.

88. 41 U.S.C. § 4304(a), (c).

89. *Id.* § 4305(a).

90. Furthermore, even as it overruled *Chevron*, the Supreme Court left undisturbed a prior, important precedent on court review of agency interpretations: Skidmore v. Swift & Company, 323 U.S. 134 (1944). The Supreme Court signaled that with the demise of *Chevron* deference, courts should return to their traditional respect for agency actions under *Skidmore*. Loper Bright

Enters. v. Raimondo, Sec'y of Com., 144 S. Ct. 2244, 2262 (2024) ("courts may—as they have from the start—seek aid from the interpretations of [agencies] responsible for implementing particular statutes"). In *Skidmore*, the Court explained that the amount of respect given to agency interpretations of statutes depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. The ASBCA recognizes that persuasive agency interpretations are "entitled to respect" under *Skidmore*. *See* Honeywell Int'l, ASBCA No. 57779, 13-1 BCA ¶ 35,380, at 173,607.

91. Auer v. Robbins, 519 U.S. 452, 461–63 (1997). The boards of contract appeals recognize this doctrine. *See* Boeing Co., ASBCA No. 60373, 20-1 BCA ¶ 37,629, at 182,683 (stating that *Auer* deference applies when board finds regulation to be ambiguous); St. Tammany Parish Gov't, CBCA No. 3872-FEMA, 17-1 BCA ¶ 36,715, 2017 CIVBCA LEXIS 113, at *8–14 (applying *Auer* deference and deferring to agency interpretation of regulation).

92. 519 U.S. at 461.

93. *Id.* at 463.

94. 325 U.S. 410, 414 (1945); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (citing *Bowles*; reversing the Court of Appeals and holding that the agency "adopted a permissible interpretation of its own regulations").

95. Udall v. Tallman, 380 U.S. 1, 16 (1964) (citing *Bowles*).

96. 588 U.S. 558 (2019).

97. *Id.* at 573.

98. *Id.* at 574–75.

99. *Id.* at 573.

100. *Id.* at 577, 579 (quoting *Auer*).

101. *Id.* at 573.

102. 47 F.3d. 1134, 1137 (Fed. Cir. 1995). The court declined to defer to DoD's contrary interpretation "because the FAR and the underlying CAS are not regulations of the Department of Defense." *Id.*

103. *Id.*

104. *Id.*

105. 84 Fed. Cl. 129, 140–41 (2008).

106. 92 Fed. Cl. 549, 567–68 (2010).

107. *Id.*

108. *Id.* at 568 (citing Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n, 990 F.2d 1298, 1305 (D.C. Cir. 1993) (deferring to Commission's decision to terminate a rulemaking)).

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Under Attack—An Examination of the False Claims Act's Whistleblower Provisions

BY NICOLE VELE

The civil False Claims Act (FCA) is regularly touted as one of the government's most important enforcement tools to combat fraud in US government spending.[1] Between FCA enforcement actions initiated by the US Department of Justice (DOJ) and *qui tam*[2] suits pursued by individuals (referred to as "relators"), the United States has successfully clawed back billions of dollars that were lost as a result of individual and corporate fraud.[3] Despite, or arguably as a direct result of, the FCA's resounding success at combating this rampant issue, the Act's *qui tam* provisions are under attack, most notably in the recent case from the US District Court for the Middle District of Florida, *United States ex rel. Zafirov v. Florida Medical Associates, LLC*.[4] In the past, challenges to the FCA's *qui tam* provisions were routinely rejected.[5] However, a recent series of developments in FCA litigation foreshadow a potential change in tides that could turn FCA enforcement actions on their head.[6]

This article begins with a brief overview of the history of the FCA and its *qui tam* provisions. Next, it outlines some recent challenges to the FCA's *qui tam* provisions. Finally, it discusses the potential future of FCA *qui tam* actions post-*Zafirov*.

A Brief History of the FCA

The FCA was originally enacted in 1863 to combat massive fraud by government contractors during the American Civil War.[7] Under the FCA, any person who knowingly presented, or caused to be presented, a false or fraudulent claim for payment or approval to an officer or employee of the United States could be liable both criminally[8] and civilly,[9] subject to significant penalties,[10] and assessed three times the amount of damages the government sustained.[11] In addition to its draconian penalties, a distinctive feature of the FCA is the unusual procedure under which its civil enforcement actions may be pursued.[12] Since its inception, the FCA has permitted two separate entities to initiate a civil action against an alleged false claimant: (1) the government itself and (2) a private person (relator) on behalf of the person and on behalf of the United States.[13] When a relator initiates the action, that is known as a *qui tam* suit.[14]

Congress intentionally included *qui tam* provisions in the FCA to accomplish two purposes: (1) supplement the government's limited federal law enforcement capabilities[15] and (2) encourage whistleblowing—the process of insiders coming forward and "blowing the whistle" on companies and individuals defrauding the government.[16] In exchange for a relator's willingness to help protect the federal treasury from fraud, relators that prevail in their lawsuits are entitled to recover a portion of the proceeds.[17] Unsurprisingly, Congress's empowerment of whistleblowers worked.[18] *Qui tam* actions quickly became popular, and by World War II, *qui tam* actions under the FCA were so prevalent that relators successfully recovered hundreds of thousands of dollars on behalf of the United States.[19]

Despite the success of *qui tam* actions, the *qui tam* provisions of the FCA have consistently been attacked on various fronts.[20] In the early 1940s, US Attorney General Francis Biddle filed an amicus brief in *United States ex rel. Marcus v. Hess*,[21] challenging the FCA's *qui tam* provisions. His challenge at the Supreme Court was ultimately unsuccessful,[22] but he remained steadfast. Next, Biddle took his complaints about FCA *qui tam* actions to Congress. There, Biddle was able to get the FCA language modified to eliminate the then-guaranteed 50 percent bounty for successful relators in favor of a significantly reduced recovery.[23] These changes effectively destroyed *qui tam* as a fraud-fighting tool for the next 40 years.[24] It was not until Congress yet again began receiving alarming reports of fraud, waste, and abuse from the Defense Department in the mid-1980s that the FCA's *qui tam* provisions were revisited.[25]

In 1986, the FCA was amended again, and this time with several revisions meant to revive the previous partnership between government prosecutors and whistleblowers.[26] Between the increase in penalties, damages, relator recovery percentages, and enhanced whistleblower protections, Congress's intent was again achieved.[27]

That is not where the FCA's story ends, however. Quite the contrary. The more successes the FCA achieves, the harder its adversaries try to tear it down. Major defense contractors have banded together and lobbied Congress for policies enabling self-policing instead of costly *qui tam* actions as a mechanism for limiting fraud;[28] health care associations have lobbied Congress

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for revisions to the FCA for violations involving medical programs;[29] and defense lawyers have levied numerous challenges against the FCA, the most recent of which have pried the door open to a discussion of the constitutionality of *qui tam* actions.[30]

Chipping Away at the Government's Strongest Fraud Enforcement Tool

After multiple legislative amendments,[31] various judicial challenges, and inconsistent government enforcement,[32] the FCA and its *qui tam* provisions still seem to be the government's best defense against rampant fraud involving government spending.[33] That said, recent constitutional challenges to the FCA's *qui tam* provisions are gaining traction, which suggests the FCA's good fortune may be running out.

In 2023 in *United States ex rel. Polansky v. Executive Health Resources*,[34] the US Supreme Court upheld the government's ability to dismiss an FCA suit over a relator's objection despite the government's decision not to intervene at the outset of the case, instead intervening at the end. However, in a dissent authored by Justice Clarence Thomas, he invited a barrage of constitutional challenges to the FCA's *qui tam* device when he argued the Court should have remanded the case for consideration of arguments that "the [FCA's] *qui tam* device is inconsistent with Article II [regarding Executive branch authority to enforce the laws] and that private relators may not represent the interests of the United States in litigation."[35] The fact that Justices Kavanaugh and Barrett agreed with Justice Thomas's position that federal courts should reexamine the constitutionality of the FCA's *qui tam* provisions strongly signaled an impending watershed moment for the FCA.[36]

Arguably that moment came to a head on September 30, 2024, when Judge Kathryn Kimball Mizelle of the US District Court for the Middle District of Florida handed down her decision in the *Zafirov* case.[37] In *Zafirov*, the relator filed an FCA suit against various corporate entities, alleging that these entities made misrepresentations to Medicare regarding patients' medical conditions.[38] Defendants, heavily relying on Justice Thomas's dissent in *Polansky*, argued for dismissal because the FCA's *qui tam* provisions violated Article II of the US Constitution. Judge Mizelle, herself a former law clerk to Justice Thomas, agreed with the defendants' reasoning that relators are "officers" of the United States in *qui tam* litigation, and, therefore, as required by Article II of the US Constitution, they must be constitutionally appointed.[39] Because relators were not "appointed consistent with the Appointments Clause" of Article II of the Constitution, the relators' appointment was unconstitutional, and dismissal of the case was the only possible remedy.[40]

While the *Zafirov* ruling does not apply nationally yet,[41] Judge Mizelle's decision is already generating conversation about the significant ripple effects it will have on FCA enforcement going forward.[42]

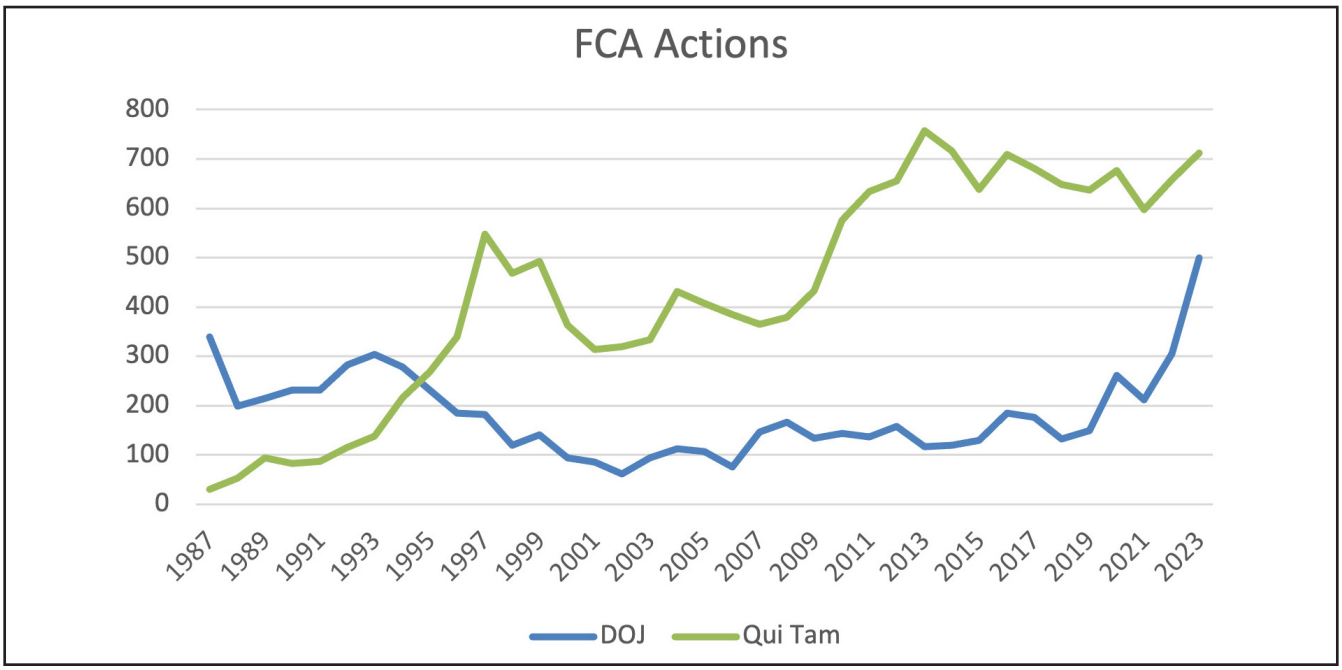
The Future of FCA *Qui Tam* Actions Post-*Zafirov*

With the constitutionality of FCA *qui tam* actions in question, there are several trends that may emerge in this arena.

Increase in Constitutional Arguments

It should come as no surprise that FCA litigators may see an increase in the number of constitutional challenges to *qui tam* actions for the foreseeable future. The goal of individuals or companies defending themselves against *qui tam* actions will be to have their actions dismissed or

FIGURE 1



disposed of before the government decides to intervene. And should the Eleventh Circuit ultimately affirm the *Zafirov* ruling, that endorsement of the constitutional challenge to the FCA's *qui tam* device will only encourage defendants in other circuits to raise similar arguments in their own cases.

Increased Reliance on DOJ for FCA Enforcement

Justice Thomas's entire premise for the unconstitutionality of the FCA's *qui tam* provisions is based on the "unitary executive theory"—meaning the president and those acting under him or her are the only ones allowed to exercise executive power.[43] If *qui tam* provisions are declared unconstitutional under this theory, the DOJ will have no choice but to shoulder the entirety of the burden for civil actions under the FCA. As seen in Figure 1 on the opposite page, a review of new FCA matters over the last 20 years shows that *qui tam* suits account for between 58.7 and 86.6 percent of cases initiated each year.[44]

Depending on the government's appetite for maintaining the FCA as its most important tool for combatting fraud,[45] the elimination of the *qui tam* provisions could necessitate the hiring of additional investigators and prosecutors. However, even with a significant increase in personnel, it is highly unlikely the DOJ will be able to pursue anywhere near the number of cases that *qui tam* relators initiate annually.[46] Without relators, many *qui tam* suits the DOJ views as meritorious but unworthy of pursuit because "the government's costs are likely to exceed any expected gain" will likely be dismissed in favor of pursuing more egregious cases.[47] Losing *qui tam* relators also means the possibility of a significant reduction in the reporting of bad actors by whistleblowers.[48]

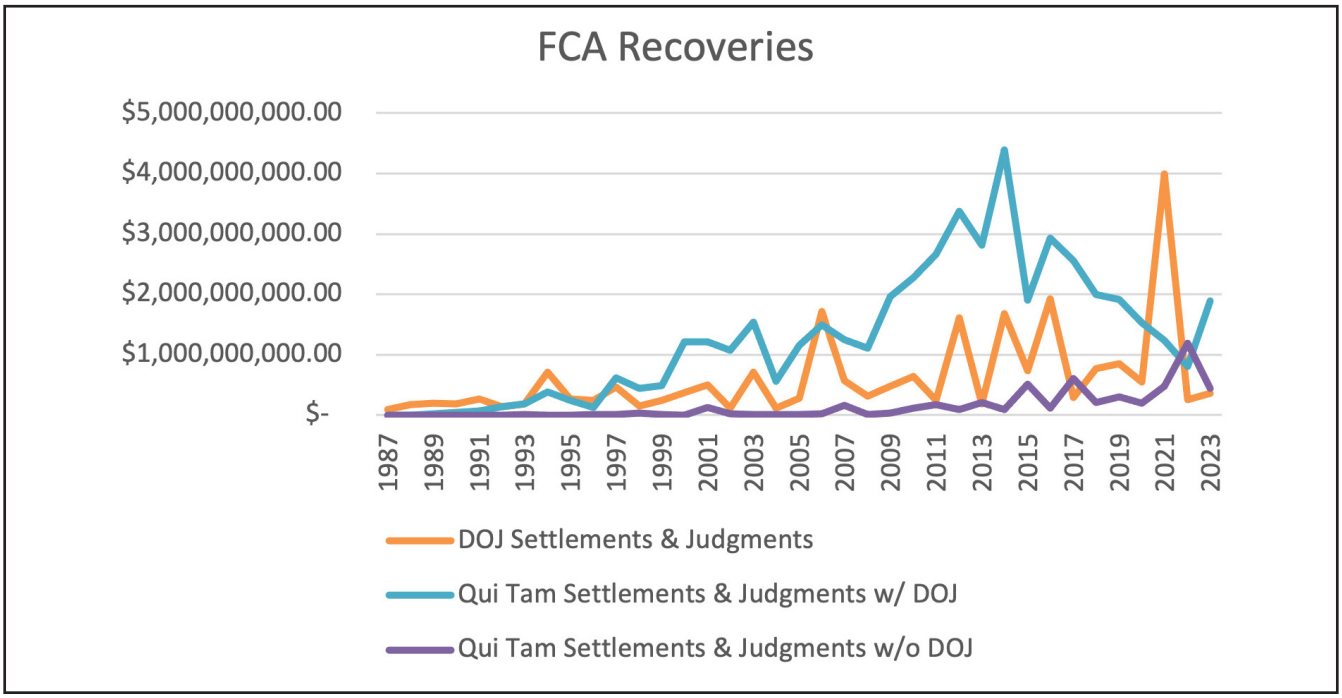
Possible Chilling Effect on Relators and Other Whistleblowers

Unfortunately, FCA litigation can take several years to resolve,[49] and there is no reason to believe that the appeal (and potential remand) of the *Zafirov* case will be any different. As such, individuals considering whether to initiate a new *qui tam* action will have yet another risk to consider when deciding whether to report an alleged fraud. There is a real possibility that a year or more down the road, a whistleblower's *qui tam* action could be "dead on arrival" if the US Supreme Court upholds *Zafirov* and the DOJ declines to pursue the case.[50] While the possibility of dismissal has always loomed over relators' actions, prior to *Zafirov*, there was still a fair chance relators would be able to pursue their case even if the DOJ was not interested in intervening.[51] However, that hope would likely be extinguished if *qui tam* actions are found to be unconstitutional. Given that the probability of DOJ intervention in a *qui tam* case is already low,[52] relators may decide that initiating a *qui tam* action while the constitutionality question is pending is simply not worth the cost or the risk.

Increase in Fraud Perpetrated Against the US Government

Without whistleblowers, the threat of being discovered and held accountable for defrauding the government is drastically reduced, which usually means an increase in fraud.[53] History has proven this to be true. Before the FCA existed as an enforcement mechanism, fraud

FIGURE 2



against the government was completely unfettered.[54] When the FCA was enacted and *qui tam* actions were incentivized, whistleblowing increased, monetary recoveries increased, and individuals were legitimately held accountable.[55] After the FCA was amended in 1943, disincentivizing *qui tam* actions, fraud, waste, and abuse soared once again.[56] The 1986 amendments reinvigorated *qui tam* actions and accountability and recoveries increased.[57] See Figure 2 on opposite page.[58]

Time and again, *qui tam* actions have proven to be effective at meaningfully addressing fraud in government spending. Absent some new program or legislation that incentivizes compliance and reporting fraud, expect fraud to swell over time if *qui tam* FCA enforcement actions are declared unconstitutional.

