I. INTRODUCTION

The purpose of the Guide to Fixed-Price Supply Subcontract Terms and Conditions is to assist both prime contractors and subcontractors in drafting and negotiating fixed-price supply subcontracts under prime contracts with the federal government of the United States. The Guide is part of an initiative of the ABA Section of Public Contract Law’s Subcontracting, Teaming and Strategic Alliances Committee to address the myriad terms and conditions in federal prime contracts that may be—and, in many cases, must be—flowed down to subcontracts. A range of authors contributed to the Guide, including government attorneys, in-house counsel, private sector attorneys, accountants, and other professionals, all of whom brought a multi-faceted perspective to the provisions and clauses analyzed herein.

This Guide is based on the published Federal Acquisition Regulation (“FAR”) and Department of Defense FAR Supplement (“DFARS”) texts as of July 2015, and provides a framework for prime contractors and subcontractors to negotiate the terms and conditions of fixed-price supply subcontracts in support of federal government customers. The Guide identifies all mandatory “flowdown” clauses (i.e., clauses in the prime contractor’s contract, which by their terms or pursuant to statute or regulatory requirements must be included in all first tier, and sometimes lower tier, subcontracts). The Guide also identifies recommended clauses, which are to be considered for inclusion not because they are mandatory, but because they will help protect the rights and obligations of the prime contractor, the subcontractor, and/or the federal government. Although the perspectives of prime contractors, subcontractors, and the Government have all been considered in the recommendation to flow down certain clauses to subcontracts, parties negotiating a subcontract will need to review the Guide and make their own independent decisions regarding how to proceed.

As with prior editions, this Fifth Edition of the Guide includes explanatory notes with each clause. The notes detail why flowdown clauses are mandatory or recommended, and cite appropriate support in statute, regulation, or the language of the clause itself, for why a clause must be flowed down (and to what tier in the subcontracting chain).
Unlike prior editions, this Fifth Edition of the Guide uses “redlined” versions of FAR and DFARS clauses that suggest the substitution of certain terms and conditions to accurately reflect the relationships between the prime contractor, its subcontractors, and in some cases, the Government. The redlines help prime contractors and subcontractors quickly identify how the language of the flowdown clauses differs from the text of the clauses in the FAR or DFARS and assess whether to retain the suggested changes and include the clauses in the relevant subcontract.

In addition, included for the first time in this Fifth Edition of the Guide is a clause matrix, which is a comprehensive index of the clauses and provisions, found in the Guide. The clause matrix lists the clauses and categorizes them as “mandatory” or “recommended.” The clause matrix also summarizes each explanatory note so practitioners, at a glance, can begin to assess the potential applicability of a clause to a fixed-price supply subcontract.

Although most of the Guide addresses flowdown clauses, it also includes different provisions that warrant the attention of prime contractors and subcontractors alike. The Guide includes “General Provisions,” which are customary commercial subcontract provisions that are not necessarily derived from the FAR or DFARS. The General Provisions include common subcontract clauses such as those addressing Acceptance, Payment, and Disputes. The General Provisions are presented with alternative language, and are intended to highlight certain performance-related issues that prime contractors and subcontractors may be able to avoid by considering and negotiating the General Provisions (or language similar to the General Provisions) into their subcontracts.

The Guide also includes “Representations and Certifications.” These are provisions that are generally included only in subcontract solicitations and mandate that subcontractors make representations or certifications in order to be eligible for award of subcontracts. The provisions themselves, however, are not included in the contracts as clauses. Instead, they identify and address issues that parties should consider when negotiating fixed price subcontracts. As with the flowdown clauses, the Representations and Certifications include explanatory notes with “redlines” that help explain the applicability of certain provisions to subcontractors.

The Committee intends to update this Fifth Edition periodically. Users of this Guide, however, should always review the FAR and DFARS to incorporate any changes, particularly the addition or deletion of mandatory flowdown clauses, since July 2015. Further, the version of the clauses reprinted in the Guide may not necessarily be the same clauses contained in either the prime contract or the most current FAR revision that users are reviewing. Therefore, it is important to identify in the subcontract agreement the applicable FAR clauses by both title and date. In this regard, the clauses that flow down to the subcontractor are the clauses that are included in the prime contract, even if the current FAR clause differs due to a subsequent revision. However, in cases where the clauses do differ, the version of the clause in this Guide may be used for guidance in rewriting the applicable clause to properly reflect the subcontract relationship.

Finally, depending upon the nature of the supplies being procured, the government may impose unique flowdown provisions. For example, the federal government mandates specific flowdown provisions where the contract involves ammunition

2 • Guide to Fixed-Price Supply Subcontract Terms and Conditions
and explosives or where international air carrier services may be involved. These mandatory clauses, which are usually (but not exclusively) imposed by each agency’s FAR supplement, are not identified in the Guide. Because of the mandatory nature of these clauses, it is particularly important that they be identified and included in subcontracts where these types of items are being procured.

II. SUBCONTRACTING FOR COMMERCIAL ITEMS

As with earlier editions of the Guide, the Fifth Edition is not intended for use in the acquisition of commercial items or commercial components. 1 For such purchases, the FAR generally contemplates that the parties will use their standard commercial agreements as purchase orders, with selected FAR clauses incorporated by reference. Subcontracts for commercial supply items (as opposed to commercial services) are generally required to incorporate only the limited set of FAR clauses listed below.

