

Recommendation 91: Require the Administrator of General Services and the Secretary of Defense to maintain the FAR and DFARS respectively, as electronic documents with references to the related statutes, Executive Orders, regulations, and policies, and with hyperlinks to Federal Register Notices.

Problem

The FAR, codified at Title 48 Code of Federal Regulations, provides the primary regulatory framework by which the federal government contracts for supplies and services and implements statutes, Executive Orders (EOs), regulations, policies, and Federal Register Notices (FRNs), established by organizations across the Federal government. DoD supplements the FAR as needed to accommodate DoD-specific statutes, policies, EOs, and FRNs in the DFARS. The FAR system, and consequently the FAR and DFARS documents, are necessarily complex because of the depth, breadth and intricacy of the acquisition policies and statutes implemented and the guidance needed to accommodate the diverse agencies and missions across federal government.

This complexity renders the FAR and DFARS challenging to navigate and understand by many of the government and industry personnel who are part of the acquisition team described in Section 1.102 of the FAR and are responsible for the requirements and acquisition processes that facilitate getting supplies and services to warfighters and support other federal missions. This situation has led to criticism by both public- and private-sector leaders and stakeholders that the structure and content of the FAR and DFARS impede both government and industry acquisition personnel and organizations from adequately understanding the complexity of acquisition and transactional processes. These commenters also contend that the inability to effectively navigate and understand the regulations prevents acquisition personnel from leveraging the flexibilities, methods, and authorities available to increase the speed of the acquisition process and encourage innovation, competition, and investment by the private sector.

Background

One of the two enumerated duties of the Section 809 Panel established in Section 809 of the FY 2016 NDAA was to

“review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage.”

Each of the Section 809 Panel report volumes contains recommended changes to statutory and regulatory language in the FAR and DFARS. These recommended changes, as required by the FY 2016 NDAA, are based on thorough research and analyses of applicable existing FAR and DFARS language and related statutory requirements and language.

As part of its review of acquisition regulations, the Section 809 Panel developed a FAR and DFARS reference document that provides data on changes to the FAR and DFARS that have been implemented since the FAR was initially published as an FRN on September 19, 1983. This research approach resulted in a document with comments to each FAR and DFARS part and subpart that trace back to

and provide information on the FRNs that specify the changes made to the FAR and DFARS since September 1983.

As stated in FAR 1.102 (d), “The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer’s needs.” FAR 1.102 (c) states, “The Acquisition Team consists of all participants in government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.” Members of the acquisition team need to understand the regulatory requirements stipulated in the FAR and DFARS, which requires more than simply reading the FAR and DFARS. It also requires knowledge of the history and requirements of the statutes, policies, EOs, and FRNs that form the basis of FAR and DFARS regulatory requirements.

In their current forms, the FAR and DFARS do not provide substantial detail on most FAR and DFARS requirements. This shortcoming contributes to challenges experienced by the acquisition workforce in navigating and understanding the FAR and DFARS. The research and reference document developed by the Section 809 Panel provides detailed reference information that makes it possible for someone—a contracting specialist or contracts administrator in government or industry, a policy analyst in government or industry, a new member of the acquisition workforce, or a student at the Defense Acquisition University—to quickly identify where regulatory and statutory changes have been made since 1983. With the comments in this reference document as a base source, users of the document can then access from the Internet copies of the FRNs that contain details on the origin of statutory or policy changes, the proposed and final rule language, and the public comments.

Discussion

The reference document produced by the Section 809 Panel will help government and industry acquisition team members better understand the FAR and DFARS, including the origins and basis for language and requirements, resulting in a better informed acquisition workforce. Having a more knowledgeable workforce will facilitate better communications between government and industry with fewer misunderstandings of FAR and DFARS requirements. In turn, both parties will be more likely to understand and appreciate each other’s concerns and incentives, which could result in more productive fact finding and negotiations, a faster contracting process, and reduced acquisition lead time. In addition to providing a tool that will contribute to a more knowledgeable workforce, this FAR/DFARS reference document can serve as a training resource for classroom, on-the-job, job-specific, and just-in-time training. It could also help demystify the FAR rulemaking process.