Creation of New Programs or Legislation to Incentivize Fraud Reporting

While the availability of *qui tam* actions has been instrumental in rooting out fraud over the past four decades, it is but one of many different mechanisms capable of addressing fraud.[59] Data analytics and artificial intelligence (AI) also have been essential in assisting the DOJ to identify fraud in health care claims and Paycheck Protection Program loans,[60] so FCA practitioners may expect the DOJ to expand its use of these tools to assist its fraud detection capabilities.[61] Practitioners also may see agencies leverage the newly minted Administrative False Claims Act to pursue false claims valued at $1,000,000 or less.[62] Regardless of the government's enforcement approach, if *qui tam* actions are ultimately deemed unconstitutional, practitioners should expect the DOJ and Congress to immediately consider, select, and implement new programs or legislation specifically designed to ferret out and incentivize the reporting of fraud.

Conclusion

History offers a stark lesson as to what will happen if the FCA's *qui tam* actions are curtailed or eliminated. While the government can successfully recover public funds lost to fraud on its own, its ability to do so is significantly enhanced by whistleblowers. Like it or not, *qui tam* litigation works as a fraud-detection and fraud mitigation device. The DOJ does not have enough independent resources to effectively and efficiently identify, investigate, and aggressively pursue actions against the overwhelming number of perpetrators defrauding the US government and the American taxpayer. If *qui tam* relators disappear, fraud will undoubtably rise, and the government will be forced to quickly identify creative and flexible solutions to curtail it. PL

Endnotes

1. Press Release, Off. of Pub. Aff., US Dep't of Just., False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023 (Feb. 22, 2024) [hereinafter FCA Settlements], https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023.
2. Under the False Claims Act (31 U.S.C. §§ 3729–3733), a private person—known as a "relator"—is empowered to bring a *qui tam* civil action in the name of the US government against any person alleged to have knowingly presented, or caused to be presented, a false or fraudulent claim for payment or approval to an officer or employee of the US government. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 (2000).
3. FCA Settlements, *supra* note 1.
4. *See* 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).
5. *See Vt. Agency of Nat. Res.*, 529 U.S. 765; Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 934–35 (10th Cir. 2005); United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753 (5th Cir. 2001); United States *ex rel.* Kreindler v. United Tech. Corp., 985 F.2d 1148, 1154–55 (2d Cir. 1993).
6. *See Zafirov*, 2024 WL 4349242.
7. *The False Claims Act*, Civ. Div., US Dep't of Just. (Feb. 23, 2024), https://www.justice.gov/civil/false-claims-act#:~:text=Share,from%20such%20qui%20tam%20actions; *see also* United States v. Bornstein, 423 U.S. 303, 309 (1976).
8. 18 U.S.C. § 287.
9. 31 U.S.C. §§ 3729–3733.
10. *Id.* § 3729(a)(1).
11. *Id.*
12. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 (2000).
13. *See Vt. Agency of Nat. Res.*, 529 U.S. at 768.
14. *See Vt. Agency of Nat. Res.*, 529 U.S. at 768.
15. ACLU v. Holder, 673 F.3d 245, 247 (4th Cir. 2011).
16. *What Is the False Claims Act?*, Phillips & Cohen (2021), https://www.phillipsandcohen.com/false-claims-act-history/#:~:text=The%20False%20Claims%20Act%20was,supplies%20to%20the%20Union%20Army.&text=The%20original%20False%20Claims%20Act,for%20each%20false%20claim%20submitted; *see also The False Claims Act: The False Claims Act (FCA) Is One of the Strongest Whistleblower Laws in the United States*, Nat'l Whistleblower Ctr., https://www.whistleblowers.org/protect-the-false-claims-act/ (last visited Dec. 23, 2024).
17. *What Is the False Claims Act?*, *supra* note 16; *The False Claims Act*, *supra* note 16. *See also* 31 U.S.C. § 3730(d) (currently allowing relators to recover between 15 and 30 percent of amounts recovered on behalf of the government); *ACLU*, 673 F.3d at 248.
18. James B. Helmer Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. Cin. L. Rev. 1261 (2013), https://scholarship.law.uc.edu/uclr/vol81/iss4/3.
19. *Id.*
20. *Id.*
21. 317 U.S. 537 (1943). Attorney General Biddle challenged *qui tam* complaints because he believed they were being filed based solely on information contained in criminal indictments, so they did not contribute anything new and could interfere with the government's criminal prosecutions. *See* H.R. 111-97, 111th Cong. (2009), https://www.congress.gov/congressional-report/111th-congress/house-report/97/1#:~:text=The%20final%201943%20amendments%20to,time%20such%20suit%20was%20brought.
22. *Marcus*, 317 U.S. at 548.
23. *See* 31 U.S.C. § 232(E)(1), (2) (1943) (limiting recovery to no more than 10 percent if the government took the FCA case and no more than 25 percent if the government allowed the relator to handle the case). The recovery amount was left to the court's absolute discretion and even allowed the court to award the relator nothing at all.
24. Helmer Jr., *supra* note 18, at 1270.

25. *Id.* at 1271.
26. *Id.* at 1273.
27. *Id.* at 1275. The current version of the FCA at 31 U.S.C. § 3730(d) allows relators to recover between 15 and 25 percent when the government intervenes in the case, and between 25 and 30 percent when the government does not. These percentages are statutory and mandatory, but the specific amount within these ranges is at the discretion of the DOJ. Between 1986 and today, thousands of *qui tam* actions have been filed and billions of dollars have been recovered. *See* the Civ. Div., US Dep't of Just., *Fraud Statistics—Overview, October 1, 1986–September 30, 2023* [hereinafter DOJ, *Fraud Statistics Overview*], https://www.justice.gov/opa/media/1339306/dl?inline.
28. *See About DII*, Def. Indus. Initiative, http://www.dii.org/about/about-dii (last visited Dec. 23, 2024).
29. One example is found on the American Hospital Association (AHA) website: Brief on Am. Hosp. Ass'n & Am.'s Health Ins. Plans as Amici Curiae in Support of Respondents, United States *ex rel.* Schutte v. Supervalu Inc. & United States *ex rel.* Proctor v. Safeway, Inc., Nos. 21-1326 & 22-111 (U.S. Mar. 2023), https://www.aha.org/amicus-brief/2023-03-28-aha-ahip-amicus-brief-false-claims-act-case.
30. *See* United States *ex rel.* Polansky v. Executive Health Resources, 599 U.S. 419, 442–52 (2023) (Thomas, J., dissenting).
31. The FCA was modified in 1943, 1986, 2009, and 2010. *See* Pub. L. No. 78-213, 57 Stat. 608 (1943); False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153; Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
32. Helmer Jr., *supra* note 18, at 1267.
33. FCA Settlements, *supra* note 1.
34. 599 U.S. 419 (2023).
35. *Id.* at 449 (Thomas, J., dissenting).
36. *Id.* at 442 (Kavanaugh, J., concurring).
37. *See* United States *ex rel.* Zafirov v. Florida Medical Associates, LLC, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).
38. *Id.* at *12.
39. *See* US Const., art. 2, § 2, cl. 2 (indicating that the president "shall have Power [to] … nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").
40. *Zafirov*, 2024 WL 4349242, at 48–49.
41. The government and relator in *Zafirov* appealed Judge Mizelle's ruling to the US Court of Appeals for the Eleventh Circuit and that appeal remains undecided as of the date of publication of this article. In the event the Eleventh Circuit affirms her ruling, it would create a circuit split that could serve as a means of elevating the issue to the US Supreme Court. If the Supreme Court grants certiorari to resolve the circuit split regarding the constitutionality of the FCA's *qui tam* device, the Court could declare *qui tam* actions unconstitutional. *See* Geoff Schweller, *Government and Whistleblower to Appeal Ruling Finding Qui Tam Unconstitutional*, Whistleblower Network News (Oct. 30, 2024), https://whistleblowersblog.org/false-claims-qui-tam-news/government-and-whistleblower-to-appeal-ruling-finding-qui-tam-unconstitutional/.
42. Victor Zhang, *Federal Court Declares False Claims Act's Qui Tam Provision Unconstitutional*, Whistleblower Network News (Oct. 22, 2024), https://whistleblowersblog.org/false-claims-qui-tam-news/federal-court-declares-false-claims-acts-qui-tam-provision-unconstitutional/.
43. Michael C. Dorf, *The Misguided Unitary Executive Theory Gains Ground*, Verdict (June 19, 2023), https://verdict.justia.com/2023/06/19/the-misguided-unitary-executive-theory-gains-ground. *See also* Seila Law, LLC v. CFPB, 591 U.S. 197 (2020).
44. *See* DOJ, *Fraud Statistics Overview*, *supra* note 27. Table 1 was created using data collected by the DOJ.
45. *The False Claims Act*, *supra* note 7.
46. DOJ, *Fraud Statistics Overview*, *supra* note 27.
47. Victoria L. Killion, Cong. Research Serv., LSB11047, Legal Standards for Government Dismissal of Qui Tam Cases Under the False Claims Act (Sept. 27, 2023).
48. Transparency Int'l, Whistleblowing: An Effective Tool in the Fight Against Corruption, Policy Position #01/2010 (2010), https://images.transparencycdn.org/images/2010_1_PP_Whistleblowing_EN.pdf.
49. Most *qui tam* cases remain under seal for at least two years while the DOJ considers whether it will intervene and adopt the case. *See* Memorandum, US Dep't of Just., False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits [hereinafter FCA Memorandum], https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf (last visited Dec. 23, 2024). And, if the matter is litigated, it can take several additional years before the case is completely resolved.
50. *Id.* According to the memorandum, fewer than 25 percent of filed *qui tam* actions result in an intervention on any count by the DOJ.
51. US Dep't of Just., Just. Manual, tit. 4: Civil, 4-4.110–4-4.111, https://www.justice.gov/jm/jm-4-4000-commercial-litigation.
52. FCA Memorandum, *supra* note 49.
53. *Whistleblowers Still the Best at Detecting Fraud*, Nat'l Whistleblower Ctr. (Aug. 2, 2007), https://www.whistleblowers.org/news/whistleblowers-still-the-best-at-detecting-fraud/.
54. *See* United States *ex rel.* Polansky v. Exec. Health Res., 599 U.S. 419, 424 (2023) (citing *United States v. McNinch*, 356 U.S. 595, 599 (1958), regarding testimony before Congress preceding adoption of the FCA that "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war").
55. Helmer Jr., *supra* note 18, at 1267.
56. *Id.* at 1271–72.
57. *Id.* at 1275.
58. Table 2 was created using data collected by the DOJ. *See* DOJ, *Fraud Statistics Overview*, *supra* note 27.
59. There are a variety of tools that can be used to identify fraudulent acts, including audits, software, AI, confidential hotlines, etc. *See Report and Prevent Fraud*, GAO FraudNet, https://www.gao.gov/about/what-gao-does/fraud (last visited Dec. 23, 2024).
60. Press Release, Off. of Pub. Aff., US Dep't of Just., Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference (Feb. 17, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar.
61. Press Release, Off. of Pub. Aff., US Dep't of Just., Acting Assistant Attorney General Brian Rabbitt Delivers Remarks at the PPP Criminal Fraud Enforcement Action Press Conference (Sept. 10, 2020), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-rabbitt-delivers-remarks-ppp-criminal-fraud.
62. Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159 (Dec. 23, 2024).

Summary of PCL Section 2024 Fall Forum

BY KARA M. SACILOTTO

From November 7–9, 2024, the Public Contract Law (PCL) Section held its Fall Forum and Fall Council meeting in Reston, Virginia, outside Washington, DC. The theme of the program was "Preparing for Tomorrow," exploring "top-of-mind" issues for in-house and government service attorneys, with the Reston, Virginia, location strategically selected to invite increased attendance among each of these two PCL Section constituencies. The Fall Forum Conference Director Kara Sacilotto, and Co-Chairs Stephen Bacon (Rogers Joseph O'Donnell PC), Ann McRitchie (Amentum Inc.), Andrew J. Smith (previously with the US Army Legal Services Agency), and Abigail Stokes (The Boeing Company), curated panels offering practical strategies and insights for in-house and government service attorneys, not to mention other attorneys in private practice.

In addition to our panels, we also had the good fortune to secure a phenomenal luncheon speaker, Craig Whitlock, an investigative reporter with *The Washington Post*. In a sold-out "fireside chat" interview with David Robbins (Jenner & Block LLP), Craig spoke about his recent books touching on issues directly relevant to PCL members: *Fat Leonard: How One Man Bribed, Bilked, and Seduced the U.S. Navy* and *The Afghanistan Papers: A Secret History of the War*. It was a fascinating, albeit sometimes disheartening, discussion of two recent incidents that reveal challenges and flaws in serving our country's national security interests, especially as those national security interests intersect with public contracting. Craig also graciously brought books to sign after his talk and easily sold them all—a testament to the attendees' enthusiasm for the fireside chat.

The Fall Forum also featured the Section's first-ever Armed Services Reception, honoring the uniformed and civilian government contracting professionals who work every day to support the common mission of keeping our nation safe. We were honored to have the George Mason University Color Guard post the colors during the playing of the National Anthem and to receive welcome remarks from Mr. Dean Berman, senior executive service (SES), assistant general counsel (Research, Development & Acquisition), and chief acquisition attorney for the Department of the Navy. We would like to extend a tremendous "thank you" to Brooke Didier, assistant counsel, F-35 Lightning II Joint Program Office (JPO), for her invaluable assistance in facilitating Mr. Berman's participation. Of course, while we honored our civilian and uniformed government partners at this reception, we also continued the Section's long tradition of providing a forum for those in private practice, government service, and in-house positions to network and enjoy the collegiality for which the Section is well known.

From beginning to end, the Forum was a smashing success. Attendance topped more than 300 registrants—the largest ever for a fall conference—and the location in the Washington, DC, area was a significant factor in our success. Many attendees provided feedback complimenting the diverse panel topics, the fun "no-host dinners" that fostered connection between Section members, and the convenient location.

Here is a summary of what we talked about at the 2024 Fall Forum.

There Is No "I" in Team: Practical Strategies for Drafting and Negotiating Teaming Agreements and Subcontracts

Moderator Amba Datta (Steptoe LLP), joined by panelists Kara Daniels (Arnold & Porter LLP), Shamir Patel (Guidehouse), and Andrew Sakallaris (Logistics Management Institute), provided a deep dive into the complexities of teaming agreements. The session began by focusing on enforceability and how ambiguity in teaming agreements could lead to disputes. The panel emphasized the importance of clear language when defining the scope and workshare of each party to reduce the risk of such disputes. The panel also addressed potential antitrust concerns that could arise from teaming agreements, suggesting strategies for mitigating those concerns through careful drafting. The session then transitioned to a discussion of critical subcontracting considerations, such as distinguishing between mandatory and nonmandatory flow-down provisions; negotiating key terms such as termination clauses and limitations of liability; and implementing robust confidentiality agreements to protect sensitive information exchanged between the parties. The panel highlighted the importance of anticipating potential disputes and proactively addressing them through well-defined dispute resolution mechanisms in the teaming agreement and the eventual subcontract. Attendees gained practical guidance on crafting effective teaming agreements and subcontracts fostering successful collaborations, while simultaneously minimizing legal risks.

Kara Sacilotto is a partner in the Government Contracts practice at Wiley Rein LLP. She litigates bid protests and claims, conducts internal investigations and advises contractors on FAR mandatory disclosure obligations, and represents contractors in conjunction with suspension and debarment matters. Kara is a former chair of the Public Contract Law Section and was the conference director for the 2024 Fall Forum.

The US Supreme Court: Recent Decisions and Upcoming Cases Important to Government Contractors

The second panel focused on two landmark cases from the US Supreme Court's 2023–2024 term and two cases to be decided in the 2024–2025 term, as well as the potential implications these cases could have on the government contracting landscape. The panel included moderator Will Havemann (Hogan Lovells) and panelists Mel Bostwick (Orrick), Lisa Mathewson (Mathewson Law LLC), Patricia McCarthy (US Department of Justice), and Tejinder Singh (Sparacino PLLC). Ms. Mathewson and Mr. Singh graciously joined the panel even though both are counsel of record on two of the cases that were scheduled for argument on the Court's November and December 2024 calendars.

First, the panel discussed the far-reaching consequences of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[1] which overturned the long-standing doctrine of *Chevron* deference.[2] The *Loper Bright* decision significantly shifts the balance of power between federal agencies and the courts, impacting how courts review agency interpretations of ambiguous statutes. Under *Loper Bright*, courts are no longer obligated to defer to an agency's reasonable interpretation of an ambiguous statute, but the court must instead independently determine the best interpretation of the law. In the second case from last term, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[3] the Supreme Court held that the statute of limitations governing challenges under the Administrative Procedure Act (APA)[4] begins to run when a plaintiff is harmed—not when the rule takes effect. Under *Corner Post*, plaintiffs are now empowered to challenge rules finalized long ago if the rule recently injured them within the APA's six-year statute of limitations. With *Chevron* deference gone and a more open-ended APA statute of limitations, the panel discussed whether challenges to agency regulations, interpretations, and enforcement actions could become more frequent, and potentially more successful, or whether government contracting will see less of an impact.

The two pending cases for the current term that the panel discussed were *Wisconsin Bell, Inc. v. United States, ex rel. Todd Heath*[5] and *Kousisis v. United States*.[6] *Wisconsin Bell* involves how the False Claims Act (FCA) applies to the E-rate program, an important federal program for providing affordable telecommunications services to schools and libraries. While E-rate is a federal program, it is funded by private parties that pay annual fees to a nonfederal entity called the Universal Service Administrative Company (USAC) that administers the fund. The case presents the question whether a request for reimbursement from USAC involves federal funds for purposes of the FCA, such that an allegedly knowingly false request for reimbursement under the E-rate program could be a false claim. The panel's discussion of the *Kousisis* case presented an opportunity to discuss the application of federal criminal wire fraud liability[7] in the context of government contracts. The panel explained that *Kousisis* raises important questions about whether violating contractual (or even pre-contractual) promises could constitute federal criminal wire fraud, even if those promises do not directly impact the alleged victim's financial interests.

