



# The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions

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## Summary

The federal government is the largest buyer of goods and services in the world, and executive branch agencies—particularly the Department of Defense—make most of these purchases. Many (although not all) acquisitions by executive branch agencies are subject to the Federal Acquisition Regulation (FAR), which can make the FAR a topic of interest to Members and committees of Congress and their staff. In particular, Members, committees, and staff may find themselves (1) considering or drafting legislation that would amend the FAR to save money, promote transparency, or further other public policies; (2) conducting oversight of executive agencies’ performance in procuring goods and services; and (3) responding to questions from constituents regarding executive branch procurement activities. In addition, certain commentators have recently suggested that some or all FAR provisions should be withdrawn.

The FAR is a regulation, codified in Parts 1 through 53 of Title 48 of the *Code of Federal Regulations*, which generally governs acquisitions of goods and services by executive branch agencies. It addresses various aspects of the acquisition process, from acquisition planning to contract formation, to contract management. Depending upon the topic, the FAR may provide contracting officers with (1) the government’s basic policy (e.g., small businesses are to be given the “maximum practicable opportunity” to participate in acquisitions); (2) any requirements agencies must meet (e.g., obtain full and open competition through the use of competitive procedures); (3) any exceptions to the requirements (e.g., when and how agencies may waive a contractor’s exclusion); and (4) any required or optional clauses to be included, or incorporated by reference, in the solicitation or contract (e.g., termination for convenience). The FAR also articulates the guiding principles for the federal acquisition system, which include satisfying the customer in terms of cost, quality, and timeliness of the delivered goods and services; minimizing operating costs; conducting business with integrity, fairness, and openness; and fulfilling public policy objectives. In addition, the FAR identifies members and roles of the “acquisition team.”

The FAR is the result of a 1979 statute directing the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB) to “issue polic[ies] ... for the purpose of promoting the development and implementation of [a] uniform procurement system.” Partly in response to this directive, the FAR was issued in 1983, and took effect in 1984. It has been revised frequently since then, in response to legislation, executive orders, litigation, and policy considerations. These revisions are generally made by the Administrator of General Services, the Secretary of Defense, and the Administrator of National Aeronautics and Space, acting on behalf of the Federal Acquisition Regulatory Council. However, the Administrator of OFPP also has the authority to amend the FAR in certain circumstances. FAR amendments generally apply only to contracts awarded after the effective date of the amendment.

While the FAR contains the principal rules of the federal acquisition system, it is not the only authority governing acquisitions of goods and services by executive branch agencies. Statutes, agency FAR supplements, other agency regulations, and guidance documents may also apply. In some cases, these sources cover topics not covered in the FAR, and sometimes the FAR addresses topics not expressly addressed in statute or elsewhere. In addition, it is the contract (not the FAR) that binds the contractor, although judicial and other tribunals may read terms required by the FAR into contracts which lack them.

Agencies subject to the FAR may deviate from it in certain circumstances, and agencies or transactions not subject to the FAR may be subject to similar requirements under other authority.

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## Introduction

The federal government is the largest buyer of goods and services in the world,<sup>1</sup> and executive branch agencies—particularly the Department of Defense—make most of these purchases.<sup>2</sup> Many (although not all) acquisitions by executive branch agencies are subject to the Federal Acquisition Regulation (FAR), which can make the FAR a topic of interest to Members and committees of Congress and their staff. In particular, Members, committees, and staff may find themselves

- considering or drafting legislation that would prompt amendment of the FAR to save money, promote transparency, or further other public policies;<sup>3</sup>
- conducting oversight of executive agencies' performance in procuring goods and services, including their compliance with the FAR;<sup>4</sup> and
- responding to questions from constituents regarding executive branch procurement activities.<sup>5</sup>

In addition, the Defense Business Board recently recommended “zero-bas[ing]” the entire acquisition system, apparently including the FAR, to “restor[e] the management of the requirements, acquisition, and budget processes back to the state envisioned by the Packard Commission.”<sup>6</sup> The Packard Commission is the name commonly given to President Reagan’s

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<sup>1</sup> See, e.g., White House, Office of the Press Sec’y, Executive Order: Strengthening Protections against Trafficking in Persons in Federal Contracts, Sept. 25, 2012, at <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe> (characterizing the federal government as the “largest single purchaser of goods and services in the world”).

<sup>2</sup> See, e.g., USASpending.gov, Prime Award Spending Data, at [http://usaspending.gov/index.php?q=node%2F3&fiscal\\_year=2011&tab=By+Agency](http://usaspending.gov/index.php?q=node%2F3&fiscal_year=2011&tab=By+Agency) (reporting that executive branch agencies spent \$536.7 billion on procurement contracts in FY2011); Gov’t Accountability Office, Best Practices: Improved Knowledge of DOD Service Contracts Could Reveal Significant Savings, GAO-03-661, at 4 (June 9, 2003) (“DOD is historically the federal government’s largest purchaser.”).

<sup>3</sup> See, e.g., Oversight and Accountability in Wartime Contracting Act of 2012, H.R. 6360, § 101(a)(1) (“Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the Federal Acquisition Regulation to provide that the contract period of contracts entered into by a covered agency in connection with an overseas contingency operation shall be limited to the contract periods specified.”); Wear American Act, S. 3444, § 2 (“Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation Council shall amend the Federal Acquisition Regulation to require Federal agencies to procure textiles and apparel articles, including components for such articles, that are manufactured in the United States wholly from articles, materials, or supplies mined, produced, or manufactured in the United States.”).

<sup>4</sup> See, e.g., House Committee on Oversight and Government Reform, Subcommittee on Technology, Information Policy, Intergovernmental Relations, and Procurement Reform, Labor Abuses, Human Trafficking, and Government Contracts: Is the Government Doing Enough to Protect Vulnerable Workers? Mar. 27, 2012, at <http://oversight.house.gov/hearing/labor-abuses-human-trafficking-and-government-contracts-is-the-government-doing-enough-to-protect-vulnerable-workers>; Senate Committee on Homeland Security and Governmental Affairs, Ad Hoc Subcommittee on Contracting Oversight, Veteran Employment and Government Contractors, June 5, 2012, at <http://www.hsgac.senate.gov/subcommittees/contracting-oversight/hearings/veterans-employment-and-government-contractors>.

<sup>5</sup> Cf. CRS Report RS22536, *Overview of the Federal Procurement Process and Resources*, by L. Elaine Halchin.

<sup>6</sup> Defense Business Board, *Linking and Streamlining the Defense Requirements, Acquisition, and Budget Processes*, FY12-02 Report to the Secretary of Defense, at 13, at [http://dbb.defense.gov/pdf/FY12-02\\_Linking\\_and\\_Streamlining\\_the\\_Def\\_Req\\_Acq\\_and\\_Budget\\_Processes.pdf](http://dbb.defense.gov/pdf/FY12-02_Linking_and_Streamlining_the_Def_Req_Acq_and_Budget_Processes.pdf). See also Kenneth B. Weckstein and Aidan J. Delgado, *Serious about Torching the FAR, or Just Overheated Rhetoric?*, 98 *Fed. Cont. Rep.* 349 (Sept. 18, 2012).

1986 Blue Ribbon Commission on Defense. The commission is generally credited with seeking to “link and streamline” the requirements, acquisition, and budget processes, thereby “reducing complexities, regulations, and processes, and enhancing accountability as well as recruiting experienced personnel with strong management credentials.”<sup>7</sup>

This report provides answers to 25 frequently asked questions regarding the FAR. These questions and their answers are organized into six broad categories, including (1) what the FAR is and what it covers; (2) promulgation of the FAR; (3) the relationship between the FAR and other authorities governing federal procurement (e.g., statutes, agency FAR supplements, other regulations, policies); (4) the FAR in relation to Congress and judicial and other tribunals; (5) the relationship between the FAR and federal procurement contracts; and (6) other topics.

## **The FAR and What It Covers**

This section includes questions and answers that broadly address what the FAR is and what it covers, including where the text of the FAR can be found; what agencies are subject to the FAR; what purchases are subject to the FAR; and what transactions fall outside the FAR’s coverage.

### **What Is the Federal Acquisition Regulation?**

The FAR is a regulation, codified in Parts 1 through 53 of Title 48 of the *Code of Federal Regulations* (CFR).<sup>8</sup> As is discussed in more detail below (see “What Does the FAR Cover?”), each part of the FAR, such as Part 37—Service Contracting, is divided into subparts (e.g., Subpart 37.1, Service Contracts—General). Subparts are divided into sections (FAR 37.113, Severance payments to foreign nationals), which may be divided into subsections (Section 37.113-2, Solicitation provision and contract clause). The FAR also contains standard solicitation provisions and contract clauses (Part 52) and forms (Part 53).

The various agency FAR supplements, codified in Chapters 2 through 63 of Title 48, and the Cost Accounting Standards (CAS), codified in Chapter 99 of Title 48, are not part of the FAR, although they can play a significant role in the acquisition process. “What Is the Relationship Between the FAR and Agency FAR Supplements?” below, discusses in more detail the relationship between the FAR and agency FAR supplements, such as the Defense Federal Acquisition Regulation Supplement (DFARS).

### **Where Can I Find the FAR?**

The FAR is available in print from the Government Printing Office as part of the *Code of Federal Regulations*, or from private publishers. However, it is arguably most conveniently accessed online, where it is available in either PDF or HTML format, at <https://www.acquisition.gov/FAR/>, or as Title 48 of the CFR at <http://ecfr.gpoaccess.gov/>, or at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

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<sup>7</sup> Linking and Streamlining the Defense Requirements, Acquisition, and Budget Processes, *supra* note 6.

<sup>8</sup> An accepted format for citing a section of the FAR is “FAR [section number].” When citing the *Code of Federal Regulations*, an accepted format is “[number of title] C.F.R. § [section number].”

## What Agencies Are Subject to the FAR?

The FAR applies to certain purchases, discussed below (see “What Purchases Are Subject to the FAR?”), by executive branch agencies, which the FAR defines to mean

executive department[s], ... military department[s], or any independent establishment[s] within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation[s] within the meaning of 31 U.S.C. 9101.<sup>9</sup>

However, although the FAR applies to executive branch agencies, it does not necessarily apply to all executive branch agencies, or to all organizational components of a particular executive branch agency.<sup>10</sup> Exceptions include, for example, the Federal Aviation Administration (FAA), which Congress has authorized to establish its own acquisition system,<sup>11</sup> and the U.S. Mint.<sup>12</sup>

The FAR does not apply to legislative branch agencies or judicial branch agencies, although agencies in the other branches of government (or otherwise not subject to the FAR) may adopt the FAR as a matter of policy, or promulgate or otherwise be subject to requirements like those in the FAR. For example, the Library of Congress, a legislative branch agency, has stated that it is Library policy to follow the FAR, unless it is determined that a deviation would “be in the best interest of the Library.”<sup>13</sup> See also “Could an Agency or Transaction Not Subject to the FAR Be Subject to Requirements Like Those in the FAR?,” below.

The FAR does not directly regulate federal contractors or would-be federal contractors, although such vendors are affected by the application of the FAR’s definitions, policies, procedures, and requirements by contracting officers. For example, the FAR provides policies and procedures related to types of contracts, subcontracting, contract termination, and payments to contractors. See also “What Is the Relationship Between the FAR and a Federal Contract?” and “What Happens If Required Contract Clauses Are Not Included in a Particular Contract?,” below.

