Department of Defense: Acquisition Rulemaking Practices

Prepared for the Committee on Armed Services House of Representatives

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Objectives

- House Report 113-446, accompanying the National Defense Authorization Act of 2015, mandated that GAO evaluate Department of Defense (DOD) rulemaking practices for issuing acquisition rules.

- In this briefing, GAO
  - describes DOD's current rulemaking procedures, including relevant provisions for notice and comment, for Defense Federal Acquisition Regulation Supplement (DFARS) rules;
  - determines the frequency with which DOD issued final and interim DFARS rules without prior notice and comment during fiscal years 2010-2014;
  - determines the most common justifications given by DOD when issuing final and interim DFARS rules without prior notice and comment; and,
  - identifies methods cited by DOD for promoting constructive communication between DOD, the public, and the acquisition industry during rulemaking.

Scope and Methodology

- To address the objectives, we
  - reviewed relevant rulemaking requirements for issuance of DFARS rules, as well as related guidance.
  - analyzed the universe of 279 interim and final DFARS rules DOD published in the Rules and Regulations section of the *Federal Register* between fiscal years 2010 and 2014, applying criteria from the relevant rulemaking requirements to determine
    - the frequency with which the rules had been issued without prior notice and opportunity for comment, and
    - the most common justifications provided by DOD when issuing rules without prior notice and comment.
      - We analyzed the text that DOD published in the *Federal Register* for common themes and patterns cited in its justifications; however, we did not assess DOD's determinations regarding the effects of its rules.
  - interviewed knowledgeable agency officials about acquisition rulemaking practices.
  - reviewed past GAO products on regulatory issues that addressed communications on rulemaking between agencies, the public, and industry officials.

Highlights

- DOD's DFARS rulemaking procedures are governed by 41 U.S.C. § 1707, which generally requires DOD to issue a proposed rule for each rulemaking and to provide not less than a 30-day public comment period. These requirements
  - only apply to 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; and
  - may be waived if "urgent and compelling" circumstances make compliance impracticable, in which case DOD issues a temporary interim rule. The interim rule must provide at least a 30-day public comment period, and DOD may issue a subsequent final rule after considering any comments received.

- During fiscal years 2010 through 2014, 139 of the 279 DFARS final and interim rules published in the Rules & Regulations section of the *Federal Register* were issued without prior notice and comment before they became effective.
  - 90 of the rules were determined by DOD to be non-substantive final rules or technical amendments.
  - 49 were issued as interim rules for which DOD had made a determination of "urgent and compelling" circumstances.

Highlights

- Our analysis of the text of the DFARS rules published without prior comment identified two primary justifications cited by DOD.
  - 49 of the rules were issued without prior public comment due to “urgent and compelling” circumstances, most frequently because they needed to be addressed either immediately or within a short-time frame to comply with a statute. For example, in 31 of the rules DOD cited specific language within a statute that required immediate implementation of a defense acquisition requirement.
  - 49 of the rules were not subject to public comments because they were deemed to be non-substantive or non-significant. For example, in 45 of the rules, DOD stated that the rules did not have significant effects beyond DOD’s internal operating procedures.
  - Another 41 of the rules were technical amendments for which DOD did not provide a justification, but which it also deemed to be non-substantive or non-significant.

- DOD officials reported receiving communications via letters, emails, and telephone calls. Among other communication techniques identified by DOD officials were an email account for members of the public and industry to ask questions, recommend changes, and provide comments and recommendations; Advanced Notices of Proposed Rulemaking (ANPR) used to receive early public input; identifying DOD points of contacts in *Federal Register* notices; and public meetings.

DFARS Rulemaking Procedures: Requirements

- DOD's DFARS rulemaking process implements and incorporates requirements from the following:
  - 41 U.S.C. § 1707 "Publication of proposed regulations";
  - Related Federal Acquisition Regulations (FAR) and DFARS regulations found in FAR Subpart 1.3, FAR Subpart 1.5, and DFARS Subpart 201.3;
  - Other rulemaking statutes and Executive Orders (such as the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Orders 12866 and 13563); and
  - Internal agency written guidance found in the FAR Operating Guide, DFARS Operating Guide, and Department of Defense Instruction 5000.35.
- Because they are related to agency contracts, DFARS rules are exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. § 553(a)).

DFARS Rulemaking Procedures: 41 U.S.C. § 1707

- DOD's DFARS rulemaking process is governed by 41 U.S.C. § 1707, which generally requires DOD to issue a proposed rule for each rulemaking and to provide a public comment period of not less than 30 days. These requirements only apply to rules which
  - are related to the expenditure of appropriated funds, and
  - have a significant effect beyond the agency's internal operating procedures, or have a significant cost or administrative impact on contractors or offerors.
- Requirements may be waived if "urgent and compelling" circumstances make compliance impracticable.
  - If notice and comment are waived, the rule is effective on a temporary basis, and the agency must provide for at least a 30-day public comment period.
  - The agency must consider comments received and may then issue a final rule.