Allowability of Legal Costs: Understanding the Rules and Their Practical Applications

The second day of the 2024 Fall Forum began with a comprehensive session on the allowability of legal costs.[8] Erin Rankin (Crowell & Moring LLP) moderated a panel featuring Tom Burke (SAIC), Adrianne Goins (Defense Contract Management Agency), and Mark Meagher (Meagher GC Law, LLC). This panel began by providing a practical understanding of FAR Part 31 cost principles, which govern the allowability of costs incurred by government contractors. The panel dove into an examination of essential caselaw, focusing on landmark decisions that have shaped the interpretation and application of cost allowability principles. The panel then explored real-world scenarios, highlighting common situations that raise cost allowability concerns. The discussion centered on situations such as Requests for Equitable Adjustments (REAs), FCA settlements, and the allowability of legal fees incurred in responding to government audits and investigations. The panelists emphasized the importance of meticulous documentation, ensuring the reasonableness of costs, and aligning all charges with government regulations. Attendees gained valuable insights on how contractors can ensure the allowability of their legal costs and navigate potential disputes with contracting officers and auditors.

Avoid Getting Stuck in the Revolving Door: Understanding, Preventing, and Mitigating Conflicts of Interest When Employees Move out of and into Government Service

The next session continued the 2024 Fall Forum's theme of exploring issues directly relevant to government and in-house counsel. Led by Jennifer Zucker (Greenberg Traurig LLP) and including Joe Moreno (SAP NS2), The Honorable Matthew Solomson (US Court of Federal Claims), Donna Snyder (Lockheed Martin), and Owen Whitehurst (Lockheed Martin), the panel discussed the ethical complexities and potential legal pitfalls arising from the movement of personnel between government and contractor roles. The panelists provided real-world examples of situations where conflicts of interest arise, such as when a former government employee joins a contractor and is involved in work related to their prior government responsibilities. The panel emphasized the importance of being proactive, including thorough vetting of new hires, having a robust ethics training program that educates employees on conflict-of-interest rules and regulations, and implementing internal controls to identify and mitigate potential conflicts. The panel also explored practical strategies for managing identified conflicts, including information firewalls to restrict access to sensitive

information, recusals from specific projects or decision-making processes, and limitations on communications with former government colleagues. And the panel also discussed recent bid protest case law regarding "revolving door" conflicts of interest.

Cross-Border Considerations and Compliance Challenges for Government Contractors

Our Day 2 post-luncheon session, moderated by Adelicia Cliffe (Crowell & Moring LLP), included insights from panelists Liza Craig (Goodwin Procter LLP), Matthew Kitzman (Defense Counterintelligence and Security Agency), and Robert Monjay (formerly of Intel), who provided valuable insights into the complex world of international contracting, with an emphasis on the evolving landscape of supply chain security and sourcing restrictions, export control regulations, and sanctions programs. The discussion highlighted the significant impact of recent geopolitical developments, such as the ongoing war in Ukraine, on the US defense industry and the broader government contracting community.

The panel discussed the growing complexities of navigating the interplay between US export controls and sanctions programs,[9] the International Traffic in Arms Regulations (ITAR),[10] and the Export Administration Regulations (EAR).[11] The panel also covered the recent developments under AUKUS, a trilateral security pact between Australia, the United Kingdom, and the United States.[12] This pact focuses on enhancing defense capabilities and technology sharing among the three nations, particularly in areas like nuclear-powered submarines and advanced technologies, and is leading to modification of export control regulations, as well as creating new compliance challenges for government contractors involved in international defense cooperation.

The panel also examined the issue of foreign ownership, control, or influence (FOCI). FOCI mitigation is a process used by the US government to assess and address potential national security risks associated with foreign involvement in companies that handle sensitive information or technologies, including classified information. The discussion covered recent updates to the FOCI rules[13] and the impact of these updates on government contractors operating across borders, including requirements for disclosure and mitigation plans to address identified risks.

Round Table Discussion with In-House General Counsel

We ended the Fall Forum Conference with a high-profile round table discussion between and among general counsels from government contractors of all sizes. Led by moderator Andrea Vavonese (Peraton), the general counsels represented large contractors—Stuart Young (Amentum) and Josh Petty (Booz Allen Hamilton Inc.)—and small contractors—Virginia Robinson (Tlingit Haida Tribal Business Corp.) and Lance Lerman (ThunderCat Technology). The discussion was wide-ranging, starting with the panelists' career paths and a "typical day in the life" of an in-house attorney, while also discussing the qualities of a successful in-house counsel, such as constant curiosity. The panel explored topics that keep general counsels up at night, including workforce safety and geopolitical impacts on business. They also offered candid advice on how outside counsel can best serve their in-house counterparts (spoiler alert/reminder: long legal memos are *not* helpful!). Attendees highlighted this panel as one that was insightful, unconventional, and worth repeating.

Thank You and Coming Soon!

The 2024 Fall Forum Director and co-chairs thank everyone who attended our first-ever "DC area" Fall Forum and hope that attendees left armed with practical tips from the panels, made new connections with colleagues during networking events, and walked away with renewed appreciation for the community of procurement law practitioners, all of whom are striving to meet the country's greatest challenges.

Our next event, the PCL Section Federal Procurement Institute (FPI), will be held from April 2–5, 2025, and is returning to Annapolis, Maryland. Please note that this year, the FPI conference will be at a new venue—the Westin Hotel—so please do not hit the "snooze button" when registering! As in the recent past, the Section's Council Meeting will be held on the afternoon of Wednesday, April 2, during the conference. We look forward to seeing you there. PL

Endnotes

1. 603 U.S. 369 (2024).
2. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
3. 603 U.S. 799 (2024).
4. *See* 5 U.S.C. §§ 551–559; *see also* 28 U.S.C. § 2401(a).
5. *See* Docket No. 23-1127; *see also* United States *ex rel.* Heath v. Wis. Bell, 92 F.4th 654 (7th Cir. 2024) (denying rehearing en banc and amending the prior opinion at 75 F.4th 778), *rev'g*, 593 F. Supp. 3d 855 (E.D. Wis. 2022).
6. *See* Docket No. 23-909; *see also* Kousisis v. United States, 82 F.4th 230 (3d Cir. 2023).
7. *See* 18 U.S.C. §§ 1343, 1349.
8. *See* FAR 31.205-47.
9. Information about US sanctions programs is generally available at 31 C.F.R. Chapter V, Office of Foreign Assets Control, Department of the Treasury; *see also Sanctions Programs and Country Information*, Off. of Foreign Assets Control, U.S. Dep't of the Treas., https://ofac.treasury.gov/sanctions-programs-and-country-information.
10. 22 C.F.R. pts. 120–130.
11. 15 C.F.R. pts. 730–774.
12. *See AUKUS: The Trilateral Security Partnership Between Australia, U.K. and U.S.*, U.S. Dep't of Def., https://www.defense.gov/Spotlights/AUKUS/.
13. *See, e.g.*, DoD Instruction 5205.87, Mitigating Risks Related to Foreign Ownership, Control, or Influence for Covered DoD Contractors and Subcontractors (May 13, 2024), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/520587p.pdf?ver=vFs4klii8Jg1dCa26CDI_Q%3d%253.

Section Public Comments on Proposed Rules: 2024 Year in Review

BY GEORGE PETEL

Periodically, the Public Contract Law (PCL) Section prepares and submits comments on proposed changes to the federal procurement regulations. Led by the Section's Legislative and Regulatory Coordinating Committee, the Section's comments collect varying perspectives and insights, recommending nonpartisan improvements to the FAR and related procurement regulations.

The year 2024 was a busy year for the Section, which submitted comments on a total of eight separate proposed rules. In an attempt to keep Section members better informed of what the Section is publicly saying, we offer the following summaries of the public comments submitted in 2024. Copies of these latest materials, as well as historic comments submitted by the Section, are available on the Section's website.

Use of DoD Program Nomenclature

Submitted on April 12, 2024,[1] the Section provided comments on DFARS Case 2021-D002, Use of DoD Program Nomenclature.[2] This proposed rule seeks to amend the DFARS to govern how contractors use Department of Defense (DoD) trademarks and program names ("Government designations" or "contract-specific designations" for government designations applicable to a particular contract); require contractors and offerors to identify existing and proposed marks applicable to a given contract in a new rights assertion table (a "marks-list"); authorize the government to use contractor marks and the contractor to use government designations in the course of contract performance; and limit how those marks can be used both during contract administration and beyond.

The Section's comments on the proposed rule asked the DoD to consider several key issues:

1. The DoD should withdraw the proposed rule as contrary to congressional intent in waiving liability for trademark infringement.
2. The DoD should withdraw the proposed rule because the government has less onerous mechanisms to achieve the same end, including using words in an RFP, negotiating royalty-free licenses, or engaging in cross-licensing activity.
3. The DoD should withdraw the proposed rule and replace it with a rule focused on addressing confusingly similar marks and program names.
4. The DoD should withdraw the proposed rule and replace it with improved guidance on licensing alternatives specific to a procurement rather than a blanket rule affecting all contracts.
5. The DoD should revise the proposed rule to remove a requirement to identify trademarks during the proposal process.
6. The DoD should revise the proposed rule to eliminate or revise requirements that contractors acknowledge and agree that, if the contractor does not claim rights in a contract-specific trademark designation, the contractor cannot use the same mark and cannot create its own trademark based on the contract-specific designation.
7. The DoD should revise the proposed rule to eliminate the contractor's duty to report any potential trademark infringement, which is not time-limited.
8. The DoD should revise the flow-down requirement to all subcontracts at all tiers.

Cybersecurity Incident and Threat Reporting

Submitted on January 23, 2024,[3] the Section provided comments on FAR Case 2021-017, Proposed Rule to Federal Acquisition Regulation: Incident and Threat Reporting and Incident Response Requirements for Products and Services Containing Information and Communications Technology.[4] This proposed rule implements Executive Order (EO) 14028, Improving the Nation's Cybersecurity, signed by President Biden on May 12, 2021,[5] and seeks to implement cybersecurity reporting standards where information and communications technology is used or provided in the performance of contracts with the federal government.

The Section's comments on the proposed rule recommended that the FAR Council consider nine key issues:

1. *Security Incident Reporting Harmonization*: The FAR Council should consider aligning the reporting timelines with other government requirements, expressly making costs associated with reporting and investigation allowable under FAR Part 31 and recoverable, requiring agencies to limit the use of

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the clause to the types of contracts in the rule and to specify in solicitations that the new clause will apply, and defining "incident" in harmony with other government definitions.
2. *Access to Contractor Information and Systems*: The FAR Council should consider adding safeguards to protect contractor information to which the government has access under the proposed rule.
3. *Reporting Cyber Threat Indicators and Defensive Measures*: The FAR Council should make it optional to report directly to the Cybersecurity and Infrastructure Security Agency (CISA) rather than as a condition to contract.
4. *Compliance When Operating in a Foreign Country*: The FAR Council should consider compliance barriers arising from foreign laws and regulations.
5. *Customization Files*: The FAR Council should amend its expansive definition of "customization files" to protect contractor intellectual property and to avoid imposing a burden outweighing any potential benefits.
6. *Flow Down*: The FAR Council should clarify and limit the scope of the flow down requirement to subcontractors, particularly adjusting the proposed timeline for reporting to allow a lower-tier subcontractor to report to CISA within eight hours of discovery of the security incident, and then subsequently to higher-tier contractors or prime contractors as soon as practicable. The FAR Council also should define and limit the scope of what information subcontractors are required to report to non-government entities.
7. *Software Bill of Materials (SBOM)*: The FAR Council should remove the SBOM requirement and address this requirement in a separate rulemaking to ensure harmonization with OMB Memo M-22-18 and DHS CISA SBOM provisions.
8. *IPV6*: The FAR Council should remove IPV6 requirements and implement those in separate rulemaking or agency guidance. IPV6 refers to "Internet Protocol version 6," which is the current version of the internet communications protocol providing an identification and location system for computers on networks, and also routing traffic across the Internet.
9. *FAR 52.239-AA, Security Incident Reporting Representation*: The FAR Council should revise the certification requirement to provide for "best of my knowledge as of the time the incident report was submitted" given the inherent conflict between speed and accuracy in reporting incidents.

Cybersecurity for Unclassified Federal Information Systems

Submitted on January 23, 2024,[6] the Section provided comments on FAR Case 2021-019, Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems.[7] This proposed rule also implements the section of EO 14028 noted above, setting minimum cybersecurity standards for unclassified federal information systems (FISs).

Beyond lauding the spirit of the proposed rule, the Section's comments recommended seven changes to the FAR Council:

1. The FAR Council should amend the rule to clarify that contracting officers must identify any applicable FISs in the solicitation before including the new FAR clauses in the resulting contract.
2. The FAR Council should add provisions ensuring that these new requirements apply only to contracts for services to develop, implement, operate, or maintain an FIS on behalf of the government.
3. The FAR Council should more narrowly tailor the definitions of "Government data" and "Government-related data."
4. The FAR Council should restrict agencies from adding additional security and privacy controls outside specified high-value FISs.
5. The FAR Council should harmonize the timing for compliance between the proposed rule and Cybersecurity Maturity Model Certification (CMMC) 2.0 milestones.
6. The FAR Council should limit access to contractor systems to ensure confidential, proprietary, and privileged information are appropriately protected.
7. The FAR Council should delete the proposed indemnity language and should engage in dialogue with industry before proceeding with such an expensive and expansive requirement.

CMMC 2.0

Submitted on October 15, 2024,[8] the Section provided comments on DFARS Case 2019-D041, Defense Federal Acquisition Regulation Supplement (DFARS): Assessing Contractor Implementation of Cybersecurity Requirements.[9] This proposed rule incorporates contractual requirements related to the CMMC 2.0 program rule, Cybersecurity Maturity Model Certification Program.[10]

The Section's comments raised several concerns and suggested multiple proposed changes to DoD:

1. *Implementation*: DoD should clarify how the requirements will apply to contract option periods that are exercised after newly implementing the rule, and DoD should either prohibit contracting officers from implementing the rule ahead of schedule or require advance warning if the DoD chooses to identify certain programs for early adoption.
2. *Data and Information Systems*: DoD should revise the definition of "Controlled Unclassified Information" (CUI) to include only information expressly marked as such, and to add a definition of "Federal Contract Information" (FCI), distinguishing the

requirements when only FCI is being used by the contractor. DoD also should include a definition or alignment with DFARS 252.204-7012 on "Covered Defense Information" (CDI) and either define "data" or only use defined terms like FCI, CUI, or CDI. Finally, DoD should permit contractors to define the scope of the information system that applies to a given DoD unique identifier requirement.

3. *Compliance and Change Management*: DoD should clarify that contractors may continue to rely on their CMMC Plans of Action and Milestones (POA&Ms) for maintaining ongoing compliance in order to address newly discovered risks or system flaws or updates that lead to temporary deficiencies. DoD also should define what constitutes a "change" that could affect compliance status, remove duplicative reporting requirements, clarify subcontracting reporting timing, and define "senior company official" for purposes of compliance affirmations.
4. *Supply Chain*: DoD should consider providing financial and technical support to small businesses that will have difficulty meeting the CMMC standards, revise the subcontract flow-down requirements to avoid overburdening subcontractors, and carve out certain suppliers.

SBA WOSB Updates

Submitted on July 15, 2024,[11] the Section provided comments on Docket 2024-0004—Small Business Administration (SBA) Proposed Rule on Women-Owned Small Business Federal Contract Program Updates and Clarifications.[12] The proposed rule would make changes to standardize requirements in the women-owned small business (WOSB) and economically disadvantaged women-owned small business (EDWOSB) programs by adding definitions, conforming the regulations to current statutes, and harmonizing language.

Beyond expressing appreciation for most of the proposed changes and suggesting other minor regulatory updates for consistency across the socioeconomic programs, the Section's comments recommended a handful of changes to the SBA, including:

1. SBA should further harmonize the language across the socioeconomic programs, including by allowing control exceptions in the WOSB and EDWOSB programs for "extraordinary circumstances."
2. SBA should add a definition of when a WOSB/EDWOSB application is "complete" for purposes of eligibility, pending approval of a concern's application.

Subcontracting to Puerto Rican and Other Small Businesses

Submitted on July 24, 2024, the Section provided comments[13] on FAR Case 2023-001—Subcontracting to Puerto Rican and Covered Territory Small Businesses.[14] The proposed rule harmonizes the FAR with SBA's final rule[15] and implements paragraphs (a) and (d) of section 861 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019[16] and paragraphs (a) and (c) of section 866 of the William M. (Mac) Thornberry NDAA for FY 2021,[17] which amended 15 U.S.C. §§ 632 and 657r(a) to add Puerto Rico, as well as the US Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, to the list of US territories from which small businesses are eligible for preferential treatment under the SBA Mentor-Protégé Program.

The Section's comments applauded the proposed rule and offered one concern on a lack of consistency in the proposed FAR rule's use of the word "question," whereas the SBA final rule had used the word "doubt" instead. Based on the dictionary definitions of "question" and "doubt," this difference in terminology could lead to an inconsistent application and interpretation of the two rules.

A final rule was issued on January 3, 2024, without any significant changes from the proposed rule.[18] The FAR Council declined to implement the Section's recommendation.

SBA HUBZone Changes and Other Clarifications

Submitted on October 1, 2024, the Section provided comments[19] on Docket 2024-0007—HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs.[20] The proposed rule makes several changes to the Historically Underutilized Business Zone (HUBZone) program, the 8(a) Business Development program (the 8(a) Program), and the SBA's size regulations, as well as technical changes to the WOSB and Veteran Small Business Certification (VetCert) programs. The Proposed Rule clarifies and improves policies surrounding some of those changes. The SBA proposed many changes to make requirements consistent across the multiple socioeconomic programs, which should ensure that the size and status requirements will be uniformly applied.

Beyond lauding most of the proposed rule and requesting additional time to provide further comments, the Section's comments recommended five changes to the SBA:

1. SBA should make additional revisions to 13 C.F.R. § 121.1001 to identify who may initiate size protests or size determinations.
2. SBA should not consolidate the recertification requirements for all SBA programs, as each has different requirements and should have different standards.
3. SBA should consider the disruption the new recertification rules will have on existing concerns and their contracts, particularly Federal Supply Schedule contracts, which SBA has historically not sought to regulate. SBA should ensure the final rule is prospective and not retroactive.

4. SBA should amend the mentor-protégé program portion of the proposed rule to alleviate harms to protégés when mentors merge, are acquired, or acquire other protégés.
5. SBA should ensure HUBZone employees are protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

SBA Rule of Two for Multiple-Award Contracts

Submitted on December 16, 2024, the Section provided comments[21] on Docket 2024-0002—Increasing Small Business Participation on Multiple-Award Contracts.[22] The proposed rule would clarify the applicability of the "Rule of Two" to multiple-award contracts (MACs) by directing that an agency set aside an order under a MAC for small business contract holders when the contracting officer determines there is a reasonable expectation of obtaining offers from two or more small business contract holders under the MAC that are competitive in terms of market prices, quality, and delivery.