## What Purchases Are Subject to the FAR?

As noted previously (see “What Agencies Are Subject to the FAR?”), executive branch agencies are generally subject to the FAR when making certain purchases. Namely, the FAR applies to *acquisitions* of *supplies* (or goods) and *services* with *appropriated funds* by most (although not all) executive branch agencies.<sup>14</sup> Each of these terms—acquisitions, appropriated funds, supplies,

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<sup>9</sup> 48 C.F.R. § 2.101(b).

<sup>10</sup> When it was established, the Transportation Security Administration (TSA) was authorized to use the FAA’s Acquisition Management System in lieu of the FAR. See Aviation and Transportation Security Act, P.L. 107-71, § 101(a), 115 Stat. 597-604 (Nov. 19, 2001) (formerly codified at 49 U.S.C. § 114(o)). However, in 2008, legislation was enacted that removed the statutory provision which exempted TSA from the FAR and permitted it to follow FAA’s acquisition system. See Consolidated Appropriations Act of 2008, P.L. 110-161, § 568, 121 Stat. 2092 (Dec. 26, 2007) (striking Section 114(o)).

<sup>11</sup> See Department of Transportation and Related Agencies Appropriations Act for FY1996, P.L. 104-50, § 348, 109 Stat. 460-61 (Nov. 15, 1995) (directing the Administrator of the Federal Aviation Administration to develop and implement an acquisition system for the FAA).

<sup>12</sup> See 31 U.S.C. § 5136 (stating that “provisions of law governing procurement or public contracts shall not be applicable to the procurement of goods or services necessary for carrying out [U.S.] Mint programs and operations”).

<sup>13</sup> Library of Congress Regulation (LCR) 2110, § 3, at [http://www.loc.gov/staff/ogc/legal\\_ref/lcr/2100/2110.html](http://www.loc.gov/staff/ogc/legal_ref/lcr/2100/2110.html).

<sup>14</sup> FAR, “Foreword,” at <https://www.acquisition.gov/FAR/current/pdf/FAR.pdf>.

and services—has a specific meaning for purposes of the FAR, which can influence whether the FAR is applicable to particular transactions.

For purposes of the FAR, *acquisition* means

the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.<sup>15</sup>

*Appropriated funds* are “funds paid out of the United States Treasury” that are charged “to an appropriation provided by or derived from an act of Congress.” An *appropriation* is “[a]uthority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes.”<sup>16</sup>

*Supplies* means

all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing.<sup>17</sup>

Other examples of supplies include office furniture, cameras and audio-visual equipment, information technology and communications equipment, cleaning products and tools, uniforms, and musical instruments.

Generally, *services* refers to tasks performed by a contractor. More specifically, a *service contract* means “a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.” The FAR identifies the following as examples of areas in which service contracts may be found:

- (1) [m]aintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- (2) [r]outine recurring maintenance of real property.
- (3) [h]ousekeeping and base services.
- (4) [a]dvisory and assistance services.
- (5) [o]peration of Government-owned equipment, real property, and systems.
- (6)

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<sup>15</sup> 48 C.F.R. § 2.101(b).

<sup>16</sup> Office of the General Counsel, U.S. Gov’t Accountability Office, *Principles of Federal Appropriations Law*, Vol. 1, at 2-4 to 2-5 (3d ed., 2004), at <http://www.gao.gov/assets/210/202437.pdf>. *But see* Int’l Line Builders, B-227811 (Oct. 8, 1987) (rejecting the Bonneville Power Administration’s argument that it was not subject to the FAR because it did not use appropriated funds on the grounds that funds available to an agency, regardless of their private source, are considered appropriated funds when they are made available for collection and expenditure pursuant to specific statutory authority); USA Fabrics, Inc., B-295737, B-295737.2 (Apr. 19, 2005) (finding that GAO’s bid protest jurisdiction, which is discussed in the FAR, is not based on the expenditure of appropriated funds, but rather turns upon whether the procurement at issue is being conducted by a “federal agency,” as that term is defined in the Competition in Contracting Act).

<sup>17</sup> 48 C.F.R. § 2.101(b).

[c]ommunications services. (7) [a]rchitect-[e]ngineering .... (8) [t]ransportation and related services .... (9) [r]esearch and development.<sup>18</sup>

## What Transactions Fall Outside the FAR's Coverage?

Certain transactions, by their nature, are not subject to the FAR. Notable examples of such transactions are

- any agency contract or agreement that is not a *procurement contract* (i.e., not a contract that uses appropriated funds to acquire property or services for the direct use of the United States), including *other transactions* (i.e., non-procurement contracts that authorized agencies may use for research and/or development of prototypes);<sup>19</sup>
- grants and cooperative agreements;<sup>20</sup>
- contracts with third parties entered into by persons using federal funds from a grant, cooperative agreement, or other federal financial assistance;<sup>21</sup>
- purchases or leases of real property;<sup>22</sup> and
- transactions where Congress has authorized a government entity to acquire goods or services “notwithstanding any other provision of law.”<sup>23</sup>

*Subcontracts* under federal contracts (i.e., contracts with third parties entered into by federal contractors) are also not subject to the FAR. In some cases, the FAR requires agencies to include terms in their prime contracts obligating their contractors to “flow down” certain requirements to subcontractors,<sup>24</sup> so that subcontractors may be subject to certain requirements like those in the FAR as terms of their contracts. However, not all requirements flow down, and certain FAR provisions that pertain primarily to the conduct of procurements by executive branch agencies are inapplicable to subcontractors. For example, although federal agencies are generally required to provide for “full and open competition” in the selection of contractors, agency contractors are

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<sup>18</sup> 48 C.F.R. § 37.101.

<sup>19</sup> Several agencies, including the National Aeronautics and Space Administration (NASA), Department of Defense (DOD), and Department of Homeland Security (DHS), have statutory authority to enter into what are known as *other transactions* (OTs). Generally, agencies with OT authority use OTs for research and development purposes, or prototype development. OTs are not subject to the FAR because the FAR “applies to all acquisitions as defined in Part 2 of the FAR,” and no definition of *other transaction* appears in Part 2. For more on OTs, see generally CRS Report RL34760, *Other Transaction (OT) Authority*, by L. Elaine Halchin.

<sup>20</sup> See generally 31 U.S.C. §§ 6303-6305 (discussing the differences between procurement contracts, grants, and cooperative agreements, including when agencies should use each of these vehicles).

<sup>21</sup> In some cases, statutes or regulations govern at least some of the terms of contracts entered into with third parties by grant recipients. See “Could an Agency or Transaction Not Subject to the FAR Be Subject to Requirements Like Those in the FAR?” below.

<sup>22</sup> See *supra* note 17 and accompanying text (excluding land and interests in land from the definition of “supplies”).

<sup>23</sup> See, e.g., 33 U.S.C. § 891d(b) (authorizing the National Oceanic and Atmospheric Administration (NOAA) to enter multiyear contracts for oceanographic research, fisheries research, and mapping and charting services to assist in fulfilling NOAA missions “[n]otwithstanding any other provision of law”).

<sup>24</sup> See, e.g., 48 C.F.R. § 52.214-26(e) (“The Contractor shall insert a clause containing all the provisions of this clause [regarding audits and records] ... in all subcontracts expected to exceed the threshold in FAR 15.403-4(a)(1) for submission of certified cost or pricing data.”).

generally not required to provide for “full and open competition” in the selection of subcontractors.<sup>25</sup>

## **What Does the FAR Cover?**

The various parts of the FAR contain somewhat different types of information, as illustrated below. In particular, Parts 1 through 51 establish policies, requirements, exceptions, practices, and procedures to guide members of the acquisition workforce in performing their responsibilities, while Parts 52 and 53 provide standard solicitation and contract clauses and forms. In addition, while much of the FAR is arguably process oriented (e.g., specifying how agencies may obtain full and open competition), the opening sections of the FAR articulate “guiding principles” for the federal acquisition system that arguably inform all other sections of the FAR and federal procurement generally (e.g., satisfying the customer, minimizing administrative operating costs).

### **Parts 1 to 51**

Contracting officers and other members of the acquisition workforce rely on the FAR for guidance on a wide range of topics, including acquisition planning, publicizing contract actions, required sources of supplies and services, and types of contracts.<sup>26</sup> Additionally, the FAR provides definitions of words and terms used in government procurement.<sup>27</sup>

Depending upon the topic, the FAR may provide contracting officers with the government’s basic policy, any requirements that agencies must meet, and any exceptions to these requirements. For example, Subpart 6.1 of the FAR articulates that, as a matter of policy, “contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts,”<sup>28</sup> and identifies acceptable procedures for full and open competition (e.g., sealed bidding, competitive proposals).<sup>29</sup> Subpart 6.3, in turn, identifies the circumstances in which other than full and open competition is permitted (e.g., only one responsible source, urgent and compelling circumstances). It also specifies the procedures and requirements for using other than full and open competition (e.g., contracting officers are generally required to justify their decision

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<sup>25</sup> *But see* 48 C.F.R. § 44.204(c) (generally requiring contracting officers to include the clause at 52.244-5 in cost-type or cost-priced contracts valued in excess of the simplified acquisition threshold entered into via negotiated procurement); 48 C.F.R. § 52.244-5(a) (“The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.”).

<sup>26</sup> *See* Parts 7, 5, 8, and 16 of Title 48 of the *Code of Federal Regulations* (CFR), respectively.

<sup>27</sup> *See* Part 2 of the FAR. In some cases, additional, or context-specific, definitions are given in other parts of the FAR, including the standard solicitation or contract clauses. *See, e.g.*, 48 C.F.R. § 9.301 (defining “approval” for purposes of the FAR provisions on first article testing and approval); 48 C.F.R. § 52.204-3 (defining “common parent” for purposes of the clause regarding taxpayer identification).

<sup>28</sup> 48 C.F.R. § 6.101(a).

<sup>29</sup> 48 C.F.R. § 6.102. The term *full and open competition* refers to acquisitions where “all responsible sources are permitted to submit sealed bids or competitive proposals.” 41 U.S.C. § 107. *Sealed bidding* “is a method of contracting that employs competitive bids, public opening of bids, and awards.” 48 C.F.R. § 14.101. Competitive proposals may be used when sealed bids are not appropriate, such as instances where it is necessary to conduct discussions with offerors relative to proposed contracts. 48 C.F.R. § 6.401(b). Other competitive procedures include awards resulting from a “broad agency announcement that is general in nature identifying areas of research interest, including criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the Government’s needs.” 48 C.F.R. § 6.102(d)(2).

to use other than full and open competition, and obtain approval from a higher-ranking agency official).

In other cases, the FAR articulates general standards that agencies are to consider in making certain determinations, or the grounds upon which agencies may take certain actions. Thus, Part 9 of the FAR—which addresses “contractor qualifications”—specifies the “general standards” that contracting officers must consider when determining whether prospective contractors are responsible. It similarly describes the grounds upon which agency suspension and debarment officials may exclude persons from federal contracting for a temporary or fixed period. Other provisions of Part 9 describe how contracting officers may (or, in some cases, must) obtain information for use in making determinations regarding contractor qualifications (e.g., preaward surveys, the Federal Awardee Performance and Integrity Information System (FAPIIS), and the Excluded Parties List System (EPLS)).