52.203-13 Contractor Code of Business Ethics and Conduct (Apr 2010)
52.219-8 Utilization of Small Business Concerns (Oct 2014)
52.222-21 Prohibition of Segregated Facilities (Apr 2015)
52.222-26 Equal Opportunity (Apr 2015)
52.222-35 Equal Opportunity for Veterans (July 2014)
52.222-36 Equal Opportunity for Workers with Disabilities (July 2014)
52.222-37 Employment Reports on Veterans (July 2014)
52.222-40 Notification of Employee Rights Under the National Labor Relations Act (Dec 2010)
52.222-50 Combating Trafficking in Persons (Mar 2015)
52.232-40 Providing Accelerated Payments to Small Business Subcontractors (Dec 2013)
52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006)

See FAR 52.244-6, Subcontracts for Commercial Items, which, in conjunction with FAR 44.402(b), provides that prime contractors need not include any FAR provision or clause other than those listed above in a subcontract at any tier for commercial items (except for FAR 52.244-6 itself, which must also flow down pursuant to paragraph (d) of that clause).

It should be noted, however, that prime contractors, including those selling commercial items to the federal government, will encounter in their prime contract a

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1. Notwithstanding the intent of this Guide to flow down clauses in subcontracts for other than commercial items, in some instances clauses written for the purchase of commercial items have been promulgated as mandatory flowdown clauses, or are otherwise recommended to be flowed down in subcontracts. In those cases, the accompanying note explains why the clause is a candidate for inclusion in a subcontract.
number of clauses in addition to these clauses. Accordingly, the parties may negotiate the inclusion of additional flowdown provisions in the subcontract purchase order. In determining what additional clauses should apply where the prime contract is for a commercial item, the Seller and Buyer should review, at a minimum, FAR Part 12 and the following clauses that are found in prime contracts for commercial items:

52.212-3 Offeror Representations and Certifications—Commercial Items (Mar 2015)
52.212-4 Contract Terms and Conditions—Commercial Items (May 2015)
52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (May 2015)

III. OTHER PROVISIONS NOT INCLUDED IN THE GUIDE

The Committee has identified several provisions that the parties may wish to include in a fixed-price supply subcontract. Inclusion of these provisions, as well as the precise language of the clause, should be based on the unique facts of each transaction, the parties’ corporate practices, and the advice of subcontract administrators and legal counsel.

Acceptance of Goods. This clause should address the parties’ criteria for acceptance of the goods to be delivered under the subcontract. The parties should designate an acceptance period that reflects the complexity of the item and is consistent with the Inspection clause in Section C of the Model. The parties also may wish to address the Buyer’s right to reject the goods or to revoke acceptance, and to specify a procedure for correction in the case of rejection.

Disclaimer of Implied Warranties. In addition to the express warranty provided in Section B of the Guide, the Seller may wish to consider a Disclaimer of Implied Warranties clause that disclaims all warranties except for those expressly provided. In the absence of such a disclaimer, implied warranties, including the warranties of merchantability and non-infringement of third party rights, could be read into the agreement.

Waiver of Consequential Damages. Consequential damages are used to compensate the aggrieved party for all damages that, in the ordinary course of business, would likely result from the other party’s breach. Consequential damages may exceed a buyer’s other remedies, such as repair or replacement of the goods. Parties to the agreement may wish to negotiate a provision that limits or excludes the recovery of consequential damages.

Procurement Integrity. Under FAR 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity (May 2014), the Government may reduce a prime contractor’s
IV. OTHER NOTES

**Mandatory and Recommended Clauses.** The Guide and the clause matrix describe clauses as “mandatory” or “recommended.” Although the Committee believes that “recommended” clauses should be considered for inclusion in fixed-price supply subcontracts, it may be inappropriate or unnecessary to include them under the circumstances of a particular subcontract.

Users of the clause matrix should note that in most cases it provides only an abbreviated version of the notes appearing throughout the Guide. We recommend reading the full version of the note in the Guide after referencing a clause in the clause matrix.

For each included Clause, the Guide provides a Note containing information concerning the Clause’s use in the prime contract, factors impacting its inclusion in the subcontract, and other considerations relating to the operation and use of the clause. Similar guidance is provided for the relevant Alternate versions of Clauses. While in most cases the use of Alternates in subcontracts tracks their inclusion in the prime contracts, in several cases the Alternate applicable to the subcontract differs from that contained in the prime contract due to the application of specific factors set forth in the Notes.

**Esoteric Clauses.** As noted, the Committee has in this Guide addressed FAR and DFARS clauses that are either mandatory flowdowns or that would reasonably be expected to be flowed down in most fixed-price supply subcontract scenarios. The Guide however does not address what might be termed some of the more “esoteric” FAR and DFARS clauses, whether their flowdown would be mandatory or recommended. If the circumstances of a particular subcontract require or implicate the incorporation of such clauses, the user should consult the FAR or DFARS.

Examples of esoteric FAR clauses include, but are not limited to:

- 52.208-8 Required Sources for Helium and Helium Usage Data (Apr 2014)
- 52.223-7 Notice of Radioactive Materials (Jan 2007)
- 52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006)
Examples of esoteric DFARS clauses include, but are not limited to:

- 252.204-7000 Disclosure of Information (Aug 2013)
- 252.222-7002 Safety Precautions for Ammunition and Explosives (May 1994)
- 252.223-7007 Safeguarding Sensitive Conventional Arms, Ammunition and Explosives (Sep 1999)
- 252.225-7016 Restriction on Acquisition of Ball and Roller Bearings (Jun 2011)
- 252.225-7019 Restriction on Acquisition of Anchor and Mooring Chain (Dec 2009)
- 252.225-7025 Restriction on Acquisition of Forgings (Dec 2009)
- 252.227-7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (Feb 2014)
- 252.229-7004 Status of Contractor as a Direct Contractor (Spain) (Jun 1997)
- 252.235-7002 Animal Welfare (Dec 2014)
- 252.235-7003 Frequency Authorization (Mar 2014)