The Section raised several issues with the proposed rule:

1. SBA should add a mechanism to require contracting officers to justify in writing refusal to implement a set-aside recommendation from SBA's Procurement Center Representative (PCR).
2. SBA should clarify that the exception regarding repetitive orders applies only to orders under the same MAC and within the prior six months, rather than 18 months.
3. SBA should increase the period of time for agency coordination with SBA PCRs and also add more precision to the standard for when coordination should occur.
4. SBA should align the rule to comply with the decision from the US Court of Federal Claims in *Tolliver Grp., Inc. v. United States*, 151 Fed. Cl. 70, 104 (2020), by requiring agencies to provide a written justification for why the agency is using a particular MAC that does not have any small business holders.

Conclusion

We thank the Section members who contributed to these public comments for their time and attention. When it comes to public contracting, regulations are inevitable. But improving the quality of these regulations relies on the careful consideration of individuals in the FAR Council, particular agencies, and members of this Section. If you are interested in joining the Legislative and Regulatory Coordinating Committee and helping

with future public comments, please contact Co-Chairs Eric Crusius (eric.crusius@hklaw.com) or George Petel (gpetel@wiley.law). PL

Endnotes

1. *See* Comments on DFARS Case 2021-D002, Use of DoD Program Nomenclature, ABA Pub. Cont. Law Sec. (Apr. 12, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/aba-pcls-comments-on-far-proposed-rule-re-use-of-dod-program-nomenclature.pdf.
2. *See* Defense Federal Acquisition Regulation Supplement: Use of DoD Program Nomenclature (DFARS Case 2021-D002), 89 Fed. Reg. 11,803 (Feb. 15, 2024).
3. *See* Federal Acquisition Regulation (FAR) Case 2021-017—Comments on Proposed Rule to Federal Acquisition Regulation: Incident and Threat Reporting and Incident Response Requirements for Products and Services Containing Information and Communications Technology, ABA Pub. Cont. Law Sec. (Jan. 23, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2024/cyber-threat-and-incident-reporting.pdf.
4. *See* Federal Acquisition Regulation: Cyber Threat and Incident Reporting and Information Sharing, 88 Fed. Reg. 68,055 (Oct. 3, 2023).
5. Executive Order 14028, Improving the Nation's Cybersecurity, 86 Fed. Reg. 26,633 (May 17, 2021).
6. *See* Federal Acquisition Regulation (FAR) Case 2021-019—Comments on Proposed Rule to Federal Acquisition Regulation: Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems, ABA Pub. Cont. Law Sec. (Jan. 23, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2024/cyber-reqs-for-unclassified-fed-info-systems.pdf.
7. *See* Federal Acquisition Regulation: Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems, 88 Fed. Reg. 68,402 (Oct. 3, 2023).
8. *See* Federal Acquisition Case 2019-D041—Comments on Proposed Rule to Defense Federal Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements, ABA Pub. Cont. Law Sec. (Oct. 15, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2024/pcl-final-comments-to-proposed-cmmc-dfars-rule.pdf.
9. *See* Defense Federal Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019-D041), 89 Fed. Reg. 66,327 (Aug. 15, 2024).
10. *See* 32 C.F.R. pt. 170.
11. *See* Docket No. 2024-0004—Comments on Women-Owned Small Business Federal Contract Program Updates and Clarifications, ABA Pub. Cont. Law Sec. (July 15, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/aba-pcls-comments-on-wosb-updates-and-clarifications.pdf.
12. *See* Women-Owned Small Business Federal Contract Program Updates and Clarifications, 89 Fed. Reg. 42,816 (May 16, 2024).
13. *See* FAR Case 2023-001—Comments on Federal Acquisition Regulation: Subcontracting to Puerto Rican and Covered Territory Small Businesses, ABA Pub. Cont. Law Sec. (July 24, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/aba-sbc-comments-on-pr-covered-territory-far-proposed-rule.pdf.
14. *See* Federal Acquisition Regulation: Subcontracting to Puerto Rican and Covered Territory Small Businesses, 89 Fed. Reg. 48,540 (June 7, 2024).
15. *See* Small Businesses in U.S. Territories: Eligibility of the Commonwealth of the Northern Mariana Islands (Final Rule), 87 Fed. Reg. 50,925 (Aug. 19, 2022).
16. *See* John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019, Pub. L. No. 115–232, 132 Stat. 1636 (Aug. 13, 2018).
17. *See* William M. (Mac) Thornberry NDAA for FY 2021, Pub. L. No. 116–283, 134 Stat. 3388.
18. *See* Federal Acquisition Regulation: Subcontracting to Puerto Rican and Covered Territory Small Businesses (Final Rule), 90 Fed. Reg. 523 (Jan. 3, 2025).
19. *See* Docket No. SBA-2024-0007—Comments on HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs, ABA Pub. Cont. Law Sec. (Oct. 1, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2024/aba-pcls-comments-on-proposed-sba-hubzone-rule.pdf.
20. *See* HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs, 89 Fed. Reg. 68,274 (Aug. 23, 2024).
21. *See* Docket No. SBA-2024-0002—Comments on Increasing Small Business Participation on Multiple-Award Contracts, ABA Pub. Cont. Law Sec. (Dec. 16, 2024), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/2024-sba-mac-rule-of-two-proposed-rule.pdf.
22. *See* Small Business Contracting: Increasing Small Business Participation on Multiple Award Contracts, 89 Fed. Reg. 85,072 (Oct. 25, 2024).

LICENSING COMMERCIAL SOFTWARE TO THE US GOVERNMENT

continued from page 1

software can pose significant national security risks. Programs like the Adaptive Acquisition Framework and the Software Modernization Implementation Plan emphasize agile and flexible procurement processes, allowing DoD to rapidly deploy new capabilities, enhance interoperability, and reduce acquisition timelines. The federal government's substantial investment in software licenses, exceeding $100 billion annually, underscores the critical role of software in federal operations and the importance of effective license management for value and efficiency.

In this article, we will explore the key considerations when licensing commercial software to the US government, examining the evolving policies and practices that shape software procurement in the defense sector. This article begins by exploring the evolving policies that guide the US government's acquisition of commercial software, highlighting the shift toward more agile and flexible procurement methods, and emphasizing the importance of speed, efficiency, and alignment with modern development practices. This article continues by defining commercial software in the context of government procurements, distinguishing between commercially available off-the-shelf (COTS) software and open-source software. The article also discusses the different types of licenses required for various software

distribution models. Next, this article provides a detailed examination of the government's license rights in commercial software, including the legal framework established by the FAR and DFARS. This section also addresses common conflicts between commercial software licenses and federal law. Next, this article explores the legal avenues available for enforcing software license rights against the US government, including copyright infringement claims and breach of contract claims, while examining recent decisions from the Board of Contract Appeals and US Court of Federal Claims. This article then concludes by discussing certain compliance measures that software vendors must adhere to when licensing software to the US government. It covers requirements such as NIST attestation, FedRAMP, and the disclosure of information regarding foreign obligations. Licensing commercial software to the US government is a complicated business, but this article should help identify the key considerations that every company should keep in mind when operating in this market.

Government Software Acquisition Policy

The policies governing the US government's acquisition of commercial software are evolving in an effort to address the challenges of rapid technological advancement and operational complexity. Both DoD and civilian federal agencies are adopting more agile, flexible approaches to software procurement, emphasizing the need for speed, efficiency, and alignment with modern development practices. For DoD, initiatives such as the Adaptive Acquisition Framework and Software Modernization Implementation Plan reflect a shift toward iterative and modular processes tailored to defense requirements. Similarly, civilian agencies are leveraging category management principles, enterprise licenses, and governmentwide acquisition contracts to streamline software procurement. Understanding these policies is critical for negotiating software licensing agreements, as they define the framework within which contracting officers acquire commercial software solutions.

The Defense Acquisition System and Software Modernization Initiatives

The Defense Acquisition System (DAS) plays a pivotal role in ensuring DoD acquires and sustains capabilities to meet national security challenges.[1] Within the DAS, the Adaptive Acquisition Framework (AAF) provides a set of tailored procurement pathways designed to streamline the software acquisition process, allowing for flexibility and speed in awarding acquisition vehicles for complex programs.[2] Among these pathways, the Software Acquisition Pathway (SWP) addresses the unique life-cycle requirements of software systems, recognizing the distinct challenges of acquiring and sustaining software in an era of rapid technological evolution.[3] The SWP focuses on iterative development, continuous integration, and rapid deployment, recognizing that software capabilities must evolve rapidly to maintain operational relevance.[4]

DoD's Software Modernization Implementation Plan (SMIP) underscores the importance of modernizing software development, deployment, and sustainment processes to support evolving mission requirements.[5] The SMIP is a comprehensive roadmap aimed at driving enterprise-level efficiencies, advancing digital engineering, and ensuring cybersecurity resilience. This plan builds upon the foundation established by the SWP, emphasizing the integration of commercial best practices, automation, and open architecture principles. These elements are crucial for fostering collaboration with industry partners while accelerating the delivery of software solutions to warfighters.

Software procurement policies also have been issued by the individual service branches. For example, the Army has taken a significant step forward in its modernization efforts with the publication of Army Directive 2024-02.[6] This directive outlines the US Army's framework for adopting agile methodologies like continuous integration/continuous delivery, implementing DevSecOps practices (Development/Security/Operations),[7] and leveraging modular open systems architectures across Army software programs. By prioritizing iterative development cycles and continuous integration, the Army directive seeks to reduce acquisition timelines and enhance the delivery of mission-critical capabilities to warfighters. A core tenet of Army Directive 2024-02 is the alignment of software acquisition processes with the broader objectives of DoD's Software Acquisition Pathway.

While DoD has taken several steps to modernize its approach to software acquisition, the Department faces persistent challenges in modernizing its software practices, as highlighted by multiple reports from the Government Accountability Office (GAO). Recent GAO reports provide a comprehensive overview of DoD's software acquisition and modernization challenges, highlighting critical gaps and progress made between 2020 and 2024. In 2021, GAO underscored systemic obstacles faced by DoD in implementing its updated policies to improve its software acquisition processes.[8] Although an increasing number of programs reported using these new methods, GAO found that many DoD programs have yet to implement these practices and that DoD had not consistently collected data or developed metrics to assess adoption and implementation. Similarly, in 2023, GAO emphasized that while DoD had initiated reforms under the AAF, implementation remained stubbornly inconsistent across different programs, especially for acquisitions of weapons systems proceeding outside the normal software acquisition pathway.[9]

The most recent assessment continues to identify ongoing deficiencies in DoD's ability to measure the performance of software development initiatives, citing inadequate use of metrics and gaps in cybersecurity.[10] This

report also discusses how legislative mandates, such as the National Defense Authorization Act for FY 2018,[11] have driven some progress in policy alignment but have not fully addressed operational inefficiencies.[12] Collectively, these findings reveal that while DoD has made strides toward modernizing its software acquisition processes, significant challenges persist. For now, it is safe to assume that policies will continue to evolve, and procedures will undergo additional evolutions as DoD continues to work through these issues and refine its acquisition processes.

Even though DoD policy is far from settled, the overall direction taken by these recent reforms to DoD software acquisition procedures is clear. From a licensing perspective, initiatives like the SWP and SMIP highlight significant shifts away from the traditional acquisition process in how DoD approaches software procurement and life-cycle management. Historically, DoD relied heavily on bespoke software solutions developed under rigid contracts.[13] However, the AAF and SMIP and the services' further implementation of these initiatives reflect a shift toward acquiring commercial software solutions and rapidly deploying and integrating them into larger defense systems. This increased reliance on and integration of commercial software into platforms and programs that have historically relied on noncommercial solutions raises critical intellectual property (IP) concerns, and the shift means that effective licensing terms must balance the commercial market's expectations with the government's needs for transparency, adaptability, and long-term support. Understanding the interplay between these initiatives and commercial practices is essential for negotiating software licenses with DoD customers.

Modernizing Federal Civilian Software Procurement

Federal civilian agencies are increasingly embracing streamlined acquisition processes to modernize their software procurement practices and to keep pace with technological advancements. Reflecting a broader government-wide shift, the General Services Administration (GSA) and the White House's Office of Management and Budget (OMB) have developed initiatives aimed at improving the acquisition and management of commercial software.[14] These efforts focus on promoting agility, efficiency, and cost-effectiveness in response to longstanding challenges associated with traditional procurement methods. A key development in this area is the implementation of category management principles and the establishment of government-wide acquisition contracts (GWACs) tailored for software and information technology (IT) solutions.

Central to these modernization efforts is the Federal IT Acquisition Reform Act (FITARA), which directs agencies to acquire and manage commercial and COTS software in a more coordinated way.[15] Complementing FITARA, OMB directed agencies to transition to centralized and collaborative software management and develop government-wide strategies to reduce duplication of efforts, such as increasing government-wide software agreements for mandatory use by all agencies.[16] GSA has aimed to improve transparency in software purchasing and reduce duplicative acquisitions. It offers software licenses and software maintenance services on its Multiple Award Schedule (MAS), GWACs, and SmartBUY blanket purchase agreements (BPAs).[17] General Services Administration Acquisition Regulation (GSAR) Case 2015-G512 was published as a final rule on February 22, 2018.[18] The rule, now a mandatory solicitation provision, supplies mandatory language to replace common commercial terms for use of computer software that conflict or are otherwise incompatible with federal law.[19]

The shift toward commercial software procurement raises unique challenges related to licensing terms and vendor relationships. For example, category management principles encourage bulk purchasing agreements and enterprise licenses, which can yield significant cost savings for the government, but also require careful negotiation to ensure compliance with federal laws and policies. Moreover, the rise of cloud-based solutions and software-as-a-service (SaaS) offerings have introduced new complexities, particularly around data sovereignty, cybersecurity, and contract administration. Civilian agencies and contractors must navigate these dynamics to craft license agreements that balance innovation, flexibility, and risk mitigation.

As with DoD, federal civilian agencies also continue to face ongoing challenges in modernizing their software acquisition and management practices. GAO has identified inefficiencies and opportunities for cost savings by concluding that many federal agencies lack comprehensive and accurate inventories of their software licenses or consistent tracking of software usage and purchases, making it difficult to reduce over- or under-purchasing licenses and manage inventory of existing licenses.[20] These observations echo earlier assessments.[21] Vendors providing commercial software and IT solutions to government customers should recognize that while acquisition policies continue to evolve across the federal government, implementation will take time.

License Acquisition Vehicles and License Management

The government employs a variety of acquisition vehicles to streamline the procurement of commercial software and IT solutions. These vehicles enable agencies to leverage pre-negotiated terms, achieve economies of scale, and expedite the acquisition process. For defense and civilian agencies alike, these tools play a critical role in balancing efficiency, compliance, and adaptability while navigating the complexities of software licensing. Notable among these vehicles are DoD's Enterprise Software Initiative (ESI) and the GSA MAS program.

The ESI, established by DoD, is a strategic sourcing program that provides streamlined access to enterprise-level software and IT products.[22] DoD also has standardized acquisition procedures through the ESI.[23] ESI agreements consolidate demand across DoD components and

other federal agencies, allowing for volume discounts and uniform licensing terms.[24] ESI also addresses critical considerations like data rights, cybersecurity compliance, and sustainment, offering a framework that aligns with the unique operational requirements of defense agencies.

For federal civilian agencies, the GSA MAS program remains one of the most widely used acquisition vehicles for software procurement. Specifically, Schedule 70—now integrated into the consolidated MAS—provides access to a broad array of software solutions, including cloud-based platforms and SaaS offerings. The GSA MAS program enables agencies to procure commercial software with pre-negotiated pricing and terms that comply with the Federal Acquisition Regulation (FAR). Additionally, programs like the IT Schedule 70's Special Item Numbers (SINs) for cloud computing and cybersecurity tools ensure that agencies can access specialized products while meeting emerging technology standards.

These acquisition vehicles highlight the government's increasing reliance on commercial software solutions to meet operational and mission needs. While these contracting vehicles provide significant advantages in terms of efficiency and standardization, they also introduce complex licensing challenges that require careful legal scrutiny. Contractors and government agencies must navigate a patchwork of regulatory requirements, agency-specific policies, and evolving technology standards to ensure agreements align with both commercial best practices and federal mandates. Understanding the nuances of these acquisition vehicles is essential to crafting contracts that balance innovation, compliance, and mission assurance.

Software license management is intended to manage, control, and protect an organization's software assets, including management of the risks arising from the use of those software assets.[25] Properly managing software licenses helps to minimize risks by ensuring licenses are deployed cost-effectively and used in compliance with licensing agreements. Software license management also ensures software purchasing and maintenance expenses are properly controlled. This management includes (1) a regular reconciliation review by agencies to ensure they have the appropriate number of licenses for each item of software in use and (2) reviews by vendors to assess the number of licenses in use to ensure the legal agreements that come with procured software licenses are adhered to and that organizations avoid purchasing unnecessary licenses. These reviews—known as "true-up and true-down" reviews—are intended to either "compare[] the current software deployment to the software purchase data to revalidate and reconcile software utilization with historical software procurement data and terms and conditions" (true-up review) or "determine[] if fewer licenses are required" (true-down review). These reviews occur prior to software license renewals or exercising options under a software license agreement.[26]

However, the government often fails to properly manage its purchased licenses by either over- or under-purchasing software licenses.[27] Recent government-wide software license initiatives and, if enacted, proposed

legislation are aimed at improving agencies' management of software licenses to, among other things, consolidate government software purchasing. This includes a government-wide initiative aimed at standardizing software license data to include a vendor assessment initiative, a government-wide IT taxonomy modernization initiative,[28] and a government-wide licensing agreement initiative.[29] In March 2023, legislation was introduced in Congress, titled the "Strengthening Agency Management and Oversight of Software Assets Act" (SAMOSA), to provide Congress improved visibility of federal agency software asset management practices.[30]

Commercial Software Overview

What Is Commercial Software?

Commercial software, in the context of federal procurements, is software that is licensed or offered for license to the general public, typically for purposes other than governmental purposes.[31] The government typically acquires commercial software under the same licenses offered to the public to the extent that such licenses are consistent with federal law.[32] As with any other commercial product, commercial software can include software not yet available in the commercial marketplace but will be in time to satisfy the delivery requirements under a government solicitation, as well as commercial software that has undergone customary or minor modifications to meet government needs.[33] To the extent that commercial software licenses include support services, those services are typically considered commercial services because they support a commercial product.[34]

Many software products are "commercially available off-the-shelf" (COTS) and are designed to be ready to use and integrate with existing systems.[35] COTS software is a narrow subset of commercial software. To be considered COTS, software must be (a) commercial software, (b) licensed in substantial quantities in the commercial marketplace, and (c) offered to the government without modification.[36] COTS software is often developed by third-party vendors and can include operating systems, office suites, productivity applications, email programs, communication protocols, and device drivers.