DFARS Rulemaking Procedures: from Draft to Final Rules

- The Defense Acquisition Regulations System (DARS), which is part of Defense Procurement and Acquisition Policy (DPAP) in the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, is responsible for preparing and publishing DFARS rules, with approval of the Director, DPAP.
- Rulemaking begins with the DFARS committee drafting a rule.
- After internal reviews that include the Defense Acquisition Regulations Council and the Office of Federal Procurement Policy, DOD will issue a proposed, final, or interim rule, depending on circumstances.
- Though the law requires comment periods of not less than 30 days, in general DOD provides public comment periods of 60 days.
- Based on any comments received, DOD officials review the comments and may revise the rule.

DFARS Rulemaking Procedures: Rules that Do Not Receive Prior Public Comment

- DOD officials told us that there are three types of publications that do not receive prior public comment: (1) technical amendments, (2) final rules without prior public comment, and (3) interim rules.

- The first two types of publications are DFARS rules that DOD determines to be non-substantive and that do not meet the criteria for prior public comment.
  - DOD considers such aspects as
    - whether the rule is editorial in nature;
    - whether it changes a requirement or merely extends the effective period of an existing requirement; and
    - whether it requires a new action or imposes a new burden on the part of contractors or offerors.

- The third category of rules does meet the 41 U.S.C. § 1707 criteria for prior public comment, but there has been a determination that “urgent and compelling” circumstances make compliance with the prior public comment requirements impracticable.

DFARS Rulemaking Procedures: "Urgent and Compelling" Circumstances

- The Director, Defense Procurement and Acquisition Policy, makes an individual determination for each interim rule to confirm that "urgent and compelling" circumstances exist.
  - FAR and DFARS Operating Guides provide guidance and instructions on the appropriate use of proposed versus interim rules.
  - DOD retains documentation of the determination and findings for each interim rule.

- DOD officials noted that, in making the determination of "urgent and compelling" circumstances, they consider such aspects as
  - whether there is a statutorily required effective date;
  - whether implementation is relatively straightforward;
  - whether there are public health and safety issues;
  - whether there could be significant cost or administrative impact if implementation is delayed;
  - what harm may occur if implementation is delayed.

- Factors that may dissuade DOD from using an interim rule include complexity in implementation, lack of clarity in the requirement, and the potential cost of significant revisions between the interim and final rule stage.

DFARS Rulemaking Procedures: “Urgent and Compelling” Circumstances

- According to DOD officials, the actions that most frequently require publication of an interim DFARS rule are statutes requiring changes to the DFARS either upon enactment of the statute or shortly thereafter, and when delaying implementation would cause harm.

- DOD’s rulemaking requirements and procedures include systematic follow-up on its interim rules.
  - DOD officials stated that they will not close an interim DFARS rule’s file until the agency receives and reviews the comments, and they may revise the rule based on the comments.

Frequency of Interim and Final DFARS Rules Issued without Prior Public Comment

- Of the 279 final and interim DFARS rules that DOD issued during fiscal years 2010 through 2014, 140 had prior rules (proposed rules or interim rules) that allowed for public comments.
- DOD issued the other 139 rules without prior opportunity for public comment. (See table 1.)
  - Two fiscal years—2010 and 2011—accounted for almost half of all the rules that DOD issued without prior opportunity for public comment during this time period.
    - In fiscal year 2010, DOD issued 31 final and interim rules and technical amendments without prior public comment
    - In fiscal year 2011, DOD issued 34 final and interim rules and technical amendments without prior public comment.

Table 1: DFARS Rules Issued with and without Prior Comment (Fiscal Years 2010-2014)[a]

Type of rule	Fiscal years					Totals
	2010	2011	2012	2013	2014	
Total final rules with prior public notice and comment						**140**
Final rule with prior proposed rule	10	30	14	7	18	**79**
Final rule with prior interim rule	23	14	12	6	6	**61**
Total final and interim rules and technical amendments without prior public notice and comment						**139**
Interim rule	17	15	6	4	7	**49**
Final rule without prior proposed or interim rule	8	12	13	7	9	**49**
Technical amendments	6	7	9	9	10	**41**
Totals	**64**	**78**	**54**	**33**	**50**	**279**

Source: GAO analysis of interim and final DFARS rules and technical amendments issued during fiscal years 2010 through 2014.| GAO-15-423R

Note: [a] This table reflects only those items published in the Rules and Regulations section of the *Federal Register*.

Most Common Justifications for Interim and Final DFARS Rules Published without Prior Public Comment

- DOD published 98 interim or final DFARS rules between fiscal year 2010 and 2014 without prior public comment, and in which the agency included a justification for not providing such opportunity for comment.
  - DOD published 49 interim DFARS rules that did not provide an opportunity for prior public comment due to “urgent and compelling” circumstances. (See table 2.)
    - 29 of the rules cited specific language within the relevant National Defense Authorization Act (NDAA) where Congress directed the changes to the rule. In some of these, little discretion was left to DOD.
    - 20 of the rules cited language within other statutes.
  - DOD published 49 final DFARS rules without prior public comments because these rules were either non-substantive or non-significant.
    - For 45 of these rules, DOD stated that because the rules were non-significant, the agency did not need to request public comments.
    - For the other 4 final rules, DOD stated that because the rules were non-substantive, the agency did not need to request public comments.