**Supply Chain Assurance and Counterfeit Parts.** Increasingly, prime contractors and subcontractors are called upon to police their supply chains. This is reflected in large part by new and revised FAR and DFARS clauses. It is also reflected by a large amount of additional regulatory activity addressing supply chain and related issues such as supply chain risk, nonconforming parts, and cyber security. Although a number of regulations have been completed and now appear in the FAR and DFARS, a number of other clauses are still under development. The fact that a number of regulations that impact supply chain assurance, counterfeit parts, and similar issues are still under development makes it difficult to recommend a particular clause or set of clauses for inclusion in subcontracts. Although parties will want to review the Guide for clauses that are finalized and ready to be flowed down, they should recognize that, in many areas but especially in the supply chain area, new regulatory language is likely forthcoming that may impact future negotiations. It may be difficult to anticipate the regulatory changes before they occur. Nevertheless, certain key supply chain issues must be addressed in

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2. Examples of recent FAR and DFARS cases addressing supply chain and other issues include: DFARS Case 2012-DO55, Rule on Detection and Avoidance of Counterfeit Electronic Parts; FAR Case 2013-002, Expanded Reporting of Non-Conforming Items; FAR Case 2012-022, Proposed Modification of Current Regulations on Higher-Level Contract Quality Requirements; DFARS Case 2014-DO65 Detection and Avoidance of Counterfeit Electronic Parts—Further Implementation; DFARS Case 2013-DO50 Supply Chain Risk; DFARS Case 2012-DO42 Business Systems Compliance; FAR Case 2012-024 Commercial and Government Entity Code; DFARS Case 2014-DO13 Update Commercial and Government Entity (CAGE) Code Information. As of this writing, DFARS Case 2015-D020, DoD Use of Trusted Suppliers for Electronic Parts, and DFARS Case 2014-D005, Detection and Avoidance of Counterfeit Electronic Parts—Further Implementation, were still under consideration.
contracts and subcontracts even in the absence of binding regulatory language. To that end, parties should consider fashioning clauses that address some of the issues on the following (non-exhaustive) list:

- Whether supplies must be authentic parts, made by the identified manufacturer and of the type, make, model and/or year identified in the Order;
- Whether supplies shall be obtained from the identified manufacturer or its authorized reseller, or where not otherwise available from trusted suppliers, to assure the proper custody, care, control and delivery of compliant supplies in accordance with applicable specifications and standards and best industry practices;
- Whether Seller shall be responsible for damages incurred by Buyer or its ultimate customer arising from the delivery of supplies that are other than what was ordered; and, if so, the type of damages that should be specified; and
- Whether, when higher level quality assurance, supply chain or counterfeit parts laws, rules or regulations apply and are flowed down in this Order, they shall take precedence.

The parties may wish to include concluding language such as the following:

All rights and responsibilities under this clause are in addition to any warranty, indemnification or other remedies available under this Order or at law.

**Time Periods Specified for Fulfilling Obligations.** Many clauses found in the Guide include language specifying the number of days within which the prime contractor must satisfy certain obligations. Alternatively, there are clauses that contain blanks, leaving it to the parties to negotiate the appropriate number of days. Users of the Guide should be aware that they must exercise discretion in calculating the time necessary to comply with flowed down subcontract requirements. The subcontract should provide sufficient time for the subcontractor to satisfy its obligations so that the prime contractor in turn has sufficient time to satisfy its obligations under the prime contract. To highlight this issue, footnotes containing the following language appear periodically throughout the Guide:

Buyer and Seller should consider the extent to which this number should be modified to allow the Buyer sufficient time to fulfill its prime contract requirements.

**GENERAL PROVISIONS**

**Acceptance**

**NOTE:** This Acceptance clause refers to the acceptance of the terms and conditions of the subcontract and not to the acceptance of supplies delivered under the subcontract. The parties may wish to consider a separate Acceptance of Goods clause.
Acceptance: Acceptance of this Order is strictly limited to the terms and conditions stated herein or specifically incorporated by reference. This Order integrates, merges, and supersedes any prior offers, negotiations, and agreements concerning the subject matter thereof and constitutes the entire Order between the parties. Any additions, deletions, or differences in the terms and conditions of this Order proposed by either party must be agreed to and expressly accepted in writing. Any of the following acts by either party shall constitute acceptance of this Order: signing and returning a copy of the Order, in hard copy or electronically; commencement of performance; or Seller’s notice to Buyer of the commencement of performance.

Payment

NOTE: The Payment clause details the prime contractor’s obligations to pay the subcontractor under the subcontract. In addition to the general terms of this clause, the parties may wish to consider adding a penalty for late payments such as a provision for payment of interest on the amount due commencing on a particular date. The parties also may wish to consider adding a prompt payment discount such as a provision for payment of an amount reduced by a specified percentage if payment is made within a designated period of days from receipt of a proper invoice.

Payment: Buyer shall pay Seller, upon the submission of a proper invoice or voucher, the price set forth in this Order for supplies delivered and accepted, less any deductions provided for in this Order. Unless otherwise specified in this Order, payment shall be made on partial deliveries accepted by Buyer if

(a) the amount due on the deliveries warrants such payment; or
(b) Seller requests such payment and the amount due is at least $1,000 or 50 percent of the total price of the Order, whichever is less.

[OPTIONAL: Unless otherwise provided, prices include all applicable federal, state and local taxes, duties, tariffs and similar fees imposed by any government, all of which shall be listed separately on the invoice.]

[OPTIONAL: DISCOUNT FOR EARLY PAYMENT: If Buyer tenders early payment so that it is received by Seller before the due date, Buyer is entitled to a ____% discount of the amount owed.]