COTS software is popular because it is convenient and affordable and offers a wide range of features. It can be a good choice for projects with tight schedules and budgets. However, there are some potential drawbacks to using COTS software, including reliance on a third-party vendor to continue to support the software and the software possibly requiring substantial customization. While generally the up-front adoption costs may be lower, COTS software could be more expensive in the long run if the user-base increases or the software requires periodic licensing.

What Is Open-Source Software?

"Open-source software" is defined as "software for which the human-readable source code is available for use, study, re-use, modification, enhancement, and re-distribution by the users of such software."[37] Open-source software is distributed under licenses that grant users permission to use, modify, and distribute software under certain conditions. These licenses ensure the software's source code is available to the public. Thus, open-source software generally is licensed under common licenses, such as Apache 2.0, MIT, and GNU General Public License (GPL). If open-source software is already available to the public and is used unchanged, it is usually considered COTS software.

When Are Software Licenses Required?

Software is protected by copyright, and each of the copyright "bundle of rights" can be separately or collectively licensed. These rights include the right to reproduce, distribute, create derivative works, publicly perform, and publicly display the software, allowing the copyright owner to control how their software is used and exploited commercially.[38] As a result, software licenses are required whenever externally acquired software is installed on one or more user computers, installed on a centrally accessed server, or accessed via the Internet.[39]

What Are the Different Types of Cloud-Based Software Distribution Licenses?

Software is distributed in a number of different ways, each of which requires a specific licensing scheme. These include distribution of copies, on media[40] or via the Internet, to be downloaded on individual computers; "Infrastructure-as-a-Service" (IaaS), which refers to a cloud computing model where a provider delivers essential IT infrastructure like servers, storage, and networking capabilities to users on demand; "Platform-as-a-Service" (PaaS), which provides a cloud-based platform that developers can use to create online software; and the more widely adopted "Software-as-a-Service" (SaaS), which is cloud-based software that is hosted online and delivered to licensees via the Internet.

Common Licensing Terms

Identity of Parties

In most instances, the identity of the licensor is simple, assuming all rights to the software are owned by a single entity. Identification of the licensee, however, can be challenging, particularly in the context of the federal government. For example, agencies may have one fulfillment group entering into the contract, while acting on behalf of multiple different entities that will be using the software. This issue can become particularly complex when identifying who the expected authorized users will be and their relationship to the licensing entity.

Duration

An essential term of every software license is its duration. This is particularly important because, depending on the duration of a copyright license, licensees may

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- Secretary
- Membership Officer (two-year term ending August 2027)
- Section Delegate to the ABA House of Delegates (three-year term ending 2028)
- Four Council members (three-year term ending August 2028)

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If you have been active in the Section over the years by frequently attending Council meetings and educational programs, if you've been the chair, co-chair, or vice-chair of one or more committees, and/or if you've been a contributor to the Section's journal or newsletter, please consider submitting your name for consideration for one of the Officer or Council positions for 2025–2026. **The deadline to apply is April 1, 2025.**

Please keep in mind that Council membership is for a three-year term, during which Council members are expected to regularly comment on, participate in, and contribute to various Section matters, as well as attend Section programs concurrent with the Council meetings. A strong preference, therefore, will be given to those individuals who have demonstrated a willingness to be active Council participants. Preference will also be given to nominees for Council member positions who have not previously been elected to a three-year term to the Section Council.

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The following Section members have been appointed as the Nominating Committee:

Eric Whytsell — Chair
Missy Copeland — Member
Judge Elizabeth Witwer — Member

The Nominating Committee's report will be available on the Section website on or before June 1, 2025, and the Committee will report to the Section at the Annual Business Meeting, August 9, 2025, where the Section membership will vote on the nominees.

periodically incur charges in order to continue using the software. These charges must be considered in the acquisition process. Licenses for COTS software are often perpetual, in that once licensed to the end-user, the licensee is not required to renew the license on a periodic basis. This is often seen in connection with operating systems, email clients, and word processing software. More specialized software is often licensed for a specific initial duration followed by automatic extensions until cancelled. The duration can vary from days to years and may or may not include upgrade rights.

Scope of Use

1. Users

Interwoven with the identification of the proper licensee for software is the identification of the users who are expected to have access to the software. The categories of users might include the licensee's affiliates, contractors, and, sometimes, third parties, if the licensed software is intended to be used in conjunction with other software or services being provided by the licensee.

Historically, software licenses were based on one of two criteria: (1) the number of permitted copies that could be used or (2) the computing capacity of the licensee's computers. The latter measure has fallen out of favor but is still seen when software is used on mainframe computers—complex, high-performance computers that are used by organizations to process large amounts of data and perform critical applications. These licenses are linked to the speed or power of the server on which they run, or the number of processors.

User-based licenses come in a variety of different configurations. These include (1) per-copy licenses, which may be further delimited by the number of users allowed per license; (2) concurrent use licenses, which allow for a specified number of users to connect simultaneously to a software application; and (3) enterprise or site licenses, which can extend to all users in a particular unit or division or a specific physical site. Many times, user-based licenses are managed using software that tracks when and by whom a particular piece of software is accessed.

2. Territory

Rights in copyright are territorial in nature, meaning that works are protected according to the copyright laws of the country in which the software is used. As a result, care should be taken regarding where licensed software will be accessed and whether that access will be on US territory.

3. Modifications

COTS software generally is distributed as executable code, which does not allow for easy modification by the licensee or end user. Nonetheless, there may be instances where modifications are needed to allow for interoperability with existing platforms or needs. License agreements should account for both permission to modify the software and the ownership of such modifications.

License Fees

As noted, COTS software licenses are typically perpetual and only require an upfront fee. Some commercial software, including some COTS software, include fees for initial and continued use of licenses. These fees may include, as part of the license contract, access to product support (e.g., maintenance, trouble shooting, and training) and/or other services, including upgrades. License fee models differ significantly depending on the software product and vendor.

Other Common Terms

Software licenses, like most contracts, usually include terms that account for indemnity by the licensor for infringement or errors in the software, indemnity by the licensee for certain actions, confidentiality, alternative dispute resolution, choice of law, and other oft-seen terms.

Federal Government Software Licensing

Government's License Rights in Commercial Software

Companies developing and licensing commercial software are mindful of protecting their valuable intellectual property to maintain their competitive advantage. Although a software developer generally maintains legal ownership of its proprietary software, it provides certain license rights to others for a fee in order for them to use that software. Consider, for example, Microsoft Office, a widely used collection of applications that help with productivity and common computer tasks, including programs for word processing, spreadsheets, presentations, databases, email, and more. While Microsoft always *owns* its product, the authors of this article are using Microsoft Word pursuant to a license containing certain terms and conditions of use. When Microsoft or similar companies license their software products to the federal government, they want to ensure the government does not obtain greater license rights than ordinarily given to the general public, fearing expanded government rights could weaken their competitive position and limit their ability to profit from their innovations in the market if different from the rights granted in the normal commercial market. On the other hand, the government wants to obtain the necessary rights to use, modify, and distribute the software effectively to support its missions.

Notably, there is virtually no guidance in the FAR regarding negotiating commercial software licenses, with only a passing reference in the Defense Federal Acquisition Regulation Supplement (DFARS) to the "Government's interest" and negotiating the desired rights "at a fair price."[41] What the FAR and DFARS *do* contain, however, is a legal framework for establishing the government's license rights in software, which in turn informs the negotiation. As such, different rules apply depending on whether the computer software is considered *commercial* or *noncommercial*, as prescribed in the FAR and DFARS. When acquiring *noncommercial* computer software, the government typically seeks specific licensing

rights, such as unlimited rights, government purpose rights, and restricted rights in that computer software. When acquiring *commercial* computer software, the government typically follows standard commercial terms and conditions being offered by the contractor. Indeed, the government has a statutory preference for purchasing commercial products and services.[42] Thus, government agencies often acquire commercial computer software and related services through FAR Part 12 acquisitions for commercial products and services.

As discussed in the outset of the previous section on commercial software, the FAR defines "commercial computer software" as any computer software that is a "commercial product" or "commercial service."[43] The FAR defines "commercial product" as a product, other than real property, that is typically used by the general public or by nongovernmental entities for purposes other than governmental purposes. It includes products that (1) have been sold, leased, or licensed to the general public or (2) have been offered for sale, lease, or license to the general public. It also includes products that have evolved therefrom, including products that have been modified or adapted from a commercial product to meet specific government requirements, as long as the modifications do not significantly alter the product's function or essential physical characteristics.[44] The DFARS definition of "commercial computer software" essentially tracks the same elements of the FAR.[45] Thus, if software meets the definition, it is considered "commercial," even if the government paid for its development.[46]

The FAR and DFARS prescribe the government's *legal rights* in a software license. The FAR mandates the government must acquire commercial computer software (and computer software documentation) "under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the government's needs."[47] The government has only the rights specified in the license, which must be approved and attached to the contract.[48] Thus, the government's rights will consist of what is contained in the manufacturer's end user licensing agreement (EULA), except to the extent such terms either (1) are inconsistent with federal procurement law or (2) do not otherwise satisfy the government end user's needs. Therefore, contractors are *not* required to (1) "[f]urnish technical information related to commercial computer software or commercial computer software documentation that is *not* customarily provided to the public" or (2) "[r]elinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation *except as mutually agreed to by the parties*."[49]

FAR 52.227-19, Commercial Computer Software License, states that the commercial computer software delivered under the contract may not be used, reproduced, or disclosed by the government except as provided in the clause, which allows the government certain commercial rights including the ability to use the software with the computer for which it was acquired, use with a backup computer, reproduce for safekeeping (archives) or backup purposes, modify the software, and disclose to support contractors.[50]

Similar to the FAR, the DFARS instructs that commercial computer software or commercial computer software documentation "shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs."[51] Thus, the software license specifies the government's legal rights to use software in accordance with terms and provisions agreed to by the software copyright owner, including any rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation.[52] Moreover, the government must, to the maximum extent practicable, competitively obtain commercial computer software and commercial computer software documentation using firm-fixed-price contracts or firm-fixed-price orders under available pricing schedules.[53]

There is no DFARS clause for commercial software. This is because, due to DoD's preference for acquiring commercial products and services, as codified in 10 U.S.C. § 3453 and 41 U.S.C. § 3307, commercial software licenses shall be used rather than a DFARS clause. Notably, DoD issued a final rule on March 22, 2023, implementing a new statutory direction at 10 U.S.C. § 4576 requiring DoD to consider all *noncommercial* computer software and related materials necessary for the agency's needs throughout the software's life cycle during acquisition negotiations in order to improve acquisition planning and ensure fair and reasonable pricing for software deliverables and license rights before contract award.[54] Although DoD acknowledged the statute applies to noncommercial software, it noted that the statute also allows for the consideration of commercial software to meet the government's life-cycle needs, and directs the government to acquire all necessary software and related materials, regardless of their commercial status, to support the life cycle of noncommercial software. The final rule also allowed for alternative deliverables when software delivery is not feasible. DoD asserts that this approach aligns with its long-standing policies for acquiring commercial software, which permit negotiations for additional deliverables and license rights when standard commercial offerings do not meet the government's needs. The final rule emphasized consistency with existing policies[55] and allowed contracting officers discretion in considering specific acquisition factors. This alignment with commercial licensing models aims to encourage commercial vendors to work with DoD.

Common Software License Provisions That Conflict with Federal Law

Commercial software licenses, often referred to as EULAs,

are typically designed for the general public and may not align with federal legal requirements. When the government acquires software, that software comes with a license that sets forth the terms and conditions of use. That license can take different forms: a standalone document, a clickwrap agreement, or a shrinkwrap agreement. Depending on the form the license takes, the government may inadvertently agree to terms normally provided to the general public but to which the government cannot agree based on fiscal or procurement laws. For instance, if the license takes the form of a clickwrap agreement—where the user must agree to a license's terms and conditions prior to using the software—government users may unknowingly agree to certain terms that the government may be prohibited by law from accepting.

During the proposal phase of a commercial computer software procurement, the government will typically review and evaluate the license terms and condition. Where award is made, the government is required to insert FAR 52.212-4, Contract Terms and Conditions—Commercial Products and Services, into the awarded contract. Moreover, the government will often incorporate the software license into the contract via exhibit or addendum. Where conflicts arise between terms of the contract and the license agreement, the order of precedence clause will resolve the inconsistencies in a particular order, whereby the software license agreement takes precedence over many of the terms and conditions of the procurement contract.[56] As a result, the government often flags any license terms that (1) are inconsistent with federal procurement law or (2) do not otherwise satisfy the government end user's needs.[57]

There are certain clauses that are standard to a commercial software license agreement that inherently conflict with federal fiscal or procurement law. For example:

1. **Assignment Clauses:** The Anti-Assignment Act prohibits the assignment of government contracts without the federal government's express approval.[58] Many commercial licenses include clauses that allow the contractor to assign the agreement to a third party, which is not permitted under federal law.
2. **Automatic Renewal Clauses:** Commercial licenses may include a clause requiring automatic renewal of the license agreement. These clauses can violate the Competition in Contracting Act (CICA), which requires full and open competition for government contracts.[59] Automatic renewals also may conflict with the Anti-Deficiency Act (ADA) if they obligate the government to future payments without guaranteed appropriations.[60] Moreover, any automatic renewal that extends beyond five years does not comply with FAR 17.204, which places a restriction on option periods not to exceed five years (including the base year).
3. **Choice of Law and Forum Clauses:** Commercial license clauses often specify that disputes will be governed by the laws of a particular state and adjudicated in a specific forum. Such provisions conflict with the federal government's sovereign immunity, which only allows lawsuits against the government under specific conditions, such as those outlined in the Tucker Act[61] and the Federal Tort Claims Act (FTCA).[62] Moreover, while the Tucker Act waives the government's sovereign immunity for contract claims, the Contract Disputes Act (CDA)[63] governs the requirements for those claims. Thus, contract disputes between the licensor and the government are required to be governed by the CDA and the FTCA, and the government will not agree to be bound by state law, nor can the United States be sued in state or foreign court.
4. **Confidentiality Clauses:** Clauses that require the government to keep the terms of the agreement confidential can conflict with the Freedom of Information Act (FOIA), which mandates public access to government records, including contracts.[64]
5. **Indemnity Clauses:** Both contractor and government indemnity clauses can pose issues. Contractor indemnity clauses—which typically require the contractor to defend the government against third-party infringement claims concerning the product or software—may conflict with the Department of Justice's (DOJ) exclusive jurisdiction over litigation involving the federal government. In other words, the government cannot hand over the reins of its defense or its settlement authority to a private party. Government indemnity clauses—where the government agrees to compensate the other party (the indemnified party) for costs and expenses arising out of third-party claims—can violate the ADA and exceed the purpose or amount prescribed for the burdened appropriation, as prescribed within the appropriations statute, if the indemnification clause creates open-ended liabilities.
6. **Limitation of Liability Clauses:** These clauses often limit the contractor's liability for damages, which can conflict with the CDA governing claims involving federal contracts. Under the CDA, a contracting officer does not have authority to settle any claim that involves fraud.[65] Rather, only the DOJ can litigate and settle claims pursuant to the civil False Claims Act.[66]
7. **Tax Clauses:** Commercial license agreements often contain a clause requiring the licensee to pay for taxes associated with the purchase of the software license. However, the federal government is constitutionally immune from paying state taxes, and any clause requiring the government to pay such taxes is invalid.[67]
8. **Termination Clauses:** Commercial license agreements often contain clauses allowing the contractor to unilaterally terminate the agreement for breach or other reasons. However, such clauses

conflict with the CDA and the FAR, which provide specific procedures for contract disputes and termination. The government retains the right to terminate the contract for convenience or cause.[68]

9. **Unilateral Change Clauses:** These clauses allow the contractor to unilaterally modify the terms of the agreement, which is not permissible under FAR 43.201, as only contracting officers can execute modifications on behalf of the government.
10. **Terms That Do Not Satisfy the Government's Needs:** Beyond terms and conditions that are inconsistent with fiscal or federal procurement law, the FAR and DFARS mandate that commercial license terms can be altered where the existing terms do not otherwise satisfy the government end user's needs. The government sometimes has specific needs that are not always outlined in law and require flexibility in commercial terms and conditions. To account for these unique needs, the government sometimes uses this exemption to contract on more familiar terms and to seek noncommercial rights in commercial software.

Enforcing Contractors' Rights When the Government Violates the Software License

Enforcement by contractors involves legal actions seeking monetary damages and, if possible, an injunction to stop the government's infringement. But bringing legal action against the government is complicated. As a general matter, the federal government can only be subject to suit if it has waived sovereign immunity by statute or by contract. There are two common types of lawsuits that can be brought against the government to enforce violations of software license terms: (1) copyright infringement claims under 28 U.S.C. § 1498 and (2) breach of contract claims under the Contract Disputes Act[69] or the Tucker Act.[70]

Copyright Infringement Liability

The Copyright Act of 1976, as amended, protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[71] Works of authorship include, among other things, computer software.[72]

The Copyright Act grants a copyright owner "exclusive rights to do and to authorize" certain delineated actions, including reproducing the copyrighted work in copies and distributing those copies to the public.[73] Authorization typically comes in the form of a written license.[74] Thus, the general public can only reproduce copyrighted material through a license or other authorization. This includes the federal government procuring computer software that is published and copyrighted. Anyone who violates an exclusive right of a copyright owner is an "infringer" of the copyright.[75] Thus, to establish a prima facie case of copyright infringement pursuant to 28 U.S.C. § 1498(b), a plaintiff must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[76]

Determining whether breach of a software license gives rise to a claim for copyright infringement is difficult. License agreements typically contemplate some form of permissible copying. Thus, the scope of the license agreement defines what qualifies as unlawful reproduction.[77] For a claim of copyright infringement to arise, the copying must be beyond the scope of the license possessed by the licensee.[78] Thus, copies of computer software subject to a license agreement infringe a copyright if two things are true: (1) the copies include original software code and (2) the copying exceeds the scope of the license agreement.[79] Additionally, whether a licensee acts beyond the scope of the license agreement turns on whether that term in the license is a *condition* that limits the scope of the license or is merely a *covenant*.[80] A covenant is a binding promise to do or not do something, while a condition is a future event that must occur before a party is obligated to perform a contract. Terms of a license are presumed to be covenants, rather than conditions, unless it is clear that a condition precedent was intended.[81]

Damages

Congress waived sovereign immunity to allow copyright owners to recover from the federal government their "reasonable and entire compensation" for copyright infringement.[82] The computation of "reasonable and entire compensation" under the statute is essentially identical to "actual damages" under the Copyright Act.[83]

Normally, a copyright owner proves its entitlement to damages through evidence of lost sales or diminished copyright value. However, where copyright infringement has not produced lost sales or opportunities or diminished the copyright's value, damages are instead calculated based on a reasonable license fee, which is determined using a hypothetical negotiation. In conducting the hypothetical negotiation, courts examine the economic realities using the factors suggested in the seminal patent infringement case of *Georgia-Pacific Corp. v. U.S. Plywood Corp.*[84] These factors include (1) the infringer's use of the copyrighted software and its associated value, (2) the established profitability of the copyrighted software, and (3) the rates paid by the government for the use of other similar software. Courts also consider all the relevant facts—not just those known by the parties at the time.[85] The hypothetical negotiation also assumes a willing buyer and seller.[86] Moreover, the court need not assess the license fee with "mathematical exactness," but rather must be able to make a reasonable approximation.[87] Such an inquiry often involves competing expert witnesses and litigation, can be fact-intensive on both the infringement and the damages owed, and can become expensive for both parties.