Yet other provisions articulate the responsibilities of various agency personnel in administering the contract. Contract administration may include a variety of tasks and responsibilities depending on, for example, the type of contract and the goods or services acquired. Part 42 of the FAR provides guidance for contracting officers and other members of the acquisition team regarding audits, postaward orientations for contractors, production surveillance and reporting, and collection of contractor performance information, among other things. Additionally, a detailed list of 71 specific contract administration functions may be found in Section 42.302, which is to be used by the contract administration officer (CAO).

## **Parts 52 and 53**

Parts 52 and 53 differ from the other parts of the FAR in that they provide agencies with standard provisions and clauses to be included, or incorporated by reference, in the solicitation or contract, as well as forms for use during the acquisition process. Part 52 contains solicitation provisions and contract clauses prescribed elsewhere in the FAR. Each provision and clause has its own unique identification number.<sup>30</sup> For example, the following provision is included in solicitations that involve an Office of Management and Budget (OMB) Circular A-76 standard competition:<sup>31</sup>

(a) This solicitation is part of a standard competition under Office of Management and Budget Circular No. A-76 (Revised), Performance of Commercial Activities, dated May 29, 2003 (hereafter “the Circular”), to determine whether to accomplish the specified work under contract or by Government performance.

(b) The Government will evaluate private sector offers, the agency tender, and public reimbursable tenders, as provided in this solicitation and the Circular.

(c) A performance decision resulting from this standard competition will be publicly announced in accordance with the Circular.

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<sup>30</sup> Each identification number corresponds to the subpart of the FAR in which the provision or clause is prescribed. Subpart 52.3 of the FAR contains a matrix that lists the unique identification number for each provision or clause and the principle contract types and purposes to which it applies.

<sup>31</sup> Circular A-76 provides the policy and procedures for, among other things, conducting public-private competitions involving federal agencies and private contractors. The circular is available at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a076/a76_incl_tech_correction.pdf).

(d) As provided in the Circular, directly interested parties may file contests, which are governed by the procedures in Federal Acquisition Regulation 33.103. Until resolution of any contest, or the expiration of the time for filing a contest, only legal agents for directly interested parties shall have access to the certified standard competition form, the agency tender, and public reimbursable tenders.<sup>32</sup>

Part 53 contains standard, optional, and agency-prescribed acquisition forms, such as Standard Form 30, “Amendment of Solicitation/Modification of Contract”; Optional Form 312, “Small Disadvantaged Business (SDB) Participation Report”; and DOD Form DD 254, “Department of Defense, Contract Security Classification Specification.”<sup>33</sup>

### **Federal Acquisition Regulation**

#### **General Structure and Parts**

Part 1—Federal Acquisition Regulations System  
Part 2—Definitions of Words and Terms  
Part 3—Improper Business Practices and Personal Conflicts of Interest  
Part 4—Administrative Matters  
Part 5—Publicizing Contract Actions  
Part 6—Competition Requirements  
Part 7—Acquisition Planning  
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Part 10—Market Research  
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Part 14—Sealed Bidding  
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Part 19—Small Business Programs  
Part 20—Reserved  
Part 21—Reserved  
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Part 23—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace  
Part 24—Protection of Privacy and Freedom of Information  
Part 25—Foreign Acquisition  
Part 26—Other Socioeconomic Programs  
Part 27—Patents, Data, and Copyrights  
Part 28—Bonds and Insurance  
Part 29—Taxes  
Part 30—Cost Accounting Standards Administration  
Part 31—Contract Cost Principles and Procedures  
Part 32—Contract Financing  
Part 33—Protests, Disputes, and Appeals  
Part 34—Major System Acquisition  
Part 35—Research and Development Contracting  
Part 36—Construction and Architect-Engineer Contracts  
Part 37—Service Contracting  
Part 38—Federal Supply Schedule Contracting

<sup>32</sup> 48 C.F.R. § 52.207-1.

<sup>33</sup> 48 C.F.R. §§ 53.301-53.303.

Part 39—Acquisition of Information Technology  
Part 40—Reserved  
Part 41—Acquisition of Utility Services  
Part 42—Contract Administration and Audit Services  
Part 43—Contract Modifications  
Part 44—Subcontracting Policies and Procedures  
Part 45—Government Property  
Part 46—Quality Assurance  
Part 47—Transportation  
Part 48—Value Engineering  
Part 49—Termination of Contracts  
Part 50—Extraordinary Contractual Actions and the Safety Act  
Part 51—Use of Government Sources by Contractors  
Part 52—Solicitation Provisions and Contract Clauses  
Part 53—Forms

## **Guiding Principles for the Federal Acquisition System**

In addition to providing procedures and requirements that, collectively, make up the procurement process, discussed above, the FAR also articulates guiding principles for the federal acquisition system (which includes performance standards), and describes the federal acquisition team and its roles and responsibilities. According to the FAR, the overarching vision of the acquisition system “is to deliver on a timely basis the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives.”<sup>34</sup> In brief, the four performance standards are

- (a) [s]atisfy the customer in terms of cost, quality, and timeliness of the delivered product or service[;]
- (b) [m]inimize administrative operating costs[;]
- (c) [c]onduct business with integrity, fairness, and openness[; and]
- (d) [f]ulfill public policy objectives.<sup>35</sup>

Agency personnel—including “representatives of the technical, supply, and procurement communities” and “the customers they serve”—and contractors make up the acquisition team.<sup>36</sup> Government members of the team “must be empowered to make acquisition decisions within their areas of responsibility ... [possess] the authority to make decisions ... and be prepared to perform the functions and duties assigned.” The contractor is also encouraged to be prepared.<sup>37</sup>

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<sup>34</sup> 48 C.F.R. § 1.102(a).

<sup>35</sup> 48 C.F.R. § 1.102-2(a)-(d) (emphases, in original, deleted).

<sup>36</sup> 48 C.F.R. § 1.102(c).

<sup>37</sup> 48 C.F.R. § 1.102-4(1)-(c).

## Promulgation of the FAR

The questions and answers in this section address the promulgation of the FAR, including the origins of the FAR; the process by which the FAR is amended; who typically promulgates regulations amending the FAR; the roles of the Office of Federal Procurement Policy (OFPP) and the Office of Management and Budget (OMB) in revising and implementing the FAR; and how long it generally takes to amend the FAR.

### How Did the FAR Originate?

Prior to the establishment of the FAR system and the initial publication of the FAR, two primary procurement regulations existed: the Federal Procurement Regulations (FPR) and the Defense Acquisition Regulation (DAR).<sup>38</sup> Generally, the FPR applied to civilian agencies and the DAR applied to the Department of Defense (DOD) and its components, although the then-Atomic Energy Commission (AEC), Central Intelligence Agency (CIA), National Aeronautics and Space Administration (NASA), Tennessee Valley Authority (TVA), and Bonneville Power Administration, among others, each had “semiautonomous procurement regulations.”<sup>39</sup> The proliferation of agency procurement regulations was such that, in its 1972 report, the Commission on Government Procurement stated that it had found “a burdensome mass and maze of procurement and procurement-related regulations” within the federal government, and “no effective overall system for coordinating, controlling, and standardizing regulations.”<sup>40</sup>

The commission’s report provided an impetus for bringing order to the “mass and maze” of procurement regulations. Notably, Congress enacted the Office of Federal Procurement Policy Act Amendments of 1979 (P.L. 96-83), which amended the Office of Federal Procurement Policy Act (P.L. 93-400) to authorize the Administrator of the Office of Federal Procurement Policy (OFPP), with the concurrence of the Director of the Office of Management and Budget (OMB), to “issue policy directives ... for the purpose of promoting the development and implementation of the uniform procurement system.”<sup>41</sup> Subsequently, OFPP released Policy Letter 80-5. This document effectively established the “Federal Acquisition Regulation System” and stated that the system would include, among other things, “[a] single Federal Acquisition Regulation (FAR), to be issued jointly by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities” under the Federal Property and Administrative Services Act, the Armed Services Procurement Act, and the National Aeronautics and Space Act.<sup>42</sup>

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<sup>38</sup> The Armed Services Procurement Regulation (ASPR) was renamed the Defense Acquisition Regulation in 1978.

<sup>39</sup> Comm’n on Gov’t Procurement, *Report of the Commission on Government Procurement*, Vol. 1, at 33 (1972).

<sup>40</sup> *Id.* at 31.

<sup>41</sup> P.L. 93-400, § 6(h), as amended by P.L. 96-83, § 4(e), 93 Stat. 650 (Oct. 10, 1979). Additionally, “[t]he policy directives shall be followed by executive agencies.” *Id.*

<sup>42</sup> U.S. Office of Mgmt. & Budget, *Federal Acquisition Regulation System; Other Procurement Rules and Regulations*, 45 Fed. Reg. 48076 (July 17, 1980).

The FAR was published initially on September 19, 1983, and took effect on October 1, 1984.<sup>43</sup> It has been periodically amended since then, as discussed below (see “Who Typically Promulgates Regulations Amending the FAR?” and “How Is the FAR Amended?”).

## **How Is the FAR Amended?**

The FAR was initially promulgated—and has subsequently been amended—using the same rulemaking procedures used in promulgating other regulations. In short, the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA), acting on behalf of the Federal Acquisition Regulatory Council (FAR Council), or the Administrator of the Office of Federal Procurement Policy (OFPP), as discussed below (see “Who Typically Promulgates Regulations Amending the FAR?”), issue proposed and final rules amending the FAR under the “notice-and-comment” procedures of the Administrative Procedure Act (APA).<sup>44</sup> The APA established four basic requirements agencies must follow when issuing rules using notice-and-comment, or informal, rulemaking.<sup>45</sup> These four steps are

1. the publication of a proposed rule in the *Federal Register*;
2. the opportunity for interested persons to submit comments on the proposed rule;
3. publication of a final rule that includes a “concise general statement” of the “basis and purpose” of the rule; and
4. a 30-day waiting period after the final rule is published in the *Federal Register* before the rule can take effect.<sup>46</sup>

If necessary, agencies can invoke a “good cause” exception to some of these requirements. One particular application of the “good cause” exception is the use of interim final rulemaking. If an agency finds that notice and comment would be “impracticable, unnecessary, or contrary to the public interest,” the agency may issue a rule without prior notice and comment and instead take post-promulgation comments.<sup>47</sup> The agency may choose to revise the rule in light of the post-promulgation comments it receives.

In addition to the APA, there are a number of executive orders and other statutes that may be applicable to the rulemaking process (for example, Executive Order 12866, the Regulatory

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<sup>43</sup> Dep’t of Def., Gen. Servs. Admin., and Nat’l Aeronautics & Space Admin., Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42102 (Sept. 19, 1983).

<sup>44</sup> 5 U.S.C. § 553. The APA has governed the rulemaking process since its passage in 1946 and provides the most long-standing and broadly applicable federal rulemaking requirements. 5 U.S.C. §§ 551 *et seq.* It defines “rulemaking” as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). In other words, if an agency is changing an existing rule or repealing an existing rule, it is required to follow the same procedures as if it were issuing a new rule. For an overview of the rulemaking process and other rulemaking requirements, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

<sup>45</sup> The APA also lays out procedures for formal rulemaking, in which trial-like hearings are required before agencies may promulgate rules. Formal rulemaking is used infrequently, however, and informal rulemaking is much more common.

<sup>46</sup> 5 U.S.C. § 553.

<sup>47</sup> 5 U.S.C. § 553(b)(B).

Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Act, and the Congressional Review Act all have additional requirements agencies must follow when promulgating rules).<sup>48</sup>

## Who Typically Promulgates Regulations Amending the FAR?

The *Federal Register* notices proposing or announcing amendments to the FAR are jointly issued by the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA).<sup>49</sup> These three agencies issue the *Federal Register* notices, in part, because federal statutes and regulations task the heads of these agencies with “jointly issu[ing] and maintain[ing] ... a single Government-wide procurement regulation, to be known as the Federal Acquisition Regulation.”<sup>50</sup> However, the amendments proposed and announced by DOD, GSA, and NASA have been arrived at by means of and with the concurrence of the Federal Acquisition Regulatory Council (FAR Council). This council—which consists of the Administrator of OFPP, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services, or their designees (see “What Roles Do OFPP and OMB Play in Revising and Implementing the FAR?”)<sup>51</sup>—is also tasked by statute with certain responsibilities as to the FAR. Specifically, the council is to “assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government,”<sup>52</sup> as well as “manage, coordinate, control, and monitor the maintenance of, issuance of, and changes in, the Federal Acquisition Regulation.”<sup>53</sup>

In practice, the FAR Council operates by referring potential changes to the FAR to one or more standing “FAR teams,” each of which is responsible for maintaining specific parts of the FAR.<sup>54</sup> Each team is created by the FAR Council, and is composed of representatives from military and

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<sup>48</sup> See generally CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

<sup>49</sup> See, e.g., Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation: United States-Korea Free Trade Agreement, 77 Fed. Reg. 56739 (Sept. 13, 2012) (amending parts 4, 25, and 52 of the FAR in response to the United States-Korea Free Trade Agreement).

<sup>50</sup> 41 U.S.C. § 1303(a)(1) (“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 ... shall jointly issue and maintain in accordance with subsection (d) a single Government-wide procurement regulation, to be known as the [FAR].”). See also 45 Fed. Reg. at 48076 *et seq.*

<sup>51</sup> 41 U.S.C. § 1302(b)(1)-(2).

<sup>52</sup> 41 U.S.C. § 1302(a).

<sup>53</sup> 41 U.S.C. § 1303(d). In addition, a number of statutes have specifically tasked the FAR Council with implementing particular amendments to the FAR. See, e.g., Sudan Accountability and Divestment Act, P.L. 110-174, § 6(d), 121 Stat. 2521 (Dec. 31, 2007) (“Not later than 120 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the Federal Acquisition Regulation ... to provide for the implementation of the requirements of this section.”); Energy Independence and Security Act, P.L. 110-140, § 433(c), 121 Stat. 1614 (Dec. 19, 2007) (“Not later than 2 years after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to require Federal officers and employees to comply with this section and the amendments made by this section in the acquisition, construction, or major renovation of any facility. The members of the Federal Acquisition Regulatory Council ... shall consult with the Federal Director and the Commercial Director before promulgating regulations to carry out this subsection.”).

<sup>54</sup> For additional information on the structure and responsibilities of the FAR Teams, see the “FAR Operating Guide,” at <http://www.acq.osd.mil/dpap/dars/far/attachments/FAR%20Operating%20Guide%20Version%203.pdf>.

civilian agencies and advisory representatives from OFPP.<sup>55</sup> The FAR teams are directed by the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DAR Council), and their activities are coordinated to ensure agreement and cooperation between civilian and defense acquisition personnel.<sup>56</sup> The relevant FAR team drafts and submits potential FAR amendments to the CAAC and the DAR Council for review. After the councils have reviewed a potential FAR amendment, they submit it to OFPP and OIRA for additional review. These are then sent to the FAR signatories within GSA, DOD, and NASA for approval before being published as proposed, interim final, or final rules in the *Federal Register*.

The Administrator of OFPP is also authorized to amend the FAR on his or her own if he or she determines that GSA, DOD, and NASA “are unable to agree on or fail to issue Government-wide regulations.”<sup>57</sup> In practice, the Administrator of OFPP appears to have seldom exercised this authority after the initial promulgation of the FAR. However, the Administrator has periodically issued policy letters and notices pertaining to federal procurement, as discussed below (see “Does the FAR Include All the Government’s Procurement Policies?”).<sup>58</sup>

Congress does not itself amend the FAR, although it could enact legislation that could prompt the executive branch to amend the FAR. See “What Can Congress Do to Prompt Amendment of the FAR?,” below.

## **What Roles Do OFPP and OMB Play in Revising and Implementing the FAR?**

The Office of Federal Procurement Policy (OFPP) provides overall direction for the government-wide procurement policies, regulations, procedures, and forms for executive agency acquisitions that make up the FAR.<sup>59</sup> The Administrator for Federal Procurement Policy is responsible for

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<sup>55</sup> See Memorandum from Robert A. Burton, Associate Administrator of OFPP, to Federal Acquisition Council Senior Agency Procurement Executives, “Revised FAR Process,” March 11, 2004. Also see testimony of David Drabkin, Acting Chief Acquisition Officer, U.S. General Services Administration, before U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Government Management, Organization, and Procurement, H.R. 5712, Close the Contractor Fraud Loophole Act, and H.R. 5787, Federal Real Property Disposal Enhancement Act, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 15, 2008.

<sup>56</sup> The CAAC and the DAR Council are made up of senior procurement officials, and the two Councils assist in the development of changes to the FAR. Subpart 1.2 of the FAR states that “revisions to the FAR will be prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulations Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council).” 48 C.F.R. § 1.201-1(a).

<sup>57</sup> 41 U.S.C. § 1121(d). As is discussed in greater detail below (see “What Roles Do OFPP and OMB Play in Revising and Implementing the FAR?”), the Administrator of OFPP may also, with the concurrence of the Director of OMB, deny the promulgation of or rescind any government-wide regulation, or final rule or regulation of an executive agency relating to procurement, if the Administrator determines that the rule or regulation is inconsistent with any policies, regulations, or procedures of the FAR. 41 U.S.C. § 1121(e).

<sup>58</sup> See, e.g., Exec. Office of the President, Office of Mgmt. & Budget, Office of Federal Procurement Pol’y, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Sept. 12, 2011). OFPP periodically promulgates regulations amending the Cost Accounting Standards in Part 99 of Title 48 of the *Code of Federal Regulations*. See, e.g., Exec. Office of the President, Office of Mgmt. & Budget, Office of Federal Procurement Pol’y, Cost Accounting Standards: Elimination of the Exemption from Cost Accounting Standards for Contracts and Subcontracts Executed and Performed Entirely Outside the United States, Its Territories, and Possessions, 76 Fed. Reg. 49365 (Aug. 10, 2011). However, Part 99 of Title 48 is not part of the FAR, as noted above (see “What Is the Federal Acquisition Regulation?”).

<sup>59</sup> 41 U.S.C. § 1121. The Office of Federal Procurement Policy (OFPP) was established, as part of the Office of (continued...)

directing the development of the procurement policies that are implemented, in part, by the FAR. The Administrator also establishes procedures to ensure that executive agencies are complying with the FAR.

In addition, the Administrator serves as the chair of the Federal Acquisition Regulatory Council (FAR Council), which “assist[s] in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities.”<sup>60</sup> The Secretary of Defense, Administrator of the National Aeronautics and Space Administration (NASA), and Administrator of the General Services Administration (GSA) are the other members of the FAR Council. In the event that these three members are unable to reach agreement regarding revisions to the FAR, the Administrator of OFPP has the authority to prescribe certain revisions without their concurrence,<sup>61</sup> as discussed above (see “Who Typically Promulgates Regulations Amending the FAR?”).

The Office of Management and Budget (OMB) provides oversight and review of proposed changes and amendments to the FAR. These responsibilities are largely carried out by OMB’s Office of Information and Regulatory Affairs (OIRA). Rules amending the FAR are subject to the same rulemaking requirements that are applicable to executive agencies, which typically include review by OIRA. Both OFPP and OIRA review proposed changes to the FAR to ensure that they are consistent with the law and policies of the Administration. The Administrator of OFPP, in concurrence with the Director of OMB, may deny or rescind any government-wide regulation or final rule of any executive agency relating to procurement if the Administrator determines that the regulation or rule is inconsistent with the policies, regulations, or procedures issued pursuant to the FAR.<sup>62</sup>

## **How Long Does It Take to Amend the FAR?**

Depending upon how the regulation is promulgated (see “How Is the FAR Amended?”), the number of comments received upon a proposed change, and other factors, the process of amending the FAR can take anywhere from months to years (and, in some cases, a change is proposed, but not finalized).<sup>63</sup> The FAR amendment could potentially take longer than any period prescribed in statute for the amendment, where amendment is required by statute.<sup>64</sup> However, rules generally have the force of law even if they are enacted after any statutory deadline for their promulgation.<sup>65</sup> Moreover, while agencies could potentially be compelled to take action in certain

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Management and Budget (OMB), in 1974 by the Office of Federal Procurement Policy Act (P.L. 93-400).

<sup>60</sup> 41 U.S.C. § 1303(d). The FAR Council was established by the Office of Federal Procurement Policy Act Amendments of 1988 (P.L. 100-679).

<sup>61</sup> 41 U.S.C. § 1121(d).

<sup>62</sup> 41 U.S.C. § 1121(e).

<sup>63</sup> See, e.g., Deborah Billings, *USDA Drops Plan to Fast-Track Rule on Contractor Labor Law Compliance*, 97 *Fed. Cont. Rep.* 85 (Jan. 31, 2012) (reporting that the Department of Agriculture had withdrawn a rule, originally scheduled to take effect on February 28, 2012, that would have required contractors to certify their compliance with labor laws).

<sup>64</sup> See, e.g., *Small Business Jobs Act*, P.L. 111-240, § 1334, 124 Stat. 2542-43 (Sept. 27, 2010) (requiring that the FAR be amended, “[n]ot later than 1 year after the date of enactment,” to address certain matters pertaining to prime contractors’ payment of small business subcontractors). This amendment had not been made as of October 24, 2012.

<sup>65</sup> See, e.g., *Barnhart v. Peabody Coal*, 537 U.S. 149, 158-59 (2002) (“[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own (continued...)”).

circumstances if they have “unreasonably delayed,” they have seldom, if ever, been compelled to issue procurement regulations.<sup>66</sup> This is, in part, because congressional indications of how quickly an agency should proceed are only one factor in determining whether a delay is unreasonable and agency action should be compelled.<sup>67</sup> Other factors include (1) whether a danger to human health is implicated by the delay; (2) the agency’s competing priorities; (3) the interests prejudiced by the delay; and (4) whether the agency has treated the present party disparately from others.<sup>68</sup> Certain of these factors (e.g., danger to human health, disparate treatment) would seldom be implicated in a procurement context.

## **Relationship Between the FAR and Other Authorities Governing Procurement**

This section addresses the relationship between the FAR and other authorities governing federal procurement, including statutes, agency FAR supplements, other regulations, and executive branch policies and guidance.

### **What Is the Relationship Between the FAR and Procurement or Other Statutes?**

In addition to the FAR, there are a number of statutes that, directly or indirectly, address the acquisition of goods and services by executive branch agencies. The primary statutes governing federal procurement are the Armed Services Procurement Act and the Federal Property and Administrative Services Act, which, respectively, govern the procurements of defense and civilian agencies. However, a number of other statutes also apply, including the Anti-Kickback Act; Brooks Act of 1972, as amended; Buy American Act; Buy Indian Act; Contract Disputes Act; Contract Work Hours and Safety Standards Act; Davis-Bacon Act; Defense Production Act; Economy Act; Federal Activities Inventory Reform (FAIR) Act; Miller Act; Office of Federal Procurement Policy Act; Prompt Payment Act; Service Contract Act; Small Business Act; Trade Agreements Act; Truth in Negotiations Act; and Walsh-Healy Public Contracts Act. In addition,

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coercive sanction.”).