[OPTIONAL: LATE PAYMENT PENALTIES: Buyer shall pay a late fee of ____% of the amount owed, but not received, by the due date as specified by this Order.]

Packing, Marking, and Shipping

NOTE: The Packing, Marking and Shipping clause details the prime contractor’s and the subcontractor’s obligations with regard to shipping supplies. In addition to the general requirements concerning packing, marking, and shipping of the supplies provided under a subcontract, the parties should address additional
topics such as whether shipping will be at the Seller's or Buyer's expense (e.g., Free On Board ("FOB") Origin or FOB Destination, or, if an international shipment, an alternate shipping term found in INCOTERMS3).  

**Packing, Marking, and Shipping:** Seller shall pack, mark, and ship all supplies in accordance with the requirements of this Order and so as to be in compliance with all applicable transportation regulations and good commercial practice for protection against damage from weather and shipment, including any applicable federal, state, and local laws and regulations for the packaging, labeling, transportation, and shipping of hazardous materials. Seller shall mark each container with the number of this Order and shall enclose a packing slip with this Order number in an envelope attached to each container. Damage resulting from improper packing or shipping will be charged to Seller.

### Publicity

**NOTE:** The Publicity clause requires approval by the other party (or, in some cases, by the Government) before one party to the subcontract issues any news release or public announcement related to the subcontract.

**Publicity:** Except as required by law, regulation, or court order, or the terms elsewhere specified in this Order, no news release, public announcement, or advertising material concerned with this Order shall be issued or made by either party without the prior written consent of the other party, which consent shall not be unreasonably withheld.

### Disputes

**NOTE:** The Guide provides a standard commercial Disputes clause and an alternative Disputes clause for consideration by prime contractors and subcontractors. Both the standard and the alternative Disputes clauses indicate that the parties may, optionally, agree to resolve their disputes through arbitration or some other form of alternative dispute resolution ("ADR"). This guidance is consistent with the ABA policy favoring ADR, and suggested sample Arbitration clauses are also provided for consideration. Other forms of ADR, besides arbitration (which may be binding or non-binding), include: (1) fact-finding, by a neutral advisor who is often a technical expert; (2) mini-trials, in which the dispute is presented in summary fashion to management officials of each party and possibly to a neutral advisor as well, to facilitate settlement discussions; (3) mediation by a neutral advisor, to facilitate settlement discussions; (4) use of settlement judges; and (5) permutations and combinations of various techniques.

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3. INCOTERMS, or International Commercial Terms, were developed by the International Chamber of Commerce. Among other things, they define international shipping terms, such as FOB Origin and Destination, but also a common shipping term like Cost, Insurance, Freight ("CIF"). See generally [http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/](http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/).
Standard Disputes Clause: The standard Disputes clause is a sample commercial disputes clause wherein the parties agree to litigate, or optionally arbitrate, their disputes before a court or arbitration panel.

The requirement for the subcontractor to continue performance pending the resolution of any such dispute is based on the clause found in prime contracts, FAR 52.233-1, Disputes, which requires a prime contractor to continue performance pending resolution of a dispute arising under the prime contract. This requirement is based on the Government’s concern that vital national interests could be compromised if a prime contractor (or subcontractors) stopped performance. The standard Disputes clause expressly supersedes the FAR Disputes clause, which incorporates the procedures of the Contract Disputes Act of 1978, 41 U.S.C. chapter 71. The parties may decide to consider expanding this clause to provide for a more detailed disputes resolution process.

Alternative Disputes Clause: The alternative Disputes clause is more closely related to the FAR Disputes clause, in that the subcontractor agrees to cooperate with the prime contractor to pursue a claim against the Government. Such a clause may be appropriate where the Government’s action may significantly impact the subcontractor.

This clause requires the subcontractor to provide a written claim within five years from the date the claim accrues and to provide certifications for claims over $100,000.

If the parties do not agree to pursue such an avenue of relief, subparagraph (b) of the clause provides that the disputes are to be resolved by litigation.

As with the standard Disputes clause, the alternative Disputes clause requires the subcontractor to continue performance pending resolution of the dispute arising under the subcontract.

Disputes [Standard clause]: Either party may litigate any dispute arising under or relating to this Order before any court of competent jurisdiction. [OPTIONAL: In the alternative, the parties may agree to arbitration of such a dispute or to some other form of alternative dispute resolution.] Pending resolution of any such dispute by settlement or by final judgment, the parties shall proceed diligently with performance. Seller’s performance shall be in accordance with Buyer’s written instructions. Any references to disputes procedures in FAR clauses incorporated by reference herein shall be deemed to be superseded by this clause.

Disputes [Alternative clause]:

(a) Any dispute that arises under or is related to this Order and which relates to a matter that gives Buyer recourse against the Federal Government under the prime contractor applicable law may be resolved, by agreement of the parties, in accordance with the Disputes clause of the prime contract as follows:
General Provisions

(1) Seller will give Buyer a fully supported written claim concerning any such dispute within five (5) years after the claim accrues, but in no event later than final payment under this Order, or Seller shall be barred from any remedy for such claim;

(2) Seller will cooperate fully with Buyer in prosecuting any such dispute and will be bound by the outcome unless: (i) Buyer does not afford Seller a reasonable opportunity to participate in the resolution of the dispute, (ii) without Seller’s written consent, Buyer settles or takes other action to prejudice Seller’s rights concerning the dispute, or (iii) Buyer, having determined to discontinue its own prosecution of the dispute, does not afford Seller an opportunity to continue to prosecute the dispute in Buyer’s name;