Jurisdiction

A copyright is an exclusive right affirmatively granted to an author by the federal government. Thus, the government retains the ability to infringe any copyright without permission, so long as the government pays the copyright owner reasonable compensation. As a result, the government and authorized contractors are not subject to regular infringement suits in US district courts, nor can any court enjoin them from continuing the infringement. Rather, the US Court of Federal Claims (COFC) possesses exclusive jurisdiction to entertain suits against the United States for the infringement of copyrights that occur within the United States.[88]

The COFC's jurisdiction is subject to three limitations.[89] The statute also provides that no recovery may be had for any copyright infringement by the government committed more than three years before the filing of the complaint. The period during which an administrative claim for compensation is pending is not counted as part of the three-year period unless suit is instituted before the government's denial of the claim.[90]

Two recent decisions from the COFC, both of which are discussed below, underscore the critical importance of clear and enforceable software licensing agreements in government contracts, and the severe legal and financial repercussions of noncompliance with licensing terms. In *Bitmanagement*, the US Navy's unauthorized use of software due to failure to implement tracking software led to significant liabilities, while in *4DD Holdings*, the unauthorized copying and use of software by government officials resulted in substantial compensation for infringement. These cases emphasize the necessity for robust license management and adherence to intellectual property rights to avoid costly disputes.

1. Bitmanagement Software GmbH v. United States

In *Bitmanagement Software GmbH v. United States*,[91] the dispute centered around the US Navy's unauthorized use of Bitmanagement's three-dimensional graphics software known as "BS Contact Geo." Bitmanagement, a German company, developed the three-dimensional visualization software enabling the visualization of geographic information in third-party hardware and software products.[92] Bitmanagement primarily licensed its software via "PC" or "seat" licenses, which allowed one installation of the software onto one computer per license.[93] Each copy of the software included a desktop executable file and a web browser plugin file. The desktop file launched the software as a standalone application, whereas the plugin launched the software within a web browser.[94]

Bitmanagement sold BS Contact Geo licenses to the Navy's Naval Facilities Engineering Systems Command (NAVFAC) through a reseller, Planet 9 Studios, Inc., on three different occasions.[95] The Navy purchased one copy in 2006, 100 copies in 2008, and 18 copies in 2012.[96] In each instance, Bitmanagement executed a license agreement with Planet 9 indicating how many licenses Planet 9 was authorized to resell to the Navy.[97] Thereafter, the Navy would purchase Bitmanagement's licenses directly from Planet 9.[98] Thus, although the Navy was bound by the terms of Bitmanagement's software license, there was no direct contract between Bitmanagement and the Navy.[99]

During the course of the license purchases, Bitmanagement and the Navy discussed moving to a floating license scheme to rectify certain issues the Navy was experiencing managing its individual seat licenses.[100] In particular, the Navy had an existing floating license server tracking application called Flexera that could be used to track BS Contact Geo by limiting the number of simultaneous users of the software based on the number of available licenses.[101] As a result, Bitmanagement agreed to deliver to the Navy a no-cost modification in the form of a new version of BS Contact Geo (version 8.001) "under the same terms of the recently awarded BS Contact Geo license procurement contract with NAVFAC."[102] Thereafter, the Navy began widespread deployment of BS Contact Geo 8.001 across its Navy Marine Corps Intranet (NMCI) network, where the software resided for more than three years.[103] During that time, Flexera "did not monitor or control the use of the BS Contact Geo plugin, i.e., the OCX component of the software was not Flexera-enabled."[104] In other words, the Navy deployed the seat licenses across its entire network without implementing Flexera to monitor usage, thereby making it simultaneously available to all of the Navy's hundreds of thousands of users.

Bitmanagement sued the Navy in the COFC for copyright infringement under 28 U.S.C. § 1498(b). Following trial, the COFC found the government not liable for copyright infringement. Although the COFC found there was no express agreement granting the Navy a license to install BS Contact Geo on all of the Navy's computers, Bitmanagement had authorized the Navy to copy BS Contact Geo version 8.001 across the Navy's NMCI network of computers. Thus, although Bitmanagement had established a prima facie case of copyright infringement, the COFC found the Navy had an implied-in-fact license permitting it to make the copies.[105] On appeal, Bitmanagement challenged the COFC's finding that the Navy had an implied-in-fact license permitting it to make the copies, and even if such an implied license existed, Bitmanagement argued the court failed to address whether the Navy complied with the Flexera condition of the license.[106]

The US Court of Appeals for the Federal Circuit (CAFC) upheld the COFC's finding that the Navy had an implied-in-fact license that allowed it to deploy BS Contact Geo across its entire network.[107] Moreover, the CAFC held that the implied-in-fact license was not precluded by the existence of express contracts between the Navy and Planet 9, and between Planet 9 and Bitmanagement.[108] However, the CAFC found that even if the Navy established that an implied-in-fact license could have

covered the Navy's actions, the Navy nevertheless committed copyright infringement by failing to comply with a condition of the license—namely that the use of Flexera to track the number of simultaneous users was a condition precedent to the Navy copying BS Contact Geo onto all Navy computers, a condition that the Navy failed to meet.[109] The CAFC applied the legal framework that holds that a copyright owner who grants a license to his copyrighted material waives his right to sue the licensee for copyright infringement and must instead pursue a claim for breach of contract.[110] However, if a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement under 28 U.S.C. § 1498(b).[111] And whether a licensee acts outside the scope of a contract by failing to comply with a term of the parties' agreement turns on whether that term is a *condition* that limits the scope of the license or is merely a *covenant*.[112] Terms of a license or contract are presumed to be covenants, rather than conditions, unless it is clear that a condition precedent was intended.[113]

The CAFC concluded that Bitmanagement only agreed to the Navy's proposed licensing scheme based upon the Navy's promised use of Flexera to limit the number of simultaneous users of BS Contact Geo, regardless of how many copies were installed on Navy computers.[114] Thus, even though Bitmanagement permitted the Navy to allow mass copies of its software at no charge, this was conditioned on the Navy's use of Flexera at the time of copying the software, thereby making use of Flexera a condition rather than a covenant.[115] The CAFC encapsulated the difference between a condition and a covenant in this context:

> Unlike payment, which is typically considered a covenant, the use of Flexera at the time of copying was critical to the basic functioning of the deal. The timing of Flexera was key because the Navy's tracking of BS Contact Geo users was intended to establish how many additional licenses the Navy would purchase. Without tracking, the Navy would have no basis to purchase more licenses and, consequently, Bitmanagement would have had no reason to enter into the implied-in-fact license. Unlike payment, which can feasibly come at any time after contract performance, Flexera was only useful if it could track, from the beginning, the number of Navy users.[116]

After finding that use of Flexera was a condition rather than a covenant, the CAFC noted that the parties stipulated at trial that Flexera "did not monitor or control the use of the BS Contact Geo plugin," which included both a desktop executable file (EXE version) and a web browser plugin file (OCX version), and it was not in dispute that "the OCX component of the software was at no point properly monitored by Flexera."[117] Although the parties disputed whether the Navy monitored the EXE version with Flexera, it made no difference as "[t]hat condition could not have been met by monitoring only half of each copy."[118] As a result, the Navy's failure to abide by the Flexera condition of that license rendered its copying of the program copyright infringement.[119] Consequently, the CAFC vacated the previous judgment in favor of the Navy and remanded the case for a calculation of damages to compensate Bitmanagement for the unauthorized copying of its software.[120]

On remand, the COFC awarded Bitmanagement $154,400 in damages based on the Navy's actual use of the software.[121] Notably, this amount was significantly less than Bitmanagement's original claim of $155,400,000 (totaling only 0.1%), but the COFC disagreed with Bitmanagement's damages calculation.[122] Critically, the COFC, as instructed by the CAFC, calculated damages based on the Navy's actual excess usage of the software rather than the number of excess copies of the software made.[123] Ultimately, the COFC calculated damages based on the number of unique-user licenses that Bitmanagement would have hypothetically negotiated with the Navy to accommodate its excess users, which was one of the three theories briefed by the government.[124] Bitmanagement appealed the COFC's damages award, which the CAFC affirmed.[125] Although Bitmanagement ultimately prevailed, this decision appears to mainly be a pyrrhic victory due to the paltry legal damages awarded. Had Bitmanagement put forth other damages theories in addition to the number of excess copies made, it may have secured a higher damages award.

2. 4DD Holdings, LLC v. United States

This case highlights the critical importance of adhering to software licensing agreements and the potential legal repercussions of noncompliance. As discussed below, the US Court of Federal Claims found that the government had indeed over-installed the software beyond the licensed terms, resulting in significant copyright violations. For commercial software licensors, it underscores the necessity of clear, enforceable license terms and vigilant monitoring of software usage by licensees. For end users of computer software, it highlights the perils of ignoring license terms.

4DD Holdings, LLC v. United States[126] involved a claim for copyright infringement arising out of the breach of a software license agreement. The software at issue was designed to facilitate the sharing of medical records among government agencies serving servicemembers, veterans, and their families.[127] DoD and the US Department of Veterans Affairs (VA) had long struggled with maintaining comprehensive health care records due to their storage across numerous poorly connected databases.[128] To address this issue, DoD initiated the Defense Health Management System Modernization (DHMSM) program, aimed at creating a single health record for every patient.[129] However, due to the lengthy implementation time, Congress pressured DoD to find a quicker solution, leading to the creation of the Defense Medical Information Exchange (DMIX) program, which sought to federate existing data from various sources into a single format.[130]

DoD selected Systems Made Simple (SMS) as the lead contractor for DMIX and selected "Tetra Healthcare Federator," a commercial software developed by 4DD Holdings (4DD), as the solution.[131] In order to run, Tetra Healthcare Federator required a separate program called "Tetra Studio," a graphical interface and programming tool that allows software engineers to "enable and instruct Tetra Healthcare Federator how to function."[132] 4DD licensed its Tetra software in two ways It licensed its Tetra Healthcare Federator software "per computer core" (where a computer core represents a computer's processing power, with each Tetra license correlating with one core)[133] and licensed Tetra Studio on a per user or per "seat" basis.[134]

The government initially licensed 64 cores of Tetra Healthcare Federator and 50 seats of Tetra Studio for approximately $1 million.[135] The agreement included an EULA that prohibited copying the software except for a single backup copy.[136] However, only two government employees actually knew of the EULA's existence, and neither employee was aware that the EULA prohibited copying.[137] In addition, although 4DD—like many software companies—typically invoked a requirement in their license agreement for monitoring license usage (whereby the software alerts the owner when a copy of its software is activated), 4DD could not invoke that feature under this arrangement due to security risks to government networks.[138] As a result, the government bore the burden of tracking license usage and ensuring compliance with the license agreement.[139]

During the software development life cycle, SMS created thousands of unauthorized copies of Tetra Healthcare Federator and Tetra Studio, including backup copies, cloned virtual machines, and new copies released to the Development and Test Center (DTC).[140] 4DD eventually discovered that the government had exceeded its license by at least 68 computer cores.[141] Despite notifying the government and initiating a "true-up" negotiation to address the excess copies, the process was marred by misrepresentations and evidence of destruction by government officials.[142] One government employee ordered the deletion of Tetra copies in the DTC to avoid liability, and both he and the other government employee falsely claimed to have verified the number of Tetra installations.[143]

The true-up negotiations culminated in a meeting where the parties agreed that the government had exceeded the license by 168 cores.[144] 4DD demanded payment at the Solutions for Enterprise-Wide Procurement (SEWP) price of $24,000 per core, but the government negotiated a lower price of approximately $10,000 per core, resulting in a settlement of $1.7 million.[145] As part of the settlement, 4DD released the government from further liability.[146] However, DoD soon abandoned Tetra in favor of the DHMSM project, rendering the government's Tetra license essentially worthless.[147] The government waited several months to reveal its decision to 4DD.[148] The loss of its customer and doubts regarding the government's representations of how many Tetra copies actually existed may have motivated 4DD to seek relief in court, while also using the discovery process to uncover the true extent of the government's infringement.

4DD filed a lawsuit in the COFC for copyright infringement, claiming that the government infringed their copyright by copying and installing the software beyond the scope of the license agreement, which only allowed for a single backup copy.[149] The government argued as an initial matter that 4DD had released the government from liability, thereby barring 4DD's claim for copyright infringement.[150] However, the COFC found that the government's misrepresentations during the true-up negotiation invalidated the release of liability and that the government had infringed 4DD's copyright by making unauthorized copies.[151] The government also argued that even without the release, 4DD's copyright claim was estopped because 4DD delayed suit until after it knew about the government's over-installations.[152] However, the COFC refused to apply the equitable estoppel doctrine on the basis that the government had unclean hands as a result of its intentional destruction of evidence and subsequent lying to 4DD about its actions.[153]

Turning to the issue of whether the government was liable for copyright infringement, the COFC held that the government infringed on 4DD's copyright by making unauthorized copies of its software beyond the scope of the EULA, identifying seven categories of infringing copies, including deployed virtual machine copies, backup copies, and RAM copies.[154] The COFC determined that the government created thousands of infringing copies during the development and testing phases of the program.[155] The COFC rejected the government's argument that only "runnable" or functional copies should count as infringing, noting that the Copyright Act defines a "copy" as any material object in which a work is fixed and can be perceived or reproduced.[156] The COFC also rejected the government's claim that copies without associated computer cores should not count against the license.[157] Ultimately, the court found that all categories of copies identified by 4DD's expert contained infringing copies and that the government exceeded the license's scope.[158] The court accepted the expert's count of infringing copies due to the government's destruction of evidence, which prevented a more precise determination.[159]

In analyzing what a hypothetical negotiation would have produced in the way of a license agreement, the court awarded 4DD a total of $11,159,907.45 in damages.[160]

Breach of Contract

Beyond claims for copyright infringement, as discussed above, if the federal government already has a license, whether express or implied, then any right to relief for violation of the terms of that license will sound in contract and should be pursued as breach of contract claims rather than copyright infringement suits under 28

U.S.C. § 1498. This includes cases where the government exceeds its rights in data such as where the government threatens to release limited rights data or copy-restricted rights software in an unauthorized manner. Contractors frequently attempt to preserve and protect their copyright by incorporating their software licensing into their contract with the government or into their subcontract with a reseller who holds a contract with the government. As discussed in the cases below, tribunals have demonstrated a willingness to enforce these license agreements against the government.

Where such rights are established in a procurement contract, any claim should be filed under the CDA, and may be pursued at the Boards of Contract Appeals or COFC. If the license exists separate and apart from any procurement contracts, a breach of contract claim may be brought in the COFC under its Tucker Act jurisdiction governing general contract disputes with the federal government. In such cases, the aggrieved owner is entitled to its reasonable damages resulting from the breach, which may be measured as lost profits or expectancy damages, or as reliance damages or unjust enrichment, looking at the contractor's cost of developing the software.

Cases

1. *Appeal of CiyaSoft Corp.*

The Armed Services Board of Contract Appeals (ASBCA) decision in *CiyaSoft Corp.*[161] analyzes the intersection between the government's rights under a contract for commercial software licenses and the seller's rights preserved by its standard software license terms. This case provides key examples of the critical considerations that contracting officers and software vendors alike must consider when entering into a procurement contract for commercial software licenses under the FAR.

CiyaSoft entered into a contract with the government to provide its proprietary commercial translation software. The contract, awarded through a sole-source justification, involved the purchase of 20 software licenses and included standard terms and conditions for commercial products under FAR Part 12.[162] The contract did not, however, include FAR 52.227-19, Commercial Computer Software License, and did not otherwise address any other conditions or restrictions on the government's license rights in the software.[163] Rather, the contract merely included a contract line item number (CLIN) stating that it was for 20 single-user licenses.[164]

CiyaSoft's software was delivered on 20 compact discs (CDs) with copies of written instructions, the single-user license agreement, and a letter addressed to the contracting officer.[165] However, the government had neither reviewed nor negotiated the terms of this license agreement prior to delivery.[166] After receipt, CiyaSoft began to suspect that the government violated the license agreement due to multiple registrations for the same product ID number and technical support inquiries from nonregistered users, including nongovernment personnel.[167] These incidents led CiyaSoft to believe that the government installed copies of the software on multiple devices in apparent contravention of the single-user restrictions, leading CiyaSoft to assert a breach of the license agreement.[168] CiyaSoft filed a certified claim alleging breach of contract and copyright infringement, which, upon denial by the contracting officer, CiyaSoft appealed to the ASBCA.[169]

To prevail on its breach of contract claim, CiyaSoft had to establish that the license agreement was part of its contract with the government. The government argued that the license agreement never became part of the contract because the contracting officer never discussed it with CiyaSoft and never saw a copy of it, the contract did not address licensing agreement terms at all, and the parties never modified the contract to incorporate the license agreement.[170] However, the ASBCA noted that the contract expressly stated it was for 20 single-user software "licenses," and, in the absence of any other potentially relevant license agreement, concluded that the contract necessarily included CiyaSoft's license agreement.[171] The ASBCA held that "it does not matter that the licensing agreement was neither negotiated, nor the terms known by the contracting officer. It is the policy of the government, when licensing commercial software to accept the licensing terms customarily provided by the vendor to other purchasers, as long as the license is consistent with federal law and otherwise satisfies the government's needs."[172] The ASBCA concluded that at the time the contract was awarded in 2010, the FAR did not address commercial "clickwrap" or "shrinkwrap" forms of licensing agreements, and that CiyaSoft's software license appeared consistent with those found enforceable by the courts under current commercial law in many jurisdictions.[173] Finally, the ASBCA found that because the contract was expressly for purchasing software licenses, the government had a duty to inquire as to what those license terms were, which the government failed to do here.[174]

The ASBCA ultimately concluded:

> Accordingly, based on the fact that it is, and has been, the policy of the federal government prior to the award of the contract to accept the terms of licensing agreements offered by vendors of commercial software that are customarily provided by the vendor to other purchasers and that vendors of commercial software have long included shrinkwrap and clickwrap license agreements with their software, which many courts have found to be valid, enforceable contract terms and the FAR currently also recognizes the validity of clickwrap and shrinkwrap licenses, we find the contract included the licensing agreement appellant shipped with its software. We also hold the government can be bound by the terms of a commercial software license it has neither negotiated nor seen prior to the receipt of the software, so long as the terms are consistent with those customarily provided by the vendor to other purchasers and do not otherwise violate federal law.[175]

The *CiyaSoft* decision confirms contractors' rights to enforce the terms of their customary commercial license agreements against the federal government, especially when the government does not include any other software license rights terms. Ultimately, after establishing that the license agreement was part of the contract, the Board concluded that the government breached the contract by violating the license agreement when it permitted the installation of a single copy of the software onto more than one computer and failed to provide CiyaSoft with a list of registered users.[176] The decision, of course, is limited to the factual context before the ASBCA, including the absence of FAR 52.227-19 in the contract. But the decision also serves as a reminder that contracting officers should review any relevant commercial software license in advance to confirm whether the contractor's customary license provides sufficient rights to satisfy the government's requirements.