Table 2: DOD's Justifications for Issuing Interim and Final DFARS Rules without Public Comment (Fiscal Years 2010-2014)

Justification	Fiscal years					Totals
	2010	2011	2012	2013	2014	
Total "urgent and compelling"						**49**
Non-NDAA related	8	4	3	2	3	**20**
NDAA related	9	11	3	2	4	**29**
Total non-substantive/non-significant						**49**
Non-substantive	0	0	0	0	4	**4**
Non-significant	8	12	13	7	5	**45**
Totals	**25**	**27**	**19**	**11**	**16**	**98**

Source: GAO analysis of the text of interim and final DFARS published between fiscal years 2010 and 2014.| GAO-15-423R

Notes:
NDAA = relevant National Defense Authorization Act
DOD also published 41 final DFARS rules that were technical amendments. According to DOD officials, technical amendments are non-significant, and therefore the agency does not request public comments.

Most Common Justifications for Rules without Prior Comment: "Urgent and Compelling" Circumstances

- Our analysis of the text of the 49 interim DFARS rules in which DOD cited "urgent and compelling" reasons for issuance without prior public comment identified several factors that influenced DOD's decisions to issue this type of rule. A particular rule may have indicated that more than one factor influenced the decision to issue an interim DFARS rule.
    - In 31 of the rules, DOD cited specific language within the statute that required immediate implementation of a defense acquisition requirement.
    - In 22 of the rules, DOD cited that there was the potential for harm to the government or individuals, or for negative impact on small businesses, if the rule's requirements were not implemented immediately.
    - In 17 of the rules, DOD cited short-term effective dates within which to implement the requirements.

Most Common Justifications for Rules without Prior Comment: Non-substantive Final Rules

- Our analysis of the text of the 49 final DFARS rules for which DOD cited no significant effect as the reason for issuance without prior public comment identified two factors that influenced DOD's decisions to issue this type of rule. A particular rule may have indicated that more than one factor influenced the decision to issue a final DFARS rule without public comment.
  - In 46 of the rules, DOD stated that the rule did not have a significant effect beyond DOD's internal operating procedures.
  - For 27 of the rules, DOD stated that there was no significant cost or administrative impact on contractors.
- Specific examples of non-substantive final rules cited by DOD include the following:
  - Decisions of the United States Trade Representative (such as waiving the Buy American Act for products from Armenia),
  - Changes to the list of qualifying countries (recognizing reciprocal defense procurement agreements signed with Poland and the Czech Republic, for example), and
  - Deletion of DFARS text that was moved to the FAR.

Most Common Justifications for Rules without Prior Comment: Technical Amendments

- DFARS technical amendments consist of non-substantive edits, including
  - administrative maintenance;
  - minor edits and corrected information, such as typographical errors, erroneous cross-references, erroneously deleted words, and punctuation errors;
  - corrected clause titles, numbers, and dates;
  - updated office symbols, codes, and telephone numbers;
  - updates to the list of buying activities and removal of references to obsolete materials; and
  - references and hyperlinks to internal processes and guidance material for contracting officer use.

- Final DFARS rules issued as technical amendments might consist of more than one non-substantive edit and might address more than one publication or rule.

- For the 41 DFARS technical amendments published in the *Federal Register* during fiscal years 2010 through 2014, DOD did not include specific justifications for their issuance without prior public comment, nor was it required to do so.

Methods DOD Identified for Promoting Constructive Communication between DOD, the Public, and the Acquisition Industry During Rulemaking

- Although not required to do so by 41 U.S.C. § 1707, we found that DOD provided justifications for determinations of "urgent and compelling" circumstances when publishing interim rules.
- DOD officials also reported receiving communications via letters, emails, and telephone calls. Among other communication techniques identified by DOD officials were the following:
  - A DPAP/DARS email account (available on their web site) used by members of the public, industry, and members of the DOD workforce to ask questions, recommend changes, and provide comments and recommendations.
  - Advanced Notices of Proposed Rulemaking (ANPR) used to receive early public input, typically describing a problem or situation and seeking public comment on potential solutions.
  - DOD's *Federal Register* notices for interim and proposed DFARS rules, which always identify a public comment period; in addition, the public and acquisition industry can always comment on final rules issued without prior comment via the DOD points of contact included in the *Federal Register* notices.
  - Public meetings, which may be appropriate when a decision to adopt, amend, or delete DFARS text is likely to benefit from significant additional views and discussions.
- Based on the relevant criteria and our audit work, we have no specific recommendations for opportunities to improve constructive communication between DOD, the public, and the acquisition industry during rulemaking.

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