(3) If Buyer and Seller agree to prosecute Seller’s claim under this subparagraph (a), for any such claim of more than $100,000, Seller shall submit with the claim a certification to Buyer and, through Buyer, to the contracting officer for the prime contract that: (i) the claim is made in good faith, (ii) the supporting data are accurate and complete to the best of Seller’s knowledge and belief, and (iii) the amount requested accurately reflects the contract adjustment for which Seller believes it is entitled under the Order, and underlying prime contract; furthermore, such certification shall be executed by a person duly authorized to bind Seller with respect to the claim, and Seller shall indemnify and hold Buyer harmless from damages, judgments, costs (including reasonable attorneys’ fees), and other liabilities arising from any breach of such certification or any violation of the Contract Disputes Act of 1978 (41 U.S.C § 7103(c)(2)) or any violation of common law or statutory prohibitions against misrepresentations, fraud or false statements;

(4) Buyer and Seller will each bear its own costs of prosecuting any such dispute;

(5) If the parties do not agree to proceed in accordance with this paragraph, the dispute will be decided in accordance with subparagraph (b);

(6) Nothing in this Order grants Seller a direct right of action against the United States under the Disputes clause of the Prime Contract.

(b) Any other dispute that arises under or is related to this Order, as well as any dispute that the parties do not agree to resolve according to the procedures set forth in the foregoing subparagraph (a), may be decided by a court of competent jurisdiction, or under the terms of any arbitration or other alternate disputes provision of this Order, if any.

4. The Contract Disputes Act and the FAR require that a claim be submitted to the contracting officer within six (6) years after the claim accrues, or such shorter time to which the parties may agree. See FAR 33.206(a). If the period in the Prime Contract is shorter than six years, the period in this clause should be shortened proportionately.
(c) Pending final resolution of any dispute arising under or relating to this Order, the parties shall proceed with performance of the Order, and Seller’s performance shall be in accordance with Buyer’s written instructions.

Arbitration

NOTE: The Guide provides a standard Arbitration clause and an alternative Arbitration clause for consideration by prime contractors and subcontractors. If the prime contractor and subcontractor agree to pursue arbitration in order to resolve a dispute under the subcontract, they may select one of the arbitration clauses for prescribing how arbitration will be pursued. The standard Arbitration clause prescribes the manner in which the parties will pursue arbitration. The alternative Arbitration clause specifies that the parties will pursue arbitration, but includes less detail than the standard clause. This Guide does not prescribe a particular forum or organization for the parties to use in pursuing arbitration. Instead, placeholders are included in bracketed language in the clause to indicate where parties should specify their agreed-upon arbitration forum. There are a number of different organizations that provide arbitration services, as well as mediation and other forms of alternative dispute resolution (“ADR”). When negotiating terms and conditions of their subcontract, the prime contractor and the subcontractor should agree upon the forum to use for purposes of pursuing arbitration.

Standard Arbitration Clause: The standard Arbitration clause addresses the manner in which arbitration is initiated, how arbitrators are selected, the location of a hearing, how costs and expenses are to be apportioned among the parties, the governing law and rules of the arbitration, and the nature and binding effect of the arbitrators’ decisions.

Alternative Arbitration Clause: An alternative Arbitration clause is provided if the parties anticipate pursuing binding arbitration as a means of resolving disputes, but either cannot agree upon the degree of detail found in the standard Arbitration clause, or choose to not include as much detail.

Arbitration [Standard Clause]: Both Buyer and Seller agree to enter into negotiations to resolve any dispute. Both parties agree to negotiate in good faith to reach a mutually agreeable settlement within a reasonable amount of time.

(a) If negotiations are unsuccessful, Buyer and Seller agree to enter into binding arbitration in accordance with the following procedures.

(b) Initiation: Selection of arbitrator(s). Either party may initiate an arbitration proceeding by the filing of a demand for arbitration with the [Insert Name of Arbitration Forum]. A panel of up to three (3) arbitrators shall be selected to hear and resolve the controversy. The parties shall either agree upon a single arbitrator or, in accordance with the rules of the arbitration
forum (the “Rules”), have an arbitrator selected for them. If the parties elect to use a panel of three arbitrators, one arbitrator shall be selected by each party and the parties’ chosen arbitrators shall select a third arbitrator. However, if either party fails to select an arbitrator within thirty (30) days after the arbitration is initiated, the [Arbitration Forum] shall select an arbitrator on behalf of such party. Any arbitrator selected to arbitrate a dispute under this Order shall not be an employee of, consultant for, or otherwise associated with the party appointing him/her.

(c) **Hearings.** Unless an oral hearing is waived in writing by both parties, the arbitrator(s) shall hold a hearing on the issue to be arbitrated. Such hearing shall be held in the County of ____________, State of _________, at such time and place as the arbitrators shall determine. Except as provided in paragraph (c), the arbitrators shall provide an opportunity to each party to be present, to be fully heard by counsel or otherwise, and to cross-examine.

(d) **Absent Party.** The parties expressly agree that any arbitration hereunder may proceed in the absence of any party who, after notice, fails to be present at such arbitration or to obtain an adjournment thereof, and that, in such event, an award may be made based solely upon the evidence submitted by the party who is present.

(e) **Binding Effect.** The parties expressly agree that the determination made in writing and signed by a majority of the arbitrators shall be final, binding, and conclusive on the parties and enforceable in any court of competent jurisdiction. Such determination shall be made within 30 days (or such longer period as in the opinion of a majority of the arbitrators may be necessary) after any hearing has been completed and any time allowed for the filing of briefs has elapsed. A signed copy of such determination shall be delivered to each of the parties.