Both government and industry are striving to recruit and retain well educated, qualified, and motivated acquisition personnel. Incoming members of the acquisition workforce are likely familiar and comfortable with using Internet-based research and reference tools. They expect to have tools that provide quick access to information. Providing relevant and readily available tools that will contribute to their learning, professional development, and work performance can and should be resourced and leveraged to expeditiously increase their knowledge, maintain their interest, and successfully motivate their performance.

The current FAR and DFARS maintained by the FAR and DARS staffs do not include versions that provide information on the FRN origins of the FAR and DFARS language like the research document developed by the Section 809 Panel. Establishing and maintaining a FAR and a DFARS that provide references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs should be planned for, programed, and funded by the Secretary of Defense and the Administrator of General Services.

The hyperlinked capability noted in this recommendation is based on current technology. It is possible that future technology could provide other, better means of accomplishing the intent of this recommendation. The Administrator of General Services and the Secretary of Defense should employ whatever technology best accomplishes the goal of providing the FAR and DFARS as described above.

Conclusions

The complexity of the FAR system has resulted in FAR and DFARS documents that are challenging to navigate and understand for most government and industry acquisition team members involved in the requirements and acquisition processes. This situation has led to criticism by senior government and industry leaders that the system and the regulations themselves are impeding innovation and timely acquisition of critical supplies and services. This frustration has also led to increased use of other contractual arrangements that are not governed by the FAR and DFARS.

As part of the statutory requirement to review acquisition regulations applicable to DoD, the Section 809 Panel developed a research and reference document that provides information about the sources and basis for FAR and DFARS content since the FAR's issuance in 1983. This tool provides summary information on the FRNs that contain the background and rationale for FAR and DFARS content. This tool can be used by both government and industry acquisition workforce members to improve knowledge of the FAR/DFARS and consequently functioning of the acquisition system.

The Administrator of General Services should plan for and resource development and implementation of a FAR that includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the FAR. The Secretary of Defense should plan for and resource development and implementation of a DFARS that includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the DFARS. Deployment of such capabilities will support efforts to enhance the knowledge and capability of the acquisition workforce, establish appropriate buyer and seller relationships, and improve functioning of the acquisition system.

Implementation

Legislative Branch

- Require the Secretary of Defense to post and make available to the public the reference document for the FAR and DFARS compiled by the Section 809 Panel.
- Require the Secretary to develop and maintain a DFARS that includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the DFARS.

- Require the Administrator of General Services to develop and maintain a FAR, in a form consistent with the DFARS developed and employed by DoD, which includes references to the statutes, EOs, regulations, and policies, and hyperlinks to FRNs that establish the basis for the regulatory language and requirements included in the FAR.

Executive Branch

- There are no regulatory changes required for this recommendation.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDED REPORT LANGUAGE

SEC. ____ . ENHANCEMENT OF CONTENT FUNCTIONALITY OF THE FAR AND THE DFARS.

This section would require the Secretary of Defense and the Administrator of General Services to maintain the Defense Federal Acquisition Regulations (DFARS) and the Federal Acquisition Regulations (FAR) and respectively, as electronic documents with references to the statutes, Executive Orders, regulations, and policies and with internet accessible links to Federal Register Notices.

The committee is aware that the FAR and DFARS currently do not contain references and internet accessible links to the relevant underlying documents that form the basis of the FAR and DFARS. The committee notes that this lack of basic information has led to criticism by the acquisition community in both Government and industry that the FAR and DFARS structure and content impedes an adequate understanding of the complexity of the acquisition processes. This often hinders acquisition personnel from leveraging the flexibilities, methods, and authorities available to increase the speed of the acquisition process and encourage innovation, competition and investment by the private sector.

This section would create a tool to be used by the government and industry acquisition workforce to enhance their knowledge of the FAR and DFARS. It is intended to further improve the functioning of the federal acquisition system.

This section also would require that the reference document compiled by the acquisition advisory panel, established under section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), be made available through a publicly accessible website of the Department of Defense.