<sup>66</sup> See, e.g., *U.S. Women’s Chamber of Commerce v. U.S. Small Bus. Admin.*, No. 1:04-CV-01889, 2005 U.S. Dist. LEXIS 32497 (D.D.C., Nov. 30, 2005) (unpublished) (finding that the Small Business Administration’s (SBA’s) delay in implementing the statute authorizing set-asides for women-owned small businesses was unreasonable, but declining to grant injunctive relief, in part, because the SBA had “re-drafted proposed regulations and [is] actively searching for proposals to conduct [the statutorily required] study”). In this case, Congress enacted the legislation authorizing set-asides for women-owned small businesses (WOSBs) in 2000. However, for various reasons, SBA did not have regulations to implement such set-asides in effect until February 4, 2011, and the FAR was not amended to address set-asides for WOSBs until April 1, 2011. *U.S. Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule*, 75 Fed. Reg. 62258 (Oct. 7, 2010) (final regulations effective February 4, 2011); Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., *Federal Acquisition Regulation: Women-Owned Small Business (WOSB) Program: Interim Rule*, 76 Fed. Reg. 18304 (Apr. 1, 2011). Thus, the first acquisitions set-aside for WOSBs were conducted in summer 2011.

<sup>67</sup> See, e.g., *Telecomm. Research & Action Center v. Federal Comm’n Comm’n*, 750 F.2d 70, 80 (D.C. Cir. 1984). For further discussion of this case, see the CRS Legal Sidebar posting, *Keeping TRAC of Agency Delays*, by Daniel T. Shedd, at <http://www.crs.gov/analysis/legalsidebar/pages/details.aspx?ProdId=153>.

<sup>68</sup> See, e.g., *Telecomm. Research & Action Center*, 750 F.2d at 80.

there are a number of provisions within other statutes (e.g., national defense authorizations acts, appropriations acts) that address procurement.

The FAR implements many such statutory provisions, although, in some cases, other agency regulations may also implement particular statutory provisions (e.g., the Small Business Act), and the FAR must “conform” to the non-procurement regulations of other agencies (see below “What Is the Relationship Between the FAR and Other Regulations (i.e., Non-FAR Supplements)?”). However, there are some procurement-related provisions in statute—especially in permanent provisions of appropriations laws<sup>69</sup>—that are not reflected in the FAR or the agency FAR supplements discussed below (see “What Is the Relationship Between the FAR and Agency FAR Supplements?”). These include, for example, statutory grounds for debarment, authorization to enter noncompetitive contracts related to hazardous fuels reduction activities, and certain restrictions upon the purchase of incandescent lamps.<sup>70</sup>

On the other hand, because certain statutes grant the executive branch broad discretion to regulate federal contracting,<sup>71</sup> there are provisions in the FAR that do not have a direct counterpart in federal statute. Examples include the grounds for administrative debarment and suspension, the requirement that contractors disclose “credible evidence” of certain offenses to federal officials, and the procedures surrounding the government’s termination of contracts for convenience or default.<sup>72</sup> Often the FAR provisions without direct statutory counterparts have developed in response to executive orders,<sup>73</sup> judicial or other decisions,<sup>74</sup> or policy recommendations.<sup>75</sup>

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<sup>69</sup> See, e.g., An Act Making Appropriations for the Government of the District of Columbia and Other Activities Chargeable in Whole or in Part against the Revenues of Said District for the Fiscal Year Ending September 30, 2001, and for Other Purposes, P.L. 106-553, App’x B, Title I, § 119, 114 Stat. 2762A-69 (Dec. 21, 2000) (“[T]he Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, including related services, on any reasonable basis.”). See also *Principles of Federal Appropriations Law*, *supra* note 16, Vol. 1, at 2-33 to 2-39 (discussing when general provisions of an appropriations act may be construed as permanent legislation).

<sup>70</sup> See, e.g., 42 U.S.C. § 7606 (statutory debarment for certain violations of the Clean Air Act); 42 U.S.C. § 17141 (prohibition upon the purchase or installation of general service incandescent lamps at certain Coast Guard facilities); Consolidated Appropriations Act, 2012, P.L. 112-74, Wildland Fire Management (Including Transfers and Rescission of Funds), 125 Stat. 1003 (Dec. 23, 2011) (noncompetitive contracts). Provisions like that in P.L. 112-74 have appeared in appropriations for the Department of the Interior since 2004. See Mason C. Alinger, *The Impact of Procurement Provisions in Appropriations Acts on the Federal Acquisition System*, 36 *Pub. Cont. L.J.* 583, 593 (2006/2007).

<sup>71</sup> See, e.g., 40 U.S.C. § 121(a) (authorizing the President to prescribe policies and directives that the President “considers necessary” to promote economy and efficiency in federal procurement). For more on presidential authority to impose requirements on federal contractors, see generally CRS Report R41866, *Presidential Authority to Impose Requirements on Federal Contractors*, by Kate M. Manuel.

<sup>72</sup> 48 C.F.R. §§ 9.400-9.409 (debarment and suspension); 48 C.F.R. §§ 3.1000-3.1004 (mandatory disclosure rule); 48 C.F.R. §§ 49.000-49.607 (termination for convenience and default).

<sup>73</sup> For example, the FAR Council amended the FAR in 2008 to require certain federal contractors and subcontractors to make “timely disclosure” to agency inspectors general and contracting officers whenever they have “credible evidence” that a violation of the civil False Claims Act or certain federal criminal laws has occurred in connection with the award, performance, or close-out of a federal contract. See Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., *Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements: Final Rule*, 73 Fed. Reg. 67064, 67065 (Nov. 12, 2008). This amendment was prompted by certain recommendations made by the Department of Justice, although Congress did enact legislation requiring that contracts for commercial items, or performed overseas, be subject to any disclosure rule promulgated by the FAR Council. See Supplemental Appropriations Act, 2008, P.L. 110-252, § 6102, 122 Stat. 2386 (June 30, 2008); Letter to the Honorable Paul Denett, Administrator, Office of Federal Procurement Policy, from the Honorable Alice S. Fisher, Assistant Attorney General, Criminal Division, Department of Justice, May 23, 2007, at <http://www.justice.gov/criminal/nptf/far/docs/2007/5-23-07-Fisher-Denett.pdf>.

## What Is the Relationship Between the FAR and Agency FAR Supplements?

The FAR expressly authorizes agency heads to issue agency-specific procurement regulations that implement or supplement the FAR.<sup>76</sup> These are codified in Title 48 of the *Code of Federal Regulations*, immediately following the FAR.<sup>77</sup> A well-known example is the Department of Defense's (DOD's) Defense Federal Acquisition Regulation Supplement (DFARS), which is found in chapter 2 of Title 48, *Code of Federal Regulations*.

There is a common misperception that agency FAR supplements differ significantly from the FAR and essentially create agency-unique procurement structures. This is generally not the case, particularly when a statute does not impose or authorize unique procurement requirements for an agency. Rather, absent agency-specific statutory requirements, agency-specific regulations may only be issued when necessary to implement FAR policies and procedures, or to supplement the FAR to meet the agency's specific needs.<sup>78</sup> Further, the regulations may not conflict or be inconsistent with the FAR, except as required by law or if the agency has used an authorized deviation (see "May Agencies Deviate from the FAR?").<sup>79</sup>

The FAR contains requirements that agencies must follow when promulgating such regulations. They include providing notice and comment in the *Federal Register* when required (e.g., if the regulations have a significant cost or administrative impact on contractors or offerors).<sup>80</sup> Additionally, agencies must comply with such federal laws as the Paperwork Reduction Act and Regulatory Flexibility Act.<sup>81</sup> See "How Is the FAR Amended?," above.

### Agency FAR "Supplements" Located in Title 48 of the Code of Federal Regulations

(Not all chapter numbers are currently in use)

(...continued)

<sup>74</sup> For example, the FAR Council proposed amending the FAR in 2011 to delete certain provisions regarding price evaluation adjustments for small disadvantaged businesses implemented under the authority of a statute that the U.S. Court of Appeals for the Federal Circuit found was unconstitutional on its face in its 2008 decision in *Rothe Development Corporation v. Department of Defense*. See Dep't of Defense, Gen. Servs. Admin., and Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses, 76 Fed. Reg. 55849 (Sept. 9, 2011).

<sup>75</sup> See, e.g., Dep't of Defense, Gen. Servs. Admin., & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: Sustainable Acquisition, 76 Fed. Reg. 31395 (May 31, 2011) (implementing, in part, Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, 74 Fed. Reg. 52117 (Oct. 8, 2009)).

<sup>76</sup> 48 C.F.R. § 1.301(a)(1).

<sup>77</sup> 48 C.F.R. § 1.303(a).

<sup>78</sup> 48 C.F.R. § 1.302; see also 41 U.S.C. § 1303(a)(2) (providing that procurement regulations other than the FAR must be limited to those "essential to implement Government-wide policies and procedures within the agency" and "additional policies and procedures required to satisfy the specific and unique needs of the agency").

<sup>79</sup> 48 C.F.R. § 1.304(b)(2). See, e.g., *Desciose v. Delbalzo*, 1998 U.S. App. LEXIS 27937, \*4 (9<sup>th</sup> Cir., Oct. 29, 1998) (unpublished) (explaining that if a GSA regulation were to conflict with the FAR, then the FAR would control).

<sup>80</sup> 48 C.F.R. § 1.301(b). See also *Davies Precision Machining, Inc. v. United States*, 35 Fed. Cl. 651, 657 (1996) ("The FAR and DFARS are issued under statutory authority and published in conformance with required statutory and regulatory procedures. FAR § 1.301(b). Accordingly, those regulations have the force and effect of law.").