(f) **Decision of Arbitrators.** In making any determination, the arbitrators shall apply the pertinent provisions of this Order without departure therefrom in any respect. The arbitrators shall not have the power to add or to modify any of the provisions of this Order; provided, however, that this provision shall not prevent, in any appropriate case, the interpretation and construction by the arbitrators of the applicable provisions of this Order to the extent necessary to apply such provisions to the issue in dispute.

(g) **Costs and Expenses.** Each party shall be responsible for paying all costs and expenses of the arbitrator selected by it and its own attorney’s fees and expert witnesses’ fees. All other costs and expenses of the arbitration proceedings, including the fees and expenses of the third arbitrator and the costs of transcripts, shall be shared equally by the parties hereto.

(h) **Governing Law and Rules.** Except as the Rules may be contrary to or differ from the provisions of this clause, each arbitration hereunder shall be governed by this clause, the prevailing government regulations and pertinent provisions of law.
Arbitration [Alternative Clause]: Any dispute not disposed of in accordance with the Disputes Clause in this Order, if any, shall be determined in the following manner.

(a) Buyer and Seller agree to enter into negotiations to resolve any dispute. Both parties agree to negotiate in good faith to reach a mutually agreeable settlement within a reasonable amount of time.

(b) If negotiations are unsuccessful, Buyer and Seller agree to enter into binding arbitration. The Rules of [Insert Name of Arbitration Forum] (most recent edition) are to govern this Arbitration. The arbitration shall take place in the County of _______, State of ________. The arbitrator shall be bound to follow the applicable subcontract provisions and ________law in adjudicating the dispute. It is agreed by both parties that the arbitrator’s decision is final, and that no party may take any action, judicial or administrative, to overturn this decision. The judgment rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(c) Pending any decision, appeal, or judgment referred to in this provision or the settlement of any dispute arising under this Order, Seller shall proceed diligently with the performance of this Order.

Assignment and Subcontracting

NOTE: This clause requires the consent of either party for an assignment, except where the assigning party has been acquired through a merger or consolidation. Note that this clause requires the assigning party to remain liable and responsible to the other party for the performance and observance of all obligations. It should also be noted that some prime contracts require the contracting officer to approve any subcontractor, or substitute subcontractor. The parties therefore must consider whether contracting officer consent will be needed before the subcontractor may assign its rights and obligations to a third party. An optional provision in this clause states that the Buyer retains the right to approve subcontracts entered into by the Seller. This optional provision may be appropriate in instances where the Government retains control over the prime contractor's subcontracts or where the prime contractor needs to ensure that lower tier subcontractors can meet certain performance criteria.

Assignment and Subcontracting:

(a) Neither this Order nor any interest herein may be assigned, in whole or in part, by either party without the prior written consent of the other party; except that without securing such prior consent, either party shall have the right to assign this Order to any successor of such party by way of merger or consolidation or the acquisition of substantially all of the business and assets of the assigning party relating to the subject matter of this Order. This right shall be retained provided that such successor shall
expressly assume all of the obligations and liabilities under this Order of the assigning party, and that the assigning party shall remain liable and responsible to the other party hereto for the performance and observance of all such obligations.

(b) Notwithstanding the foregoing, any amounts due, or to become due, hereunder may be assigned by the Seller to a bank, trust company, or other financing institution, provided that such assignments shall not be binding upon the Buyer unless and until the assignment agreement is received by Buyer.

(c) [OPTIONAL: Neither the entirety nor any part of this Order may be further subcontracted by Seller without the prior written consent of Buyer.]

**Waiver and Severability**

**NOTE:** The Guide includes a standard commercial Waiver and Severability clause. The clause helps ensure that the failure or delay of either party to exercise its rights under a provision of the subcontract will not operate as a waiver of such a right. The Severability clause clarifies that if any portion of the Order is determined to be unenforceable, the remaining portions of the Order remain enforceable.

**Waiver and Severability:** The failure or delay of either party to insist on performance of any provision of this Order, or to exercise any right or remedy available under this Order, shall not be construed as a waiver of that provision, right, or remedy in any later instance. Further, if any provision of this Order is or becomes void or unenforceable by operation of law, the remaining provisions shall be valid and enforceable.

**Choice of Law**

**NOTE:** This Choice of Law clause states that, except for provisions based on the FAR or agency clauses or regulations, the provisions of the subcontract shall be governed by the laws of the particular state chosen by the parties. With regard to provisions based on the FAR or other agency clauses or regulations, the clause provides that these provisions are to be interpreted according to the federal law of government contracts as enunciated by the federal administrative and judicial bodies with jurisdiction of these matters, including the U.S. Government Accountability Office, the Boards of Contract Appeals, U.S. Court of Federal Claims, and the district and appellate courts of the United States. This provision is beneficial to both parties in that these bodies of law provide most of the precedent for interpreting FAR and other agency clauses and regulations, thus allowing for consistent interpretation of the provisions at both the prime contract and subcontract levels.

**Choice of Law:** This Order shall be governed by the laws of the State of ________________, except that any provision in this Order that is (i) incorporated
in full text or by reference from the Federal Acquisition Regulation ("FAR"), or (ii) incorporated in full text or by reference from any agency regulation that implements or supplements the FAR, or (iii) that is substantially based on any such agency regulation or FAR provision, shall be construed and interpreted according to the federal common law of government contracts as enunciated and applied by federal judicial bodies, Boards of Contract Appeals, and quasi-judicial agencies and bodies of the federal Government.

Warranties

**NOTE:** The Guide includes a standard commercial Warranty clause. Under the provision, the parties should consider an agreed-upon period of time for the warranty. The Warranty clause expressly provides that the product conforms to all requirements of the Order, is free from all defects in material and workmanship, and will be fit for its intended purposes. The implied warranties of merchantability, fitness for a particular purpose, and title may be expressly excluded if the parties so desire, unless there is a specific warranty requirement in the prime contract that the Buyer must flow down to and obtain from the Seller.