2. *Avue Techs. Corps. v. Dep't of Health and Human Servs.* Many companies that sell software licenses do not contract directly with the federal government, which adds another layer of complexity to attempts by subcontractors or suppliers seeking to enforce their EULAs against the government under the CDA by asserting breach of contract. Recent decisions by the CBCA and the Federal Circuit in *Avue Techs. Corps. v. Dep't of Health and Human Servs.*[177] underscore this challenge. In *Avue Techs.*, a company that sold its commercial computer software to the government indirectly through a reseller's GSA Federal Supply Schedule (FSS) contract sought to enforce its EULA against the government at the CBCA.[178] When GSA added Avue's software to the prime's schedule contract, GSA reviewed, approved, and incorporated Avue's EULA into the schedule contract.[179] Avue alleged the US Food and Drug Administration (FDA) violated its EULA by exceeding authorized usage limits after it purchased the software from the schedule contract in 2015.[180] However, the GSA MAS contract vendor did not sponsor the claim, and the FDA contended that no privity of contract existed between Avue, the software vendor, and the federal government.[181] The CBCA dismissed the appeal for lack of jurisdiction, and Avue appealed to the Federal Circuit.[182]

On appeal, the Federal Circuit vacated the CBCA's dismissal and held that in certain circumstances, third parties are in privity of contract with the government, becoming a "contractor" within the meaning of the CDA, and therefore may bring a claim under the CDA.[183] The Federal Circuit remanded the appeal to the CBCA to determine whether the EULA constituted a "procurement contract" under the CDA.[184] Specifically, the court wanted the Board to consider whether Avue was a party to a procurement contract with the government by virtue of the incorporation of its EULA into the task order and schedule contract.[185] Since the government did not—and could not—dispute the existence of a "procurement contract," meaning the task order and schedule contract, the Board was instructed to consider whether Avue had enforceable rights under the procurement contract.[186]

On remand, the CBCA ruled that while the EULA was a legally binding agreement, it did not qualify as a "procurement contract" for CDA purposes.[187] In rejecting Avue's argument that the EULA created a freestanding enforceable obligation between it and the federal government, the CBCA reiterated that CDA jurisdiction hinges on privity of contract. The Board emphasized that the EULA does not, by its own terms, obligate Avue to perform any services and does not obligate the government to pay Avue directly for its computer software license.[188] Instead, the Board noted that the FSS vendor remained the prime contractor who supplied the subscription to Avue's software and received payment from the government for that subscription, and that Avue merely conferred conditional permission for the government to use the software it acquired through the prime contractor.[189] In other words, the Board recognized the tiered contracting structure of the transaction, wherein the software vendor acts as a licensor and the FSS prime contractor acts as a reseller of the license to the government via a contract, which places any enforceable rights against the government under the contract exclusively with the FSS prime contractor. As a result, the Board held that the EULA could not sustain a direct CDA claim by Avue.[190]

The *Avue* decisions reinforce that software licensors selling through agreements with resellers that hold FSS contracts must rely on their prime contractors to sponsor claims for government breaches of incorporated EULAs. While EULAs may be legally binding, they do not constitute "procurement contracts" that independently establish CDA jurisdiction. Software companies should ensure their licensing terms are explicitly incorporated into FSS contracts and collaborate closely with their FSS vendors to pursue sponsored breach of contract claims. This evolving area of procurement law highlights the need for precise drafting and a thorough understanding of the CDA's jurisdictional framework. Otherwise, software vendors may find their contractual rights unenforceable against the government under the CDA.

Compliance Measures

In the context of government software procurement, compliance measures are essential to ensure software products and services meet stringent security and regulatory standards. These measures are designed to protect sensitive information, maintain the integrity of federal systems, and ensure contractors adhere to best practices in software development and deployment. Key compliance frameworks, such as the National Institute of Standards and Technology (NIST) Secure Software Development Framework and the Federal Risk and Authorization Management Program (FedRAMP), play a

crucial role in setting these standards. Additionally, recent legislative and regulatory updates, including requirements for disclosing foreign obligations, further emphasize the importance of transparency and security in government contracts. This section will explore these compliance measures in detail, highlighting their significance and the implications for contractors and federal agencies alike.

NIST Attestation

Federal contractors who sell or license software to US federal agencies will be required to attest that their software products and components are developed using secure practices as outlined in NIST Special Publication 800-218, known as the Secure Software Development Framework (SSDF).[191] This requirement stems from Executive Order 14028,[192] aimed at improving the nation's cybersecurity, and is supported by two OMB memoranda.[193] The Cybersecurity and Infrastructure Security Agency (CISA) has published a "common form" for this attestation, which federal agencies will use to ensure software security compliance.[194]

Contractors must complete a form confirming their adherence to secure software development practices, providing federal agencies with assurances about the security of the software they use. The new requirement comes amid increasing enforcement actions under the DOJ's Civil Cyber-Fraud Initiative. Contractors risk not only losing business, but also facing allegations of providing false information if they fail to comply accurately. While CISA has not set a specific deadline, OMB directed agencies to collect attestations within three to six months of the release of CISA's common form, which happened in March 2024.[195] The FAR Council is expected to incorporate this requirement into new and existing contracts soon.[196] Thus, although agencies will be asking contractors for the common form, the absence of a FAR clause incorporated into the contract requiring submission of the common form creates a bind for contractors—while the agencies may ask for it, there may be no legal requirement to provide it. Contractors need to assess and possibly adjust their software development processes to meet these new standards, which may involve significant diligence and changes to current practices. The goal of these measures is to enhance the security of software used by federal agencies, thereby strengthening the overall cybersecurity posture of the federal government.

FedRAMP

FedRAMP, originally established in 2011, is a government-wide program that aims to streamline the adoption of secure cloud services across federal agencies by providing a standardized authorization process. It is thought of as "the official security stamp of approval to sell cloud computing solutions inside the Washington D.C. beltway."[197] The GSA FedRAMP Program Management Office (PMO) manages the program. All cloud services offered for sale to the government, such as SaaS, PaaS, and IaaS, are required to obtain a Joint Accreditation Board (JAB) Provisional Authority to Operate (P-ATO) or Agency ATO prior to use by a federal agency.

On July 25, 2024, the OMB issued memorandum M-24-15, which introduces significant updates to the FedRAMP program.[198] The new memorandum rescinds the original 2011 directive and introduces a modernized vision and governance structure for FedRAMP, reflecting advancements in federal cybersecurity and changes in the commercial cloud marketplace.

Among the notable changes in the memorandum is the establishment of a FedRAMP Board. This board is tasked with providing strategic guidance and recommendations to ensure the program remains aligned with the evolving cybersecurity landscape and federal needs. The board will play a crucial role in overseeing the implementation of the updated policies and ensuring that the program's objectives are met effectively. Another significant update is the introduction of "program authorizations" for cloud service providers (CSPs) that do not have an agency sponsor. This change is designed to expand the FedRAMP marketplace by allowing more CSPs to participate in the program, thereby accelerating the secure adoption of cloud services across federal agencies. By removing the requirement for an agency sponsor, the memorandum aims to reduce barriers to entry for CSPs and foster greater innovation and competition in the cloud services marketplace.

The memorandum also mandates the use of the Open Security Controls Assessment Language (OSCAL). OSCAL is a standardized, machine-readable data format that enhances cybersecurity compliance by enabling automated security assessments and continuous monitoring. By adopting OSCAL, the memorandum seeks to improve the efficiency and effectiveness of the authorization process, making it easier for federal agencies to assess and manage the security of cloud services.

For federal agencies, the updated FedRAMP policy means a more streamlined and efficient process for adopting secure cloud technologies. The introduction of program authorizations and the use of OSCAL are expected to reduce the time and effort required to achieve and maintain compliance with federal security standards. This, in turn, will enable agencies to leverage the benefits of cloud computing more rapidly and consistently, enhancing their ability to deliver services to the public. For cloud service providers, the changes introduced in the memorandum represent new opportunities and challenges. The removal of the agency sponsor requirement opens the door for more CSPs to participate in the FedRAMP program, potentially increasing competition in the marketplace. However, CSPs also will need to adapt to the new requirements, such as the use of OSCAL, to ensure they can meet the updated security and compliance standards.

Overall, OMB memorandum M-24-15 marks a significant step forward in the modernization of the FedRAMP Program. By introducing a new governance structure, expanding the FedRAMP marketplace, and adopting advanced technologies like OSCAL, the memorandum aims to enhance the security, efficiency, and effectiveness of the authorization process. These updates will help ensure that federal agencies can continue to leverage secure cloud services to meet their mission-critical needs in an increasingly digital world.

Disclosure of Information Regarding Foreign Obligations

On November 15, 2024, DoD issued a proposed rule (DFARS Case 2018–D064) to amend the DFARS to implement Section 1655 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.[199] Specifically, Section 1655(a) prohibits DoD from acquiring certain products, services, or systems unless the contractor discloses any sharing of source code and computer code with foreign governments. Additionally, Section 1655(c) mandates that contracts include a clause requiring ongoing disclosures during the contract performance period if new information arises. This rule aims to enhance transparency and security in defense contracts involving information technology, cybersecurity, industrial control systems, and weapon systems.

To implement these requirements, the proposed rule introduces a new subpart, DFARS 239.7X. This new subpart outlines the statutory requirements; defines key terms such as "computer code," "open-source software," and "source code"; and details the prohibition on acquiring certain products without the required disclosures. Under the proposed rule, contractors must report any foreign access to source code or object code for noncommercial products developed for DoD, dating back to August 13, 2013. The proposed rule clarifies that the prohibition does not apply to open-source software and establishes procedures for contracting officers to validate disclosures in the Electronic Data Access (EDA) system before awarding contracts. The rule also provides guidelines for a new solicitation provision and contract clause. The pre-award provision, DFARS 252.239-70YY, requires offerors to disclose foreign obligations in the EDA system to be eligible for award. The post-award clause, DFARS 252.239-70ZZ, requires contractors to maintain and update disclosures in the EDA system and ensure subcontractors do the same.

Overall, this proposed rule emphasizes the importance of maintaining accurate and complete disclosures throughout the contract life cycle. By mandating the disclosure of such obligations, DoD aims to identify and address any vulnerabilities that may arise from foreign entities gaining access to critical technological information. This measure is part of a broader effort to safeguard the integrity of defense systems and maintain the technological edge of the US military. Public comments on the proposed rule were due on January 14, 2025.

Conclusion

Licensing commercial software to the federal government requires navigating complex regulations, compliance measures, and evolving procurement policies. Contractors must understand specific licensing terms that align with federal requirements, such as those in the FAR and DFARS, ensuring their software licenses meet federal law and government needs in areas like cybersecurity and intellectual property. Effective license management is crucial to avoid disputes and protect intellectual property. Best practices include thoroughly preparing and negotiating license agreements, staying informed about legislative updates, and leveraging acquisition vehicles like DoD's Enterprise Software Initiative and the GSA MAS program to streamline procurement and build compliant partnerships with government agencies. PL

Endnotes

1. Dep't of Def. Directive (DoDD) 5000.01, The Defense Acquisition System (Sept. 9, 2020) (Change 1 effective July 28, 2022).
2. Dep't of Def. Instruction (DoDI) 5000.02, Operation of the Adaptive Acquisition Framework (Jan. 23, 2020) (Change 1 effective June 8, 2022).
3. DoDI 5000.87, Operation of the Software Acquisition Pathway fig. 1, at 5 (Oct. 2, 2020) (illustrating the phases of the software acquisition pathway).
4. *Id.*
5. DoD, Software Modernization Implementation Plan Summary (Mar. 2023), https://dodcio.defense.gov/Portals/0/Documents/Library/SW-Mod-I-PlanExecutiveSummary.pdf.
6. Sec'y of the Army, Army Directive 2024-02, Enabling Modern Software Development and Acquisition Practices (Mar. 11, 2024).
7. DevSecOps is a software development approach that focuses on security early in and throughout the development process; it has become common practice within the software industry. *See* George I. Seffers, *U.S. Army Gets Aggressive on Software Reforms*, The Cyber Edge (May 15, 2024), https://www.afcea.org/signal-media/cyber-edge/us-army-gets-aggressive-software-reforms.
8. GAO, DOD Software Acquisition: Status of and Challenges Related to Reform Efforts, GAO-21-105298 (Sept. 30, 2021).
9. GAO, Defense Software Acquisitions: Changes to Requirements, Oversight, and Tools Needed for Weapon Programs, GAO-23-105867 (July 20, 2023).
10. GAO, IT Systems Annual Assessment: DOD Needs to Strengthen Software Metrics and Address Continued Cybersecurity and Reporting Gaps, GAO-24-106912 (July 11, 2024) [hereinafter GAO, IT Systems Assessment], https://www.gao.gov/assets/gao-24-106912.pdf.
11. National Defense Authorization Act (NDAA) for Fiscal Year 2018, Pub. L. No. 115-91, §§ 873–874, 131 Stat. 1283, 1498–503 (Dec. 12, 2017) (Congress established two Agile pilot programs for DoD. "Agile" is an iterative development approach in which software is delivered in increments throughout the project but built iteratively by refining or discarding portions as required based on user feedback.).
12. GAO, IT Systems Assessment, *supra* note 10, at 10 n.21. As discussed by GAO at footnote 21, Congress later established the software acquisition pathway that now includes support for Agile practices. *See* NDAA 2020, Pub. L. No. 116-92, § 800, 133 Stat. 1198, 1478 (Dec. 20, 2019).
13. *See* GAO, Software Development: Effective Practices and Federal Challenges in Applying Agile Methods, GAO-12-681 (July 27, 2012).

Request for Comments on Revisions to the Model Procurement Code

BY MELISSA COPELAND

The American Bar Association Section of Public Contract Law is undertaking a significant revision of the Model Procurement Code (MPC), which many states and local jurisdictions use to inform their procurement laws, as the MPC was last updated in 2000. For your reference, a copy of the MPC is available at https://www.americanbar.org/groups/public_contract_law/about/committees/state-local-procurement/

The MPC Revision Project Committee is starting with Article 12, focused on ethics in public contracting. The Article 12 Drafting Committee is co-chaired by Ellen Daley, Illinois Chief Procurement Officer, and Melissa Copeland of Schmidt & Copeland LLC.

The Article 12 Drafting Committee would like your insights on these initial topics:

1. Does your procurement law or language use or reference any language from the MPC Article 12?
2. Are there particular areas of ethics in public contracting that you believe should be considered by the drafting committee to address other challenges you have encountered? (For example, Organizational Conflicts of Interest; personal conflicts of interest, i.e., conflicts arising from government use of temporary worker acquired through staff augmentation contracts; or gifts to government).
3. How does your jurisdiction provide guidelines and requirements for ethics in public contracting to government and contractors? Do your procurement laws/rules/regulations include ethics principles, or does your jurisdiction have a separate ethics committee/commission/code that governs procurement?
4. Has your jurisdiction recently made changes to your procurement laws/rules/regulations to respond to challenges related to ethical practices during the procurement, contracting, and contract management processes?

We would appreciate receiving your information and insights. Please respond with any information that you can provide via the online MPC Revisions questionnaire by March 31, 2025. If you prefer, you may email Ellen Daley at ellen.h.daley@illinois.gov and Melissa (Missy) Copeland at missy@schmidtcopeland.com.

Melissa Copeland is a partner at Schmidt & Copeland LLC, located in Columbia, South Carolina. She practices in the area of state and local public contracts, particularly state and local bid protests. She is also a member of the Section's MPC Revision Project Committee.

14. *See, e.g.*, Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circ. A-130, Managing Information as a Strategic Resource (July 28, 2016), *suspended in part by* OMB Memorandum M-17-26, Reducing Burden for Federal Agencies by Rescinding and Modifying OMB Memoranda (June 15, 2017).
15. Federal Information Technology Acquisition Reform Act, Pub. L. No. 113-291, div. A, tit. VIII, §§ 831–837, 128 Stat. 3438, 3461–70 (2014).
16. Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Memorandum M-16-12, Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing (June 2, 2016).
17. *IT Software*, GSA, https://www.gsa.gov/technology/it-contract-vehicles-and-purchasing-programs/information-technology-category/it-software (last visited Dec. 29, 2024).
18. General Services Administration Acquisition Regulation; Unenforceable Commercial Supplier Agreement Terms, 83 Fed. Reg. 7631, 7631–33 (Feb. 22, 2018) (amending GSAR 552.212–4).
19. *See* GSAR 552.212-4, Contract Terms and Conditions—Commercial Products and Commercial Services (FAR Deviation) (Jan. 2023), para. (w), *Commercial supplier agreements unenforceable clauses*.
20. GAO, Federal Software Licenses: Agencies Need to Take Action to Achieve Additional Savings, GAO-24-105717 (Jan. 29, 2024).
21. GAO, Federal Software Licenses: Better Management Needed to Achieve Significant Savings Government-Wide, GAO-14-413 (May 22, 2014).
22. *See* Def. Fed. Acquisition Reg. Supp. (DFARS) subpt. 208.74, Enterprise Software Agreements (Jan. 31, 2023).
23. *See* DoD Proc., Guidance & Info. (PGI) 208.74, Enterprise Software Areements.
24. *See DoD ESI Mission*, DoD ESI, https://www.esi.mil/ (last visited Dec. 29, 2024).
25. GAO, Federal Software Licenses: Agencies Need to Take Action to Achieve Additional Savings, GAO-24-105717 (Jan. 29, 2024).
26. *Id.* at 7.
27. *See e.g.*, EPA OIG, EPA Improperly Awarded and Managed

Information Technology Contracts, 21-P-0094 (Mar. 10, 2021); NASA OIG, NASA's Software Asset Management, IG-23-008 (Jan. 12, 2023).