<sup>81</sup> 48 C.F.R. § 1.301(b). The Paperwork Reduction Act is codified at 44 U.S.C. § 3501, *et seq.* and the Regulatory Flexibility Act is codified at 5 U.S.C. § 601, *et seq.*

Chapter 2—Department of Defense Federal Acquisition Regulation Supplement (DFARS)  
Chapter 3—Department of Health and Human Services Acquisition Regulation (HHSAR)  
Chapter 4—Department of Agriculture Acquisition Regulation (AGAR)  
Chapter 5—General Services Administration Acquisition Regulation (GSAR)  
Chapter 6—Department of State Acquisition Regulation (DOSAR)  
Chapter 7—U.S. Agency for International Development Acquisition Regulation (AIDAR)  
Chapter 8—Department of Veterans Affairs Acquisition Regulation (VAAR)  
Chapter 9—Department of Energy Acquisition Regulation (DEAR)  
Chapter 10—Department of the Treasury Acquisition Regulation (DTAR)  
Chapter 12—Department of Transportation Acquisition Regulation (TAR)  
Chapter 13—Department of Commerce Acquisition Regulation (CAR)  
Chapter 14—Department of the Interior Acquisition Regulation (DIAR)  
Chapter 15—Environmental Protection Agency Acquisition Regulation (EPAAR)  
Chapter 16—Office of Personnel Management Federal Employees Health Benefits Acquisition Regulation (FEHBAR)  
Chapter 18—National Aeronautics and Space Administration Federal Acquisition Regulations Supplement (NFS)  
Chapter 19—Broadcasting Board of Governors  
Chapter 20—Nuclear Regulatory Commission Acquisition Regulation (NRCAR)  
Chapter 21—Office of Personnel Management Federal Employees' Group Life Insurance Federal Acquisition Regulation  
Chapter 23—Social Security Acquisition Regulation (SSAR)  
Chapter 24—Department of Housing and Urban Development Acquisition Regulation (HUDAR)  
Chapter 25—National Science Foundation  
Chapter 28—Department of Justice Acquisition Regulation (JAR)  
Chapter 29—Department of Labor Acquisition Regulation (DOLAR)  
Chapter 30—Department of Homeland Security Acquisition Regulation (HSAR)  
Chapter 34—Department of Education Acquisition Regulation (EDAR)  
Chapter 51—Department of the Army Acquisition Regulations  
Chapter 52—Department of the Navy Acquisition Regulations  
Chapter 53—Department of the Air Force Federal Acquisition Regulation Supplement (reserved)  
Chapter 54—Defense Logistics Agency  
Chapter 57—African Development Foundation

## **What Is the Relationship Between the FAR and Other Regulations (i.e., Non-FAR Supplements)?**

Although the FAR and any agency FAR supplements, discussed above (see “What Is the Relationship Between the FAR and Agency FAR Supplements?”), are intended to guide executive agencies in acquiring goods and services, they may not be the only regulations to address particular procurement-related topics. For example, regulations promulgated by the Department

of Energy codified in Title 10 of the *Code of Federal Regulations* discuss the award and administration of energy savings performance contracts by federal agencies. These long-term contracts—which provide for the contractor to incur the costs of implementing energy savings measures in exchange for a share of any energy savings directly resulting from the measures—are also discussed in certain agency FAR supplements.<sup>82</sup> However, Title 10 expressly provides that

The provisions of this subpart are controlling with regard to energy savings performance contracts notwithstanding any conflicting provisions of the Federal Acquisition Regulation and related Federal agency regulations.<sup>83</sup>

Other agency regulations directly or indirectly pertaining to federal procurement include those in Titles 13, 28, 29, and 41 of the *Code of Federal Regulations*, which, respectively, discuss contracting with small businesses; Federal Prison Industries/UNICOR; the Davis-Bacon and Service Contract Acts, and certain other labor provisions; and AbilityOne and contractors' anti-discrimination and affirmative action obligations.

Depending upon the requirements of the underlying statute and, particularly, whom this statute charges with its implementation, the FAR provisions may need to “conform” to the provisions of another agency’s regulations,<sup>84</sup> or the FAR and any agency regulations may be issued with the “concurrence” of all agencies involved.<sup>85</sup>

## **Does the FAR Include All the Government’s Procurement Policies?**

Various procurement policies, requirements, and guidance are issued by OFPP or OMB as circulars, guides, memoranda, and policy letters.<sup>86</sup> Some of these documents supplement material found in the FAR, while others cover subjects or issues not found in the FAR. For example, Policy Letter 11-01, “Performance of Inherently Governmental and Critical Functions,” addresses a topic also addressed in the FAR. Policy Letter 11-01 provides specific guidance regarding how agencies are to manage inherently governmental and other functions,<sup>87</sup> while Subpart 7.5 of the FAR lists examples of functions that are considered to be inherently governmental, or that “may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor

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<sup>82</sup> 48 C.F.R. § 225.7017-1 (DOD); 48 C.F.R. § 225.7017-4 (DOD); 48 C.F.R. § 801.602-70 (Veterans Affairs).

<sup>83</sup> 10 C.F.R. § 436.30(a).

<sup>84</sup> See, e.g., 15 U.S.C. § 634(b)(6) (authorizing the Administrator of Small Business to “make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter,” which, among other things, limits agencies’ ability to “bundle” or “consolidate” requirements into contracts that are unsuitable for award to small businesses); U.S. Small Bus. Admin., Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation: Notice of Proposed Rulemaking, 77 Fed. Reg. 29130 (May 16, 2012) (“This proposed rule [regarding contract bundling] may conflict with current FAR and General Services Administration regulations. As a result, those regulations will need to be amended once this rule is issued as final.”).

<sup>85</sup> See, e.g., 42 U.S.C. § 8287(b)(1)(A) (“The Secretary [of Energy], with the concurrence of the [FAR Council] ... shall, by rule, establish appropriate procedures and methods for use by Federal agencies to select, monitor, and terminate contracts with energy service contractors in accordance with laws governing Federal procurement that will achieve the intent of this section in a cost-effective manner.”).

<sup>86</sup> See the heading “Policy Information” on the Office of Federal Procurement Policy’s website, at [http://www.whitehouse.gov/omb/procurement\\_default](http://www.whitehouse.gov/omb/procurement_default), for links to circulars, guides, memoranda, policy letters, and other documents.

<sup>87</sup> See 76 Fed. Reg. at 56227.

performance.”<sup>88</sup> In contrast, other procurement topics are addressed by OFPP memoranda, but not covered in the FAR. Examples include Federal Activities Inventory Reform (FAIR) Act inventories, service contract inventories, and the quality of federal procurement data.<sup>89</sup>

## **The FAR, Congress, and Judicial and Other Tribunals**

This section includes questions and answers that address what Congress can do to prompt amendment of the FAR; what Congress can do if it disapproves of a potential amendment to the FAR; and the deference given to FAR provisions by judicial and other tribunals.

### **What Can Congress Do to Prompt Amendment of the FAR?**

As noted previously (see “Who Typically Promulgates Regulations Amending the FAR?”), Congress does not itself amend the FAR. However, Congress may prompt the executive branch to amend the FAR by doing one of two things. In some cases, Congress effectively prompts amendment of the FAR by enacting or amending a law implemented, in part, through the FAR.<sup>90</sup> This law need not mention the FAR, or amendment of the FAR, for an amendment to ensue. In other cases, Congress explicitly directs that the FAR be amended.<sup>91</sup> Sometimes, Congress also specifies that the FAR Council should make this amendment, or the time frame within which the amendment should be made (although not all FAR amendments required by Congress are made within the prescribed time frame, as discussed above, “How Long Does It Take to Amend the FAR?”). The former approach appears to be more common in situations where procurement or other statutes directly address the topic of the legislation, while the latter approach tends to be used in situations where the FAR addresses topics not directly addressed in statute (see “What Is the Relationship Between the FAR and Procurement or Other Statutes?”).

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<sup>88</sup> 48 C.F.R. § 7.503.

<sup>89</sup> Lesley A. Field, Acting Administrator, Office of Fed. Procurement Pol’y, Federal Activities Inventory Reform (FAIR) Act Submission for Fiscal Year 2012, Mar. 26, 2012, at [http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-09\\_0.pdf](http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-09_0.pdf); Daniel I. Gordon, Administrator, Office of Fed. Procurement Pol’y, Service Contract Inventories, Dec. 19, 2011, at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventory-guidance.pdf>; Daniel I. Gordon, Administrator, Office of Fed. Procurement Pol’y, Improving Federal Procurement Data Quality – Guidance for Annual Verification and Validation, May 31, 2011, at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/improving-data-quality-guidance-for-annual-verification-and-validation-may-2011.pdf>.

<sup>90</sup> See, e.g., Small Business Jobs Act, P.L. 111-240, § 1313, 124 Stat. 2538-39 (Sept. 27, 2010) (codified at 15 U.S.C. § 657q) (imposing certain limitations upon agencies’ consolidation of requirements into contracts unsuitable for award to small business, but not directly calling for the promulgation of regulations on consolidation). SBA recently proposed amending its regulations, including those on bundling, to address the Small Business Jobs Act’s restrictions on consolidation, and it is anticipated that the FAR will be amended in conformity with any SBA regulations once the SBA regulations are finalized. See 77 Fed. Reg. at 29149.

<sup>91</sup> See, e.g., P.L. 111-240, § 1334, 124 Stat. 2542-43 (codified at 15 U.S.C. § 637(d)(12)(E) (“Not later than 1 year after the date of enactment . . . , the [FAR Council] . . . shall amend the [FAR] . . . to—(i) describe the circumstances under which a contractor may be determined to have a history of unjustified, untimely payments to subcontractors; (ii) establish a process for contracting officers to record the identity of a contractor described in clause (i); and (iii) require the identity of a contractor described in clause (i) to be incorporated in, and made publicly available through, the Federal Awardee Performance and Integrity Information System, or any successor thereto.”).

However, as discussed previously (see “Who Typically Promulgates Regulations Amending the FAR?”), the FAR Council and OFPP may also amend the FAR without the enactment of procurement-related legislation or a congressional directive to do so. Some FAR amendments are initiated by the FAR Council, in particular, in response to policy concerns or litigation.<sup>92</sup> In other cases, the FAR Council amends the FAR in response to an executive order directing the amendment of the FAR, or otherwise addressing procurement matters.<sup>93</sup> Thus, committees and Members of Congress could also encourage the FAR Council or OFPP to use its authority to amend the FAR, or encourage the President to issue an executive order, provided that the proposed changes are within their authority.<sup>94</sup>

## **What Can Congress Do If It Disapproves of a Potential Amendment to the FAR?**

In certain circumstances, Congress may have concerns about a proposed or final amendment to the FAR, particularly one which may have resulted from executive branch action without express statutory authorization. Members of Congress may make such concerns known to the executive branch informally (e.g., via letters), or through the exercise of oversight, in the hope of prompting the abandonment or modification of the provisions in question. In some cases, however, Congress may also enact legislation that effectively or expressly forecloses certain amendments to the FAR. For example, Congress could enact legislation whose requirements would be inconsistent with certain potential amendments to the FAR, as happened in 2008, when Congress required that contracts for commercial items or performed overseas be subject to any “mandatory disclosure rule” promulgated by the FAR Council.<sup>95</sup> Congress could also enact legislation that bars agencies from imposing certain requirements on contractors, or from using appropriated funds to implement rules, regulations, or executive orders pertaining to contract-related matters.<sup>96</sup> In addition, the Congressional Review Act (CRA) (5 U.S.C. §§801-808) provides Congress with the opportunity to overturn a final rule, including a rule that would amend the FAR, through the enactment of a joint resolution of disapproval. If passed by Congress and signed into law by the

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<sup>92</sup> See *supra* notes 73-74.

<sup>93</sup> See *supra* note 75.

<sup>94</sup> For example, absent a statute expressly authorizing such awards, the FAR Council would arguably lack the authority to amend the FAR to authorize agencies to make sole-source awards to “local firms,” because such awards would not constitute full and open competition, and Congress has expressly required that any exception to the requirement that agencies obtain full and open competition through the use of competitive procedures be expressly authorized by statute, or involve certain narrow circumstances (e.g., unusual and compelling circumstances).

<sup>95</sup> Supplemental Appropriations Act, 2008, P.L. 110-252, § 6102, 122 Stat. 2386 (June 30, 2008) (“The Federal Acquisition Regulation shall be amended within 180 days after the date of the enactment of this Act pursuant to FAR Case 2007-006 (as published at 72 Fed. Reg. 64019, November 14, 2007) or any follow-on FAR case to include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items.”).