With regard to commercial item procurements, the Government policy is to seek “at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice” and it may specify minimum or special warranty terms. FAR 12.404. The standard commercial item clause, FAR 52.212-4, Contract Terms and Conditions—Commercial Items, provides for implied warranties of merchantability and fitness for a particular purpose.

Given that warranties cover the general and specific attributes of the supplies or services being procured, recent changes in the FAR and DFARS regarding supply quality, supply chain integrity, and avoidance, detection, reporting, and remediation requirements for actual or suspect counterfeit electronic parts in the supplies or services being furnished through or from the subcontractor to the ultimate Government customer, may impose requirements that the prime contractor must flow down through its supplier and services chain. These provisions may limit the prime contractor’s and subcontractor’s ability to provide warranty correction, repair, or replacement to its higher tier contractor or the ultimate Government customer, and the damages the contractor and subcontractor can recover. The standard Warranty clause provided here does not address these provisions. For prime contractors or subcontractors that have special provisions in the Government prime or subcontract requiring certain supply quality or supply chain integrity, such as FAR 52.246-11, Higher-Level Contract Quality Requirement and DFARS 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System, these provisions should be reviewed carefully to determine whether and to what extent they will need to be flowed down, to ensure that all requirements are satisfied, and to mitigate risks relating to the ability to address and recover under warranty, claims, and damages provisions under a prime contract or subcontract.
**General Provisions**

**Warranties:** Seller warrants to Buyer that for a period of ________________ from Buyer’s acceptance of items delivered under this Order, those items shall: (i) conform to all requirements of this Order; (ii) be genuine items of the kind and type called for under the Order, (iii) be free from all defects in material and workmanship; and (iv) to the extent the Order does not call for manufacture pursuant to designs furnished by Buyer, be free from all defects in design and fit for their intended purposes.

**Patent Infringement Indemnity**

**NOTE:** Subparagraph (b) of the Patent Indemnity clause provides that when the Government gives its authorization and consent to perform the prime contract using whatever patented items are necessary, the subcontractor’s liability for any patent infringement will be limited to the extent that the prime contractor must indemnify or hold harmless the Government. In some instances, a prime contractor must indemnify the Government for any patent infringement, while in other instances the Government will retain the entire risk of any potential patent infringement. This clause ensures that the subcontractor’s duty to indemnify the prime contractor is consistent with the prime contractor’s duty to indemnify the Government. The parties may consider risk-mitigation strategies in negotiating indemnification obligations, such as inserting a cap on the amount of indemnification.

**Patent Infringement Indemnity:**

(a) Seller shall defend Buyer, Buyer’s customers, and any subsequent owners, sellers, users, or operators of the items delivered under this Order against all claims and in all proceedings alleging infringement of any U.S. or foreign patent or copyright in the manufacture or sale of any item delivered under this Order, and Seller shall hold said parties harmless from any resulting liabilities and losses, provided Seller is reasonably notified in writing of such claims and proceedings, and further provided that said parties give Seller authority, information, and assistance at Seller’s expense for the defense of same. Seller’s obligation shall not apply to items manufactured pursuant to designs developed and furnished by Buyer or to any alleged infringement arising from the Buyer’s use or sale of items delivered under this Order in combination with items not delivered by Seller if such alleged infringement would not have occurred from the use or sale of such items solely for the purpose for which they were designed or sold by Seller to Buyer.

*[OPTIONAL: The amount of Seller’s indemnification shall be capped at $______]*

(b) When this Order is performed under the authorization and consent of the U.S. Government to infringe U.S. patents, see FAR 52.227-1, Authorization and Consent, Seller’s liability for infringement of such patents pursuant to
such performance shall be limited to the extent of the obligation of Buyer to indemnify or hold harmless the U.S. Government.

Order of Precedence

**Note:** The purpose of the Order of Precedence clause is to resolve conflicting or inconsistent contract language. In conjunction with the Integration and Merger clause, this clause is important in subcontracts that incorporate a number of documents such as provisions of the prime contract, the proposal, schedules, and specifications.

**Order of Precedence:** In the event of any inconsistency, ambiguity, or conflict between or among the provisions of this Order, such inconsistency, ambiguity, or conflict shall be resolved by the following descending order of precedence:

1. Typed provisions set forth in this Order including, but not limited to, one or more provisions or clauses of the Federal Acquisition Regulation ("FAR") or the Defense Federal Acquisition Regulation Supplement ("DFARS") to the extent they are expressly incorporated into this Order by reference, and if so incorporated have the same force and effect as if they were given in full text;
2. The statement of work;
3. The preprinted portion of this Order;
4. Other incorporated or referenced documents; and
5. Specifications attached hereto or incorporated by reference.

Buyer’s specifications shall prevail over those of the U.S. Government, and both of the foregoing shall prevail over specifications of Seller.

Integration and Merger

**Note:** The purpose of the Integration and Merger clause, also referred to as the “Entire Agreement” clause, is to prohibit the use of extrinsic material to vary the terms of the subcontract if a dispute arises concerning its meaning or intent.

**Integration and Merger:** This Order, including any and all attachments and documents incorporated herein by reference, constitutes the entire agreement between Buyer and Seller, and supersedes all prior representations, agreements (including prior versions), understandings, and communications between Buyer and Seller related to the subject matter and negotiation of this Order. No amendment or modification of this Order shall be binding upon either party unless it is set forth in a written instrument signed by expressly authorized representatives of both Buyer and Seller. The rights and remedies afforded to either party pursuant to any part
or provision of this Order are in addition to any other rights and remedies afforded by any other parts or provisions of this Order, by law, or otherwise.