1 **SEC. ____ . ENHANCEMENT OF CONTENT FUNCTIONALITY OF THE FEDERAL**
2 **ACQUISITION REGULATION AND THE DEFENSE FEDERAL**
3 **ACQUISITION REGULATION SUPPLEMENT.**

4 (a) POSTING OF 809 PANEL FAR/DFARS REFERENCE DOCUMENT ON DOD WEBSITE.—

5 (1) POSTING ON PUBLIC WEBSITE.—The Secretary of Defense shall make available
6 to the public, through a website of the Department of Defense that is accessible to the
7 public, the research and reference document compiled by the Section 809 Panel that is
8 described in paragraph (2).

9 (2) DOCUMENT.—The research and reference document referred to in paragraph
10 (1) is the reference document compiled by the Section 809 Panel that provides
11 information on changes to the Federal Acquisition Regulation (in this section referred to
12 as the “FAR”) and the Defense Federal Acquisition Regulation Supplement (in this
13 section referred to as the “DFARS”) that have been implemented since the FAR was
14 issued in 1983.

15 (3) 809 PANEL.—In this section, the term “Section 809 Panel” means the panel
16 established by the Secretary of Defense pursuant to section 809 of the National Defense
17 Authorization Act for Fiscal Year 2016 (Public Law 114-92), as amended by section
18 863(d) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-
19 328) and sections 803(c) and 883 of the National Defense Authorization Act for Fiscal
20 Year 2018 (Public Law 115-91).

21 (b) MAINTENANCE OF DFARS BY DEPARTMENT OF DEFENSE WITH REFERENCES TO
22 SOURCE DOCUMENTS.—

1 (1) IN GENERAL.—Chapter 141 of title 10, United States Code, is amended by
2 inserting after section 2381 the following new section:

3 **“§ 2382. Defense Federal Acquisition Regulation Supplement: maintenance with references**
4 **to source documents and references with internet links to Federal Register notices**

5 “(a) IN GENERAL.—The Secretary of Defense shall maintain the Defense Federal
6 Acquisition Regulation Supplement (in this section referred to as the ‘DFARS’) in a form that
7 includes references to the statutes, executive orders, regulations, and policies, and references
8 with internet accessible links to the Federal Register notices, that establish the basis for the
9 regulatory language and requirements included in the DFARS.

10 “(b) PUBLIC AVAILABILITY.—The Secretary of Defense shall make available to the
11 public, through a website of the Department of Defense that is accessible to the public, the
12 DFARS as maintained pursuant to subsection (a).

13 “(c) TIMEFRAME FOR DEVELOPMENT.—The Secretary of Defense shall fully implement
14 subsection (a) not later than the end of the 2-year period beginning on the date of the enactment
15 of this section.”.

16 (2) CLERICAL AMENDMENT.—The table of sections at the beginning of such
17 chapter is amended by inserting after the item relating to section 2381 the following new
18 item:

“2382. Defense Federal Acquisition Regulation Supplement: maintenance with references to source
documents and references with internet links to Federal Register notices.”.

19 (c) MAINTENANCE OF FAR BY GSA WITH REFERENCES TO SOURCE DOCUMENTS.—
20 Section 1303 of title 41, United States Code, is amended by adding at the end the following new
21 subsection:

1 “(e) FEDERAL ACQUISITION REGULATION WITH REFERENCES TO SOURCE DOCUMENTS AND
2 REFERENCES WITH INTERNET LINKS TO FEDERAL REGISTER NOTICES.—

3 “(1) IN GENERAL.—The Administrator of General Services shall maintain the
4 Federal Acquisition Regulation in a form that includes references to the statutes,
5 executive orders, regulations, and policies, and references with internet accessible links to
6 the Federal Register notices, that establish the basis for the regulatory language and
7 requirements included in the Federal Acquisition Regulation.

8 “(2) CONSISTENCY WITH DEFENSE FEDERAL ACQUISITION REGULATION
9 SUPPLEMENT.—The Administrator shall maintain the Federal Acquisition Regulation as
10 required by paragraph (1) in a form that is consistent with the Defense Federal
11 Acquisition Regulation Supplement as maintained by the Secretary of Defense under
12 section 2382 of title 10.

13 “(3) PUBLIC AVAILABILITY.—The Administrator shall make available to the
14 public, through a website of the General Services Administration that is accessible to the
15 public, the Federal Acquisition Regulation as maintained pursuant to paragraph (1).

