U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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April 17, 2015

The Honorable Mac Thornberry
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

Department of Defense: Acquisition Rulemaking Practices

This report transmits our February 2015 briefing prepared in response to the mandated review contained in House Report 113-446, accompanying H.R. 4435, Howard P. 'Buck' McKeon National Defense Authorization Act (NDAA) of 2015, of the Department of Defense (DOD) acquisition rulemaking practices.

Our objectives were (1) to describe DOD's current rulemaking procedures, including relevant provisions for notice and comment, for Defense Federal Acquisition Regulation Supplement (DFARS) rules; (2) to determine the frequency with which DOD issued final and interim rules without prior notice and comment during fiscal years 2010 through 2014; (3) to determine the most common justifications given by DOD when issuing final and interim DFARS rules without prior notice and comment; and (4) to identify methods cited by DOD for promoting constructive communication between DOD, the public, and the acquisition industry during rulemaking.

To describe DOD's current rulemaking procedures for DFARS rules, we reviewed the relevant rulemaking requirements for issuance of DFARS rules, including 41 U.S.C. § 1707, which governs DOD's DFARS rulemaking process, and related agency guidance. To determine the frequency of final and interim DFARS rule issued without prior notice and comment between fiscal years 2010 and 2014, we compiled a list of all DFARS rules published by DOD in the Rules and Regulations section during those fiscal years, using the Government Printing Office's Federal Digital System database on the *Federal Register*, supplemented by documentation from DOD and testimonial evidence from DOD officials.[1] We then analyzed that universe of 279 interim and final DFARS rules and technical amendments published in the Rules and Regulations section of the *Federal Register* and applied criteria from the relevant rulemaking requirements to identify those rules published without prior notice and comment. To determine the most common justifications cited by DOD for issuing final and interim DFARS rules without prior notice and comment, we reviewed all 139 DFARS rules published in the *Federal Register* without prior notice and comment, analyzing the texts of justifications cited in those rules for common themes and patterns. To identify methods cited by DOD for promoting constructive communication during rulemaking, we interviewed knowledgeable agency officials about communication opportunities between DOD and the agency, the public, and industry officials.

[1]Published by the Office of the Federal Register, National Archives and Records Administration, the *Federal Register* is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations. The Rules and Regulations section contains final rules and regulations—those regulatory documents having general applicability and legal effect.

We also reviewed our past products that addressed communication opportunities during the rulemaking process.

We tested the reliability of the *Federal Register* database used to compile our master list of DFARS rules by reviewing related documentation, interviewing knowledgeable agency officials, testing for missing data, and by tracing each of the rules on our master list to source documents. We concluded that the data were sufficiently reliable for our purposes. We did not assess DOD's decisions regarding exceptions from prior notice and comment or its determinations regarding the effects of its rules; instead, we are providing information based on what the agency published in the *Federal Register* and in related documents as the basis for its decisions regarding exceptions.

We conducted this performance audit from October 2014 to April 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In summary, we found the following:

- DOD's acquisition rulemaking procedures are governed by 41 U.S.C. § 1707, which generally requires DOD to issue a proposed rule for each rulemaking that provides not less than a 30-day public comment period. These requirements only apply to those DFARS rules which are related to the expenditure of appropriated funds and have a significant effect beyond the agency's internal operating procedures, or which have a significant cost or administrative impact on contractors or offerors. However, the requirements may be waived if DOD determines that "urgent and compelling" circumstances make compliance with the requirements impracticable. In those instances, DOD issues a temporary interim rule that provides at least a 30-day public comment period. DOD may then issue a subsequent final rule after considering any comments received.

- Of the 279 final and interim DFARS rules and technical amendments published in the Rules and Regulations section of the *Federal Register* during fiscal years 2010 through 2014, 139 were issued without prior notice and comment before they became effective. DOD determined that 90 of the 139 DFARS rules were either non-substantive final rules or technical amendments. DOD also determined that 49 of the 139 DFARS rules had "urgent and compelling" circumstances and therefore issued the DFARS rules as interim rules.

- Our review and analysis of the text of the 139 DFARS rules published without prior public comments identified two primary justifications cited by DOD for waiving the public comment requirement. For 49 of these 139 DFARS rules, DOD cited "urgent and compelling" circumstances, most frequently because acquisition requirements either needed to be addressed immediately (or within a short-time frame) to comply with a statute. Specifically, DOD cited specific language within a statute that required immediate implementation of a defense acquisition requirement as the "urgent and compelling" circumstance for 31 of these 49 DFARS rules. Another 49 of the 139 DFARS rules issued without prior public comment were not subject to public comments because DOD determined that the rules were non-substantive or non-significant. Specifically, DOD stated that 46 of the rules did not have significant effects beyond

DOD's internal operating procedures. The remaining 41 DFARS rules issued without public comments were technical amendments for which DOD did not provide justifications in the published rules, but which it also deemed to be non-substantive or non-significant.

- DOD officials identified multiple efforts to provide opportunity for public and industry participation during the rulemaking process. For example, DOD provides several mechanisms--such as a web-based email account--for the public and industry officials to ask questions, recommend changes, or comment on DFARS rules. Based on our review of the relevant criteria for issuance of DFARS rules and our audit work, we have no specific recommendations for opportunities to improve constructive communications between DOD, the public, and the acquisition industry during rulemaking.

Agency Comments

On April 8, 2015, DOD provided one technical comment which we have incorporated.

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We are sending copies of this report to the appropriate congressional committees, the Secretary of Defense, and other interested parties. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-6806 or sagerm@gao.gov. Contact points for our offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff members who made major contributions to this report were Timothy Bober, Assistant Director; Judith Kordahl, Andrea Levine, Donna Miller, Patricia Norris, Joseph Santiago, Cynthia Saunders, and William Woods.

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Enclosure