**Buyer-Furnished Property**

**NOTE:** Note that this clause does not govern the subcontractor’s use, maintenance, or disposal of government-furnished property. That is addressed in FAR 52.245-1 Government Property, as flowed down in this Guide. Instead, this clause focuses on how property furnished by the prime contractor to the subcontractor for the purpose of performing the subcontract should be handled.

**Buyer-Furnished Property:**

(a) Buyer shall retain title to all property furnished to and utilized by Seller in the performance of this Order, including, but not limited to, dies, molds, jigs, tools, and materials. Seller shall label, inventory, store, maintain, and either dispose of, or return Buyer’s property, including scrap, according to Buyer’s written direction. Seller shall be responsible for all loss or damage to Buyer’s property in Seller’s possession. If Buyer does not provide Seller with timely written direction concerning the labeling, inventorying, storage, maintenance, and either disposal or return of Buyer’s property, including scrap, then Buyer shall be liable to Seller for the reasonable expense of labeling, inventorying, storage, maintenance, and either disposal or return of such property.

(b) This clause does not govern Seller’s handling, use, maintenance, and either disposal or return of Government-furnished property that may come into Seller’s possession during Seller’s performance of this Order; such handling, use, maintenance, or disposal is governed by FAR 52.245-1, Government Property, to the extent it is incorporated into this Order.

**Compliance**

**NOTE:** The purpose of the Compliance clause is to confirm that either the Seller or both parties will comply with applicable provisions of law and regulation. The parties may decide if just the Seller or both parties will agree to the obligations of the Compliance clause.

**Compliance:** Seller agrees to comply with the applicable provisions of any federal, state, or local law or ordinance and all orders, rules, and regulations issued thereunder.

[OPTIONAL: Both parties agree to comply with the applicable provisions of any federal, state, or local law or ordinance and all orders, rules, and regulations issued thereunder.]
Open Source Software

NOTE: The Open Source Software clause clarifies the Seller’s obligation to notify and obtain authorization from the Buyer before providing any open source software under a subcontract. The clause also sets forth the detail the Seller must provide to the Buyer before the open source software will be accepted.

Open Source Software: Without any prior written consent of Buyer, Seller shall not incorporate any Open Source Software, including any source code governed by an Open Source license, into work to be performed and/or delivered under the Order. Before Buyer will consider providing written approval for the incorporation of any item of Open Source Software, Seller shall first identify all Open Source Software incorporated into the work to be performed and/or delivered under the Order, including a complete source code listing with a description of the operation of the software in English and machine-readable form, together with complete copies of any licenses required to be accepted.

Confidentiality

NOTES: The Confidentiality clause is intended to ensure both the Buyer and Seller protect any proprietary and confidential information disclosed to each other during the course of performance.

Confidentiality: The Buyer and Seller agree to protect any and all proprietary and confidential information disclosed to each other during the course of performance of the Order. Receiving party agrees to comply with all proprietary information markings and restrictive legends applied by disclosing party to anything provided hereunder to receiving party. Receiving party agrees not to use any information provided by disclosing party for any purpose except as provided under this Order and agrees not to disclose such information to third parties without the prior written consent of disclosing party.

Reporting Obligations Related to Business Ethics and Conduct

NOTES: The Reporting Obligations Related to Business Ethics and Conduct clause clarifies the obligations of the Buyer and Seller to abide by reporting requirements under FAR 3.1003.

Reporting Obligations Related to Business Ethics and Conduct: Buyer has the obligation to report to the Government where there is credible evidence of waste fraud or abuse, or violations of law as noted in certain clauses in this Order. Accordingly, the Seller acknowledges and agrees to abide by all reporting obligations under FAR 3.1003 and notify Buyer where the clause provides for such notification. This obligation does not prevent Seller from directly reporting any credible
evidence it receives of waste, fraud or abuse, or other violations of law, relating to the Order directly to the Government.

**Termination for Convenience**

**NOTES:** The Termination for Convenience clause establishes the right of the Buyer to terminate the subcontract for convenience, but only when the prime contract, or the portion of the prime contract covering the subcontract is terminated by the Government.

**Termination for Convenience:** Buyer may terminate this Order in whole or in part and from time to time for its convenience if the Government terminates the work covered by this Order. Buyer shall terminate the Order for convenience by giving written notice to Seller specifying the effective date of the termination. In the event of a termination, Seller shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this Order, Seller shall be paid a percentage of the Order price reflecting the percentage of work performed prior to the effective date included in the notice of termination. Seller shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

**Termination for Cause**

**NOTES:** The Termination for Cause clause describes the circumstances under which the Buyer may terminate the subcontract for cause, establishes a cure period, and clarifies the respective rights and obligations of the parties following a termination for cause.

**Termination for Cause:**

(a) Buyer may terminate this Order, in whole or in part, if the Seller fails to (i) Deliver the supplies within the time specified in this Order or any extension; (ii) Make progress, so as to endanger performance of this Order (but see paragraph (b) of this clause); or (iii) Perform any of the other provisions of this Order (but see paragraph (b) of this clause).

(b) The Buyer’s right to terminate this Order under subparagraphs (a)(ii) and (iii) of this clause may be exercised if the Seller does not cure such failure within 5 days (or more if authorized in writing by the Buyer) after receipt of the written notice from the Buyer’s Purchasing Representative specifying the failure.

(c) In the event of termination for cause, Buyer shall pay Seller the Order price for any amount of supplies or services that have been accepted, and Seller shall be liable to Buyer for any and all rights and remedies provided by law. If it is later determined that Buyer improperly terminated this Order for default, such termination shall be converted to a termination for convenience.