28. GAO, Technology Business Management: OMB and GSA Need to Strengthen Efforts to Lead Federal Adoption, GAO-22-104393 (Sept. 2022).

29. GAO, Federal Software Licenses: Agencies Need to Take Action to Achieve Additional Savings, GAO-24-105717 (Jan. 29, 2024).

30. H.R. 1695, 118th Cong. (Mar. 22, 2023). A companion bill was introduced in the Senate, S. 931, 118th Cong. (Mar. 22, 2023); *see, also*, Matt Bracken, *Agency Software Purchasing Bill Passes House*, FedScoop (Dec. 4, 2024), https://fedscoop.com/samosa-act-federal-agency-software-buying-passes-house/.

31. FAR 2.101. "*Commercial computer software* means any computer software that is a commercial product or commercial service."

32. FAR 12.212; *see also* DFARS 227.7202-3.

33. *See* FAR 2.101 (defining "commercial product") (the definition also includes non-developmental software developed exclusively at private expense and sold competitively in substantial quantities to multiple state, local, or foreign governments).

34. *Id.* (defining "commercial service").

35. NISTIR 7711; *see also* FAR 2.101 (defining "COTS").

36. In FAR 2.101, *compare* "Commercial product" *with* "Commercially available off-the-shelf (COTS) item."

37. John S. McCain NDAA for Fiscal Year 2019, Pub. L. No. 115-232, § 1655(h)(6), 132 Stat. 1636, 2151 (Aug. 13, 2018) (codified at 10 U.S.C. § 2224 note).

38. 17 U.S.C. § 106.

39. *See generally* FAR 52.227-19(a); DFARS 227.7202-3(a).

40. Many DoD and other government customers are self-hosted and are not connected to the Internet. These environments require air-gap delivery of software, which requires specialized distribution methods.

41. DFARS 227.7011.

42. 10 U.S.C. § 3453; 41 U.S.C. § 3307.

43. FAR 2.101.

44. *Id.* FAR 2.101 also defines "commercial service" as services that are offered and sold competitively in substantial quantities in the commercial marketplace. These services are based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved, and are provided under standard commercial terms and conditions, similar to those used in the commercial marketplace. Additionally, commercial services can include installation, maintenance, repair, training, and other services that support a commercial product, regardless of whether these services are provided by the same source or at the same time as the commercial product.

45. DFARS 252.227-7014(a)(1).

46. Moreover, as similarly discussed at the top of the prior section, many commercial computer software products are COTS, a subset of commercial computer software, because the product is sold in substantial quantities in the commercial marketplace and is offered to the government without modification. *See* FAR 2.101 (defining "COTS").

47. FAR 12.212(a).

48. FAR 12.212(b); *see also* DFARS 227.7202-3.

49. FAR 12.212 (emphasis added).

50. FAR 52.227-19.

51. DFARS 227.7202-1.

52. FAR 52.227-19(a); DFARS 227.7202-3.

53. DFARS 227.7202-1.

54. Defense Federal Acquisition Regulation Supplement: Noncommercial Computer Software (DFARS Case 2018-D018), 88 Fed. Reg. 17,340 (Mar. 22, 2023).

55. DFARS 227.7202-1(c).

56. FAR 52.212-4(s).

57. General Services Administration Acquisition Regulation; Unenforceable Commercial Supplier Agreement Terms, Final Rule, 83 Fed. Reg. 7631 (Feb. 22, 2018).

58. 41 U.S.C. § 6305.

59. *Id.* § 3301.

60. 31 U.S.C. § 1341.

61. 28 U.S.C. § 1491.

62. *Id.* § 1346(b).

63. 41 U.S.C. §§ 7101–7109.

64. 5 U.S.C. § 552.

65. 41 U.S.C. § 7103.

66. 31 U.S.C. §§ 3729–3733.

67. Alabama v. King & Boozer, 314 U.S. 1 (1941); *see also* FAR 52.212-4 (requiring contracts for commercial products and services to include all applicable taxes).

68. FAR 52.212-4(l), (m).

69. 41 U.S.C. §§ 7101–7109.

70. 28 U.S.C. § 1491. Not discussed in this article, another theory licensors may pursue is a misappropriation claim seeking an injunction under the Administrative Procedures Act, 5 U.S.C. §§ 551–559.

71. 17 U.S.C. § 102(a).

72. *Id.* § 101; Bitmanagement Software GmbH v. United States, 144 Fed. Cl. 646, 655 (2019), *vacated and remanded on other grounds*, 989 F.3d 938 (Fed. Cir. 2021).

73. 17 U.S.C. § 106(1), (3); *see* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985). However, "[n]ot all copying . . . is copyright infringement." *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). A "copy" is only infringing if it contains "constituent elements of the work that are original." *Id.* In other words, the portions copied by the alleged infringer must contain protected elements of the copyrighted work. In the computer software context, it refers to portions of a software's coding that are original to the author. *See* 4DD Holdings, LLC v. United States, 169 Fed. Cl. 164, 180 (2023), *reconsideration denied*, No. 15-945C, 2024 WL 2240359 (Fed. Cl. Apr. 26, 2024) (citing Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 840 (Fed. Cir. 1992)).

74. *Bitmanagement Software*, 144 Fed. Cl. at 655 (citing Enzo APA & Son, Inc. v. Geapag A.G., 134 F.3d 1090, 1093 (Fed. Cir. 1998) ("a license may be written, verbal, or implied"); Graham v. James, 144 F.3d 229, 235 (2d Cir. 1998) ("nonexclusive licenses may . . . be granted orally, or may even be implied from conduct") (quoting 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 10.03[A][7], at 10–43)).

75. 17 U.S.C. § 501(a).

76. Gaylord v. United States, 595 F.3d 1364, 1372 (Fed. Cir. 2010) (*Gaylord I*) (quoting *Feist Publ'ns*, 499 U.S. at 361).

77. *4DD Holdings, LLC*, 169 Fed. Cl. at 180.

78. *Id.* (citing Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307, 1315–16 (Fed. Cir. 2005); *accord* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 940 (9th Cir. 2010) (stating that "copyright infringement based on breach of a license agreement" requires "copying [that] exceed[s] the scope of the defendant's license")).

79. *4DD Holdings*, 169 Fed. Cl. at 180.

80. Bitmanagement Software GMBH v. United States, 989 F.3d 938, 950 (citing 3 Nimmer & Nimmer, *supra* note 74, § 10.15[A][2] ("If the grantee's violation consists of a failure to satisfy a condition to the grant (as distinguished from a breach of a covenant), it follows that the rights dependent on satisfaction of that condition have not been effectively granted, rendering any use by the grantee without authority from the grantor. The legal consequence is that the grantee's conduct may constitute copyright infringement.")).

81. *Id.* at 950 (citing Mularz v. Greater Park City Co., 623 F.2d 139, 142 (10th Cir. 1980) ("Where the intention or meaning of a contract is in question as to whether it should be construed as a covenant, or, in the alternative, a condition precedent, the

tendency of the courts is to construe it as a covenant or a promise rather than a condition unless it is plain that a condition precedent was intended."); Graham v. James, 144 F.3d 229, 237 (2d Cir. 1998)).

82. *4DD Holdings*, 169 Fed. Cl. at 184 (citing 28 U.S.C. § 1498(b); Gaylord v. United States, 777 F.3d 1363, 1367 (Fed. Cir. 2015) (*Gaylord III*)).

83. *Id.* (citing Gaylord v. United States, 678 F.3d 1339, 1343 (Fed. Cir. 2012) (*Gaylord II*) (Congress waived sovereign immunity to allow copyright owners to recover from the United States their "reasonable and entire compensation" for copyright infringement when it enacted 28 U.S.C. § 1498(b). The computation of "reasonable and entire compensation" under Section 1498(b) is essentially identical to "actual damages" under the Copyright Act.).

84 318 F. Supp. 1116 (S.D.N.Y. 1970) (citing *Gaylord III*, 777 F.3d. at 1367–68 (endorsing the use of objective factors from patent law in copyright cases)).

85. *E.g.*, Sinclair Refin. Co. v. Jenkins Petrol. Process Co., 289 U.S. 689 (1933) (explaining how the facts between infringement and trial establish a "book of wisdom that courts may not neglect").

86. *4DD Holdings*, 169 Fed. Cl. at 186 (citing *Gaylord III*, 777 F.3d at 1367).

87. *Id.*

88. 28 U.S.C. § 1498(b).

89. *Id.*

90. Wechsberg v. United States, 54 Fed. Cl. 158, 163 n.11 (2002).

91. 989 F.3d 938 (Fed. Cir. 2021).

92. *Id.* at 941.

93. *Id.*

94. *Id.* at 943.

95. *Id.* at 941.

96. *Id.*

97. *Id.*

98 *Id.*

99. *Id.*

100. *Id.* at 943.

101. *Id.* ("Flexera is a server-based program used to limit the number of simultaneous users of a 'Flexera enabled'—or 'FlexWrapped'—software based on the number of available licenses. When a user opens a FlexWrapped program, the program alerts the Flexera tracking server that the program is in use. The FlexWrapped program sends a similar alert when the program is no longer in use. The Flexera license manager thus limits the number of users of FlexWrapped software to the number of licenses that a user owns.").

102. *Id.* at 944.

103. *Id.*

104. *Id.* at 945.

105. As to this last point, the court found that the Navy's goal was to obtain a product suitable for broad deployment, and Bitmanagement helped the Navy achieve this goal by providing a license file that was not PC-specific, providing a silent installer, and modifying the installation file for Flexera compatibility. Based on these facts, the court determined that Bitmanagement was both aware of the Navy's plan to install BS Contact Geo across its entire network and authorized such installations.

106. *Id.* at 946.

107. *Id.* at 947.

108. *Id.* at 948.

109. *Id.* at 950.

110. *Id.* (citing Jacobsen v. Katzer, 535 F.3d 1373, 1380 (Fed. Cir. 2008)).

111. *Id.*

112. *Id.* (citing 3 Nimmer & Nimmer, *supra* note 74, § 10.15[A][2] ("If the grantee's violation consists of a failure to satisfy a condition to the grant (as distinguished from a breach of a covenant), it follows that the rights dependent on satisfaction of that condition have not been effectively granted, rendering any use by the grantee without authority from the grantor. The legal consequence is that the grantee's conduct may constitute copyright infringement.")).

113. *Id.* (citing Mularz v. Greater Park City Co., 623 F.2d 139, 142 (10th Cir. 1980) ("Where the intention or meaning of a contract is in question as to whether it should be construed as a covenant, or, in the alternative, a condition precedent, the tendency of the courts is to construe it as a covenant or a promise rather than a condition unless it is plain that a condition precedent was intended."); Graham v. James, 144 F.3d 229, 237 (2d Cir. 1998)).

114. *Id.*

115. *Id.*

116. *Id.* at 950–51.

117. *Id.* at 951.

118. *Id.*

119. *Id.*

120. *Id.*

121. Bitmanagement Software GMBH v. United States, No. 16-840C, 2022 WL 17077251, at *18 (Fed. Cl. Nov. 1, 2022).

122. *Id.* at *2.

123 *Id.* at *16–17.

124. *Id.* at *17.

125. Bitmanagement Software GmbH v. United States, No. 2023-1506 (Fed. Cir. Jan. 7, 2025).

126. 169 Fed. Cl. 164 (2023), *reconsideration denied*, No. 15-945C, 2024 WL 2240359 (Fed. Cl. Apr. 26, 2024).

127. *Id.* at 171.

128. *Id.*

129. *Id.*

130. *Id.* at 172.

131. *Id.*

132. *Id.*

133. *Id.* ("For example, if a customer had a four-core computer, it would have to buy four Tetra Healthcare licenses—one for each core.").

134. *Id.*

135. *Id.*

136. *Id.* at 173.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 174.

141. *Id.*

142. *Id.* at 175.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 176.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 177.

151. *Id.* at 178.

152. *Id.* at 179.

153. *Id.* at 179–80.

154. *Id.* at 181.

155. *Id.* at 190.

156. *Id.* at 182.

157. *Id.* at 184.

158. *Id.*

159. *Id.* at 190, n.26.

160. *Id.* at 190 (these damages were broken down as $9,174,922.88 for non-backup copies of Tetra Healthcare Federator, $1,834,984.57 for backup copies of Tetra Healthcare Federator, and $150,000 for all copies of Tetra Studio).

161. ASBCA Nos. 59519, 59913, 18-1 BCA ¶ 37,084 (June 27, 2018) (CiyaSoft, appearing *pro se*, pursued claims under two appeals. The first (ASBCA No. 59519) sought damages for breach

of the commercial license terms, while the second (ASBCA No. 59913) related to constructive changes and unauthorized work under the broader contract.).
162. *Id.* at 180,510–11.
163. *Id.* at 180,511.
164. *Id.* at 180,510.
165. *Id.* at 180,512.
166. *Id.* at 180,513.
167. *Id.* at 180,513–14.
168. *Id.* at 180,514–15.
169. *Id.* at 180,515.
170. *Id.* at 180,517.
171. *Id.*
172. *Id.* (citing FAR 12.212).
173. *Id.* at 180,517–18.
174. *Id.* at 180,518.
175. *Id.*
176. *Id.* at 180,524.
177. CBCA Nos. 6360, 6627, 22-1 BCA ¶ 38,024 (Jan. 14, 2022), *vacated and remanded*, No. 22-1784, 96 F.4th 1340 (Fed. Cir. Mar. 6, 2024).
178. *Id.* at 184,650.
179. *Id.* at 184,651.
180. *Id.*
181. *Id.*
182. *Id.* at 184,652–53.
183. Avue Techs. Corp. v. Sec'y of Health & Hum. Servs., 96 F.4th 1340, 1342 (Fed. Cir. 2024).
184. *Id.* at 1346.
185. *Id.*
186. *Id.*
187. Avue Techs. Corp. v. Dep't of Health & Hum. Servs., CBCA Nos. 8087(6360)-REM, 8088(6627)-REM, 24-1 BCA ¶ 38,617, at 187,714–16 (July 1, 2024).
188. *Id.* at 187,717.
189. *Id.*
190. *Id.* at 187,717–18.
191. Nat'l Inst. of Standards & Tech., U.S. Dep't of Com., NIST Special Publication 800-218, Secure Software Development Framework (SSDF) Version 1.1: Recommendations for Mitigating the Risk of Software Vulnerabilities (2022).
192. Executive Order 14028, Improving the Nation's Cybersecurity, 86 Fed. Reg. 26,633 (May 12, 2021).
193. Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Memorandum M-22-18, Enhancing the Security of the Software Supply Chain Through Secure Software Development Practices (Sept. 14, 2022); Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Memorandum M-23-16, Update to Memorandum M-22-18, Enhancing the Security of the Software Supply Chain Through Secure Software Development Practices (June 9, 2023).
194. *Secure Software Development Attestation Form*, Cybersecurity & Infrastructure Sec. Agency (2024), https://www.cisa.gov/secure-software-attestation-form.
195. OMB Memorandum M-23-16, *supra* note 193, at 2.
196. FAR Case No. 2023-002, Supply Chain Software Security.
197. *See* Luke Bencie & Sarah Bencie, *What It Takes to Sell Cloud-Based Software to the U.S. Government*, Harv. Bus. Rev. (May 11, 2023), https://hbr.org/2023/05/what-it-takes-to-sell-cloud-based-software-to-the-u-s-government.
198. Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Memorandum M-24-15, Modernizing the Federal Risk and Authorization Management Program (FedRAMP) (July 15, 2024).
199. Defense Federal Acquisition Regulation Supplement: Disclosure of Information Regarding Foreign Obligations (DFARS Case 2018–D064), 89 Fed. Reg. 90,254 (Nov. 15, 2024).

NEWS FROM THE CHAIR

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In case you missed them, the Section published two special articles in *The Procurement Lawyer*, highlighting the fifth anniversary of the Department of Justice Procurement Collusion Strike Force (PCSF). The first article authored by Sandra Talbott, the Deputy Director for the Strike Force, and Prosecutor Daniel Loveland, also with the Strike Force, discussed the evolution of the Strike Force over the last five years, criminal violations in public procurement, the consequences of antitrust crimes, enhanced incentives to report and invest in compliance, and the future of the Strike Force. The follow-up article featured a Q&A with Deputy Director Talbott and Director Daniel Glad. The Section greatly appreciates the willingness of the Strike Force to engage with us and provide the opportunity for dialogue.

It's also a pleasure to report that the Section is making headway on revising the Model Procurement Code (MPC) for State and Local Governments in partnership with the National Association of State Procurement Officials (NASPO). This is a massive undertaking to update the MPC for the first time in twenty-five years. Many thanks to the numerous Section members involved in this effort over the course of time, particularly Immediate Past Chair Eric Whytsell (Stinson LLP), past Chair Jennifer Dauer (Diepenbrock Elkin Gleason McCandless LLP), Diana Mendez (Bilzin Sumberg Baena Price & Axelrod LLP), Missy Copeland (Schmidt & Copeland LLC) and Keith McCook (State Fiscal Accountability Authority).

Not surprisingly, our Annual Federal Procurement Institute (FPI), from April 2–4 in Annapolis, Maryland, includes an exciting lineup of panels and topics, including "Procurement Policy and Priorities Under the New Administration," "Post-Award Debriefings," "Continuing COVID-related Funding Issues," "IRA and CHIPS Initiatives and the Continuing Impact on Government Contracting and Construction Projects," "the Space Industry and Lower Earth Orbit Development," "Current Trends in Commerciality," and "Legal Ethics for Government Contracts Attorneys."

Following the FPI, we will also have our third-annual Committee Showcase on May 15, again graciously hosted by Hogan Lovells. My thanks as well to Adam Lasky (Seyfarth Shaw LLP) for his planning and oversight again this year for the Showcase. Please stay tuned for details.
This is an exciting time to be a member of the Section of Public Contract Law. If you're looking for ways to get involved and help us advance our mission, please contact me at jworkmaster@milchev.com and Section Director Brennan at patty.brennan@americanbar.org.

See you in Annapolis! PL