<sup>96</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2012, P.L. 112-81, § 823, 125 Stat. 1502-03 (Dec. 31, 2011) (“The head of an agency may not require a contractor to submit political information related to the contractor or a subcontractor at any tier, or any partner, officer, director, or employee of the contractor or subcontractor (1) as part of a solicitation, request for bid, request for proposal, or any other form of communication designed to solicit offers in connection with the award of a contract for procurement of property or services; or (2) during the course of contract performance as part of the process associated with modifying a contract or exercising a contract option.”); Consolidated Appropriations Act, 2012, P.L. 112-74, § 743, 125 Stat. 939 (Dec. 23, 2011) (“None of the funds made available in this or any other Act may be used to recommend or require any entity submitting an offer for a Federal contract to disclose [certain political spending] as a condition of submitting the offer.”).

President, a joint resolution of disapproval results in the rule having no “force or effect.” Enacted in March 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (P.L. 104-121), the CRA contains expedited procedures for congressional consideration of such joint resolutions of disapproval.

## **How Much Deference Do Courts and Other Tribunals Give to FAR Provisions?**

Like other regulations, FAR provisions represent agencies’ constructions of the statutes which they implement. As such, judicial and other tribunals generally review the provisions of the FAR in light of *Chevron, USA v. Natural Resources Defense Council* in determining whether these interpretations are entitled to deference (commonly known as “Chevron deference”).<sup>97</sup> In *Chevron*, the Supreme Court articulated a two-part test for review of an agency’s construction of a statute which it administers: (1) Has Congress directly spoken to the precise question at issue, and (2) If not, is the agency’s reasonable interpretation of the statute consistent with the purposes of the statute?<sup>98</sup> “[I]f the statute speaks clearly ‘to the precise question at issue,’” the tribunal “must give effect to the unambiguously expressed intent of Congress,”<sup>99</sup> regardless of what the agency regulation provides. However, where “the statute is silent or ambiguous with respect to the specific issue,” the tribunal “must sustain the [a]gency’s interpretation if it is ‘based on a permissible construction’ of the Act.”<sup>100</sup>

Over the years, certain FAR provisions have been upheld under *Chevron* on the grounds that Congress has not spoken directly to the precise question at issue, and the agency’s interpretation is reasonable and consistent with the purposes of the underlying statute.<sup>101</sup> However, other provisions have been found either to be contrary to the intent of Congress, as “unambiguously expressed” in statute; or to be based on an impermissible construction of the underlying statute.<sup>102</sup>

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<sup>97</sup> 467 U.S. 837 (1984). Some judges and commentators have suggested that at least certain provisions of the FAR are not entitled to *Chevron* deference, apparently on the grounds that no specific agency was expressly granted authority to promulgate them. *See, e.g., DynCorp, ASBCA No. 49714, 00-2 B.C.A. ¶ 30,986* (suggesting that certain provisions of the FAR were not entitled to *Chevron* deference because the Board found “no indication that Congress entrusted the accommodation of conflicting policies on the issue before us to the agencies through the FAR”). This view appears to be a minority one, however. *See, e.g., Brownlee v. DynCorp, 349 F.3d 1343, 1354 (Fed. Cir. 2003)* (“The FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference.”); *Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1321 (Fed. Cir. 2003)* (“Where, as here, an agency has adopted a regulation by notice-and-comment rulemaking, the *Chevron* standard of deference applies to that regulation.”); *Newport News Shipbuilding & Dry Dock Co. v. Garrett, 6 F.3d 1547, 1552 (Fed. Cir. 1993)* (“[W]e must accord ‘considerable weight’ to the agency’s interpretation of a statute it is responsible to implement.”).

<sup>98</sup> *Chevron*, 467 U.S. at 842-43.

<sup>99</sup> *Barnhart v. Walton, 535 U.S. 212, 217 (2002)* (quoting *Chevron*, 467 U.S. at 842-43).

<sup>100</sup> *Id.* at 218 (quoting, in part, *Chevron*, 467 U.S. at 843).

<sup>101</sup> *See, e.g., Brownlee, 349 F.3d at 1355-56* (finding that FAR provisions disallowing the costs of a government contractor in defending against criminal charges brought by the United States against one of the contractor’s employees in which the employee is convicted was not inconsistent with the underlying statute, even though that statute only addressed convictions of contractors, not convictions of contractor employees); *Info. Tech. & Applications Corp., 316 F.3d at 1312* (finding that FAR provisions defining “discussions” and “clarifications” were entitled to *Chevron* deference even though these definitions represented new interpretations of the terms).

<sup>102</sup> *See, e.g., DGR Assocs. v. United States, 94 Fed. Cl. 189 (2010)* (finding that FAR and SBA regulations that implicitly provided for parity among the small business set-aside programs conflicted with the Small Business Act insofar as the act required agencies to use a set-aside for HUBZone small businesses in certain circumstances); *Mission* (continued...)

These provisions tend to be amended to conform to the underlying statute (although in some cases, the underlying statute has been amended to support a long-standing agency interpretation).<sup>103</sup>

In contrast, individual agency interpretations of the FAR, issued in guidance or other documents, are not entitled to *Chevron* deference, although they may receive a lesser degree of deference.<sup>104</sup> The extent of such deference is generally “understood to vary with circumstances,” such as “the degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position,” as well as the “writer’s thoroughness, logic, and expertise, its fit with prior interpretations, and any other source of weight.”<sup>105</sup>

## **The FAR and Federal Contracts**

This section includes questions and answers addressing the relationship between the FAR and a federal contract; whether FAR amendments apply to pre-existing contracts; and what happens if a contract clause which is required by the FAR is not included in a particular contract.

### **What Is the Relationship Between the FAR and a Federal Contract?**

The FAR applies only to federal agencies, while the contract applies to both the agency and the contractor. Thus, it is the provisions in the contract, not those in the FAR, that bind the contractor, although contract terms required by the FAR may be read into contracts which lack them in certain circumstances (see “What Happens If Required Contract Clauses Are Not Included in a Particular Contract?”).

While the FAR contains many standard terms and clauses, the details and specifics are left to the individual contract. For this reason, the drafting that occurs for each contract can be highly important. The interaction between the FAR and the contract is exemplified by the treatment of economic price adjustments. These provide for the upward or downward revision of prices in a contract if certain conditions occur.<sup>106</sup> The FAR provides that there are three general types of economic price adjustments: those based on established prices; those based on actual costs of

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(...continued)

*Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010) (same); *Engineered Demolition, Inc. v. United States*, 60 Fed. Cl. 822 (2004) (finding that certain provisions defining “defective certification” then in Section 33.201 of the FAR were not entitled to *Chevron* deference because Congress had not delegated authority to implement them to the executive branch, but rather intended the courts to make such determinations).

<sup>103</sup> See, e.g., Small Business Jobs Act, P.L. 111-240, § 1347(b)(1), 124 Stat. 2547 (Sept. 27, 2010) (amending the Small Business Act to provide for parity among the set-aside programs); Dep’t of Defense, Gen. Servs. Admin., Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation: FAR Case 2006-034, Socioeconomic Program Parity: Proposed Rule, 73 Fed. Reg. 12699, 12699 (Mar. 10, 2008) (implementing the relevant provisions of the Small Business Jobs Act).

<sup>104</sup> See, e.g., *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (holding that cogent “administrative interpretations . . . not [the] products of formal rulemaking . . . warrant respect,” but are not accorded *Chevron* deference); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).

<sup>105</sup> *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

<sup>106</sup> 48 C.F.R. § 16.203.

labor or material; and those based on cost indexes of labor or material.<sup>107</sup> When one of these price adjustments is to be used, the contract will then be drafted to address the specifics, such as identifying the events that will trigger the price adjustment, identifying the applicable indexes or established prices, and establishing the base levels.

Importantly, while courts and other tribunals will generally interpret a statute or regulation, such as the FAR, by looking at its plain language,<sup>108</sup> a contract will be construed by looking at the intent of the parties.<sup>109</sup> In addition, provisions of a contract could potentially be waived by a party to the contract.<sup>110</sup>

## **Do Amendments to the FAR Apply to Pre-Existing Contracts?**

Amendments to the FAR generally apply only to contracts entered into on or after the date of the amendment, not to *pre-existing contracts* (i.e., contracts whose terms have already been agreed upon).<sup>111</sup> The FAR itself characterizes this as a “convention.”<sup>112</sup> However, this convention is intended to shield the government from liability for breach of contract, which it could potentially incur were it to unilaterally amend the terms of an existing contract.<sup>113</sup> Moreover, when the FAR change is prompted by a statute, this convention also reflects the fundamental canon of statutory interpretation that laws will not be given retroactive effect unless there is clear congressional intent to the contrary.<sup>114</sup> A procurement-related statute could potentially be found to have

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<sup>107</sup> 48 C.F.R. § 16.203-1(a)(1).

<sup>108</sup> See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (reciting the “plain meaning rule,” which provides that if the language of a statute is clear, there is no need to look outside the statute to ascertain its meaning); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“the meaning of the statute must, in first instance, be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms”) (citations omitted).

<sup>109</sup> See *Alvin, Ltd. v. U.S. Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987) (“In the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intent of the parties”) (quoting S. Williston, *A Treatise on the Law of Contracts* § 601 (3d ed. 1961)); *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971) (“It has been a fundamental precept of common law that the intention of the parties to a contract control its interpretation.”).

<sup>110</sup> A waiver is a relinquishment of a legal right. See, e.g., *Am. Nat’l Bank & Trust Co. v. United States*, 23 Cl. Ct. 542 (1991). The government could potentially be bound by a waiver if the contractor relies upon the waiver to its detriment. See, e.g., *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 687 (1994) (constructive waiver of specifications by acceptance of a nonspecification performance); *Freeway Ford Truck Sales, Inc. v. Gen. Servs. Admin.*, GSCBA 10662, 93-3 BCA ¶ 26,019 (finding termination for default improper where the government had waived its right to terminate by allowing the contractor to continue with production). However, agencies may not waive statutory requirements unless specifically authorized to do so. See, e.g., *M-R-S Mfg. Co. v. United States*, 492 F.2d 835 (Ct. Cl. 1974) (contracting officer could not waive the requirements of the Truth in Negotiations Act).

<sup>111</sup> 48 C.F.R. § 1.108(d) (“Unless otherwise specified—(1) FAR changes apply to solicitations issued on or after the effective date of the change; (2) [c]ontracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and (3) [c]ontracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.”).

<sup>112</sup> *Id.*

<sup>113</sup> The general rule is that any changes to a contract must be bilateral and supported by consideration. See, e.g., *Ford v. Ford*, 68 P.3d 1258, 1268 (Alaska 2003). However, certain government contracts include a Changes clause, which authorizes the government to make certain unilateral modifications within the scope of the contract. See generally CRS Report R42469, *Government Procurement in Times of Fiscal Uncertainty*, by Kate M. Manuel and Erika K. Lunder.

<sup>114</sup> See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (“absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment”). See also *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“A law is (continued...)”).

retroactive effect if it purported to alter the parties' obligations under a contract whose terms had been agreed upon prior to the statute's enactment.<sup>115</sup>

## **What Happens If Required Contract Clauses Are Not Included in a Particular Contract?**

Because the standard contract clauses are designed, in part, to protect the government's interests in the performance of the contract, the FAR generally requires that some variant of these clauses be either included or incorporated by reference in agency contracts.<sup>116</sup> However, agencies have sometimes awarded contracts that lack a required clause,<sup>117</sup> prompting questions about whether the requirements governed by that clause apply.