16 “(4) TIMEFRAME FOR DEVELOPMENT.—The Administrator shall fully implement
17 paragraph (1) not later than the end of the 2-year period beginning on the date of the
18 enactment of this subsection.”.

The section of title 41, United States Code, amended by subsection (c) above is below.
Note subsection (d) in particular:

Title 41, United States Code

§1303. Functions and authority

(a) FUNCTIONS.—

(1) ISSUE AND MAINTAIN FEDERAL ACQUISITION REGULATION.—Subject to sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title, the Administrator

of General Services, the Secretary of Defense, and the Administrator of National Aeronautics and Space, pursuant to their respective authorities under division C of this subtitle, chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451 et seq.),¹ shall jointly issue and maintain in accordance with subsection (d) a single Government-wide procurement regulation, to be known as the Federal Acquisition Regulation.

(2) LIMITATION ON OTHER REGULATIONS.—Other regulations relating to procurement issued by an executive agency shall be limited to—

(A) regulations essential to implement Government-wide policies and procedures within the agency; and

(B) additional policies and procedures required to satisfy the specific and unique needs of the agency.

(3) ENSURE CONSISTENT REGULATIONS.—The Administrator, in consultation with the Council, shall ensure that procurement regulations prescribed by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with the policies prescribed pursuant to section 1121(b) of this title.

(4) REQUEST TO REVIEW REGULATION.—

(A) BASIS FOR REQUEST.—Under procedures the Administrator establishes, a person may request the Administrator to review a regulation relating to procurement on the basis that the regulation is inconsistent with the Federal Acquisition Regulation.

(B) PERIOD OF REVIEW.—Unless the request is frivolous or does not, on its face, state a valid basis for the review, the Administrator shall complete the review not later than 60 days after receiving the request. The time for completion of the review may be extended if the Administrator determines that an additional period of review is required. The Administrator shall advise the requester of the reasons for the extension and the date by which the review will be completed.

(5) WHEN REGULATION IS INCONSISTENT OR NEEDS TO BE IMPROVED.—If the Administrator determines that a regulation relating to procurement is inconsistent with the Federal Acquisition Regulation or that the regulation otherwise should be revised to remove an inconsistency with the policies prescribed under section 1121(b) of this title, the Administrator shall rescind or deny the promulgation of the regulation or take other action authorized under sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title as may be necessary to remove the inconsistency. If the Administrator determines that the regulation, although not inconsistent with the Federal Acquisition Regulation or those policies, should be revised to improve compliance with the Regulation or policies, the Administrator shall take action authorized under sections 1121, 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 as may be necessary and appropriate.

(6) DECISIONS TO BE IN WRITING AND PUBLICLY AVAILABLE.—The decisions of the Administrator shall be in writing and made publicly available.

(b) ADDITIONAL RESPONSIBILITIES OF MEMBERSHIP.—

(1) IN GENERAL.—Subject to the authority, direction, and control of the head of the agency concerned, each official who represents an agency on the Council pursuant to section 1302(b) of this title shall—

(A) approve or disapprove all regulations relating to procurement that are proposed for public comment, prescribed in final form, or otherwise made effective by that agency before the regulation may be prescribed in final form, or otherwise made effective, except that the official may grant an interim approval, without review, for not more than 60 days for a procurement regulation in urgent and compelling circumstances;

(B) carry out the responsibilities of that agency set forth in chapter 35 of title 44 for each information collection request that relates to procurement rules or regulations; and

(C) eliminate or reduce—

(i) any redundant or unnecessary levels of review and approval in the procurement system of that agency; and

(ii) redundant or unnecessary procurement regulations which are unique to that agency.

(2) LIMITATION ON DELEGATION.—The authority to review and approve or disapprove regulations under paragraph (1)(A) may not be delegated to an individual outside the office of the official who represents the agency on the Council pursuant to section 1302(b) of this title.

(c) GOVERNING POLICIES.—All actions of the Council and of members of the Council shall be in accordance with and furtherance of the policies prescribed under section 1121(b) of this title.

(d) GENERAL AUTHORITY WITH RESPECT TO FEDERAL ACQUISITION REGULATION.—Subject to section 1121(d) of this title, the Council shall manage, coordinate, control, and monitor the maintenance of, issuance of, and changes in, the Federal Acquisition Regulation.