In certain circumstances, the courts and boards of contract appeals will "read" required clauses into contracts which lack them, treating the clause as a term of the contract despite its absence. The currently prevailing grounds for reading clauses in is that articulated by the former Court of Claims (currently the U.S. Court of Appeals for the Federal Circuit) in *G.L. Christian & Associates v. United States*, wherein the court found that certain required contract terms allowing the government to terminate contracts for its convenience were to be read into contracts which lacked them because (1) the terms represented a "deeply ingrained strand of public procurement policy," and (2) federal regulations can "fairly be read" as permitting the clause to be read into the contract since they require agencies to incorporate the clause.<sup>118</sup> Other required FAR clauses that have been read into government contracts under the "*Christian* doctrine" have included those allowing the government to terminate contracts for default,<sup>119</sup> addressing protests after award,<sup>120</sup> and governing contractors' use of government property.<sup>121</sup> However, courts have declined to read in other clauses, often when the contractor (as opposed to the government) seeks to rely upon the missing, but required, clause.<sup>122</sup> In other cases, courts have relied upon other grounds to read

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retrospective if it changes the legal consequences of acts completed before its effective date.") (internal quotations omitted); *Sturges v. Carter*, 114 U.S. 511, 519 (1885) (a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability").

<sup>115</sup> *But see* Office of Federal Contract Compliance Programs v. Florida Hospital of Orlando, ARB Case No. 11-011 (Oct. 19, 2012) (finding that a statutory provision enacted in 2011, which precluded certain hospitals from being found to be "subcontractors" subject to the jurisdiction of the Office of Federal Contract Compliance Programs, did not have impermissible retroactive effect when applied to a case pending at the time of the statute's enactment because the statute did not increase any party's liability for past conduct, or impose any new duties on completed transactions).

<sup>116</sup> *See, e.g.*, 48 C.F.R. § 22.1310(a)(1) (directing contracting officers to "[i]nser the clause at 52.222-35, Equal Opportunity for Veterans, in solicitations and contracts if the expected value is \$100,000 or more," unless certain exceptions apply).

<sup>117</sup> *See, e.g.*, Half of Contracts in DOD IG Review Lack Clause Regarding Trafficking in Persons, 95 *Fed. Cont. Rep.* 134 (Feb. 8, 2011) (reporting that the DOD Inspector General (IG) recently found nearly half of a sampling of DOD contracts did not include a required clause intended to combat trafficking in persons).

<sup>118</sup> *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426-27 (Ct. Cl. 1963).

<sup>119</sup> *Sabre Eng'g Corp.*, ASBCA No. 24, 133, 81-2 B.C.A. ¶ 15,310.

<sup>120</sup> *COMSI, Inc.*, ASBCA No. 34,588, 88-1 B.C.A. ¶ 20,245.

<sup>121</sup> *Hart's Food Serv., Inc.*, ASBCA No. 34,588, 88-1 B.C.A. ¶ 21,789.

<sup>122</sup> *See, e.g.*, *United States v. Franklin Steel Prods., Inc.*, 482 F.2d 400 (1973); *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5<sup>th</sup> Cir. 1973).

certain terms into government contracts, such as the theory that the government has an “inherent right” to terminate contracts for its convenience.<sup>123</sup>

## Other Topics

This section addresses agency deviations from the FAR; the ability of third parties to enforce the terms of the FAR against a government contractor; the use of procurement techniques not expressly mentioned in the FAR; and whether agencies or transactions not subject to the FAR could be subject to requirements like those in the FAR.

### May Agencies Deviate from the FAR?

Agencies are authorized to deviate from the FAR under certain circumstances. A *deviation* involves agency noncompliance with a mandatory procurement regulation (e.g., using a solicitation provision or contract clause that is inconsistent with the FAR), in the absence of a statute expressly requiring or authorizing such noncompliance.<sup>124</sup> Only those deviations authorized by the FAR are permitted.<sup>125</sup> Contracting officers must use the Authorized Deviations in Provisions clause and the Authorized Deviations in Clauses clause to notify offerors and contractors when a solicitation or contract contains a deviation.<sup>126</sup>

Deviations may be granted (as discussed below) when necessary to meet the agency’s specific needs and requirements, so long as not precluded by law, executive order, or regulation.<sup>127</sup> The FAR recognizes two types of deviations: individual and class. Individual deviations affect only individual contract actions.<sup>128</sup> They may generally be authorized by the agency head, with the contracting officer required to document the justification and agency approval in the contract file.<sup>129</sup> Class deviations affect multiple contract actions.<sup>130</sup> For civilian agencies (other than

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<sup>123</sup> See *Russell Motor Car Co. v. United States*, 261 U.S. 512, 521 (1923) (“With the termination of the war the continued production of war supplies would become not only unnecessary but wasteful. Not to provide, therefore, for the cessation of this production when the need for it has passed would have been a distinct neglect of the public interest.”); *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, 323 (1875) (“[I]t would be of serious detriment to the public service if the power of the head[s] of [federal agencies] did not extend to providing for all . . . possible contingencies by modification or suspension of the contracts and settlement with the contractors.”).

<sup>124</sup> 48 C.F.R. Subpart 1.4; see also 48 C.F.R. § 1.401 (defining “deviation” as (1) issuing or using a policy, procedure, solicitation provision, contract clause, method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR; (2) omitting a FAR-prescribed solicitation provision or contract clause; (3) using a solicitation provision or contract clause with modified or alternate language not authorized by the FAR; (4) using a FAR-prescribed solicitation provision or contract clause on a substantially-as-follows or substantially-the-same-as basis if inconsistent with the intent, principle, or substance of the FAR; (5) authorizing lesser or greater limitations on the use of any FAR-prescribed solicitation provision, contract clause, policy, or procedure; and (6) issuing certain policies or procedures that are not incorporated into the agency’s FAR supplement).

<sup>125</sup> See *Gold Line Ref. v. United States*, 54 Fed. Cl. 285 (2002) (holding that an agency’s nonauthorized deviation from the FAR regarding pricing sources for an economic price adjustment was unenforceable, and thus the contractor was entitled to damages).

<sup>126</sup> 48 C.F.R. § 52.107.

<sup>127</sup> 48 C.F.R. § 1.402. Deviations are not authorized with respect to the Cost Accounting Standards regulations for solicitation provisions and contract clauses (48 C.F.R. §§ 30.201-3, 30.201-4) or the Cost Accounting Standards Board regulations (48 C.F.R. Chapter 99). See *id.*

<sup>128</sup> 48 C.F.R. § 1.403.

<sup>129</sup> See *id.*

NASA), deviations may generally be authorized by agency heads or their designees after consultation with the Civilian Agency Acquisition Council (CAAC).<sup>131</sup> Additionally, a copy of each class deviation must be provided to the FAR Secretariat.<sup>132</sup> For DOD, the FAR provides that class deviations will be done in accordance with DFARS,<sup>133</sup> which generally grants the Director of Defense Procurement and Acquisition Policy the authority to issue them.<sup>134</sup> If any agency requires a permanent class deviation, then it should propose a FAR revision when appropriate.<sup>135</sup>

An example of a recent high-profile class deviation is the one DOD issued regarding the new federal database for contractors, System for Award Management (SAM).<sup>136</sup> In anticipation of SAM's completion, the FAR and DFARS were amended to require contractors to use the database to meet initial registration and annual certification requirements.<sup>137</sup> However, as explained by the DOD deviation memorandum, “[s]ince implementation, SAM has experienced performance issues that have affected the timely processing of awards,” and therefore DOD decided to issue a class deviation until those issues are resolved.<sup>138</sup> The deviation provides that contractors may use alternative means to meet these registration and certification requirements, and it will remain in effect until rescinded.

## **May an Acquisition Team Use a Policy or Procedure That Is Not Addressed by the FAR?**

The FAR authorizes acquisition team members to use any “specific strategy, policy, or procedure” not addressed by the FAR so long as the strategy, policy, or procedure is in the best interests of the government, and is not prohibited by statute, regulation, executive order, or case law.<sup>139</sup> This means that agencies are not necessarily limited to the strategies or procedures expressly mentioned in the FAR, but rather may exercise some discretion in structuring procurements to meet agency circumstances and needs. For example, although the FAR nowhere mentions the use of reverse auctions, agencies’ use of reverse auctions in source selection has been upheld on the grounds that “a procurement procedure is permissible where not specifically prohibited.”<sup>140</sup>

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<sup>130</sup> 48 C.F.R. § 1.404.

<sup>131</sup> 48 C.F.R. § 1.404(a)(1).

<sup>132</sup> 48 C.F.R. § 1.404.

<sup>133</sup> 48 C.F.R. § 1.404(b).

<sup>134</sup> 48 C.F.R. §§ 201.402, 202.404. DOD’s current and archived class deviations are available on the Defense Procurement and Acquisition Policy website at [http://www.acq.osd.mil/dpap/dars/class\\_deviations.html](http://www.acq.osd.mil/dpap/dars/class_deviations.html).

<sup>135</sup> 48 C.F.R. § 1.404.

<sup>136</sup> See Office of the Undersecretary of Defense, Acquisitions, Technology and Logistics, DOD, Memorandum: Class Deviation—System for Award Management (date stamped Aug. 21, 2012), at <http://www.acq.osd.mil/dpap/policy/policyvault/USA004926-12-DPAP.pdf> (hereinafter *DOD Deviation Memorandum*).

<sup>137</sup> 48 C.F.R. Subpart 4.11, § 4.1201; 48 C.F.R. §§ 204.1103(2)(i), 204.1202.

<sup>138</sup> *DOD Deviation Memorandum*, *supra* note 136.

<sup>139</sup> 48 C.F.R. §§ 1.102 (d) and 1.102-3.

<sup>140</sup> MTB Group, Inc., B-295463 (Feb. 23, 2005). In this case, GAO further noted that the use of reverse auctions is consistent with Part 13 of the FAR, which addresses simplified acquisition procedures.

## **Can a Third Party Enforce the Terms of the FAR Against a Government Contractor?**

The ability of third parties to enforce the requirements of the FAR—or the terms of a government contract—against a contractor is generally limited, particularly if the third party is not a subcontractor under the federal contract.<sup>141</sup> In some cases, persons harmed by the actions (or inaction) of a government contractor have alleged that the harm would not have occurred had the contractor complied with the requirements of the FAR (as incorporated in the contract, or otherwise), or that they should be entitled to recover for this harm because of the provisions of the FAR. For example, the plaintiffs in *Baragona v. Kuwait & Gulf Link Transportation Company* alleged that they were “third party beneficiaries” of a FAR provision requiring government contractors to obtain insurance against certain liability claims by third parties, and that this clause “effectively waive[d] a [foreign] contractor’s ability to assert a personal jurisdiction defense.”<sup>142</sup> However, such allegations generally fail, as they did in *Baragona*, in part, because plaintiffs typically lack standing to enforce the terms of a contract to which they are not a party.<sup>143</sup>

## **Could an Agency or Transaction Not Subject to the FAR Be Subject to Requirements Like Those in the FAR?**

Agencies and/or transactions that are not themselves subject to the FAR could potentially be subject to requirements like those in the FAR for several reasons. In some cases, the FAR implements, in part, a more broadly applicable statute, and the requirements of this underlying statute could be found to pertain to agencies and/or transactions that are not themselves subject to the FAR. For example, the Government Accountability Office (GAO) recently found that Historically Underutilized Business Zone (HUBZone) small businesses must be accorded a price evaluation preference when the General Services Administration (GSA) acquires certain leasehold interests in real property even though such acquisitions are not subject to the FAR (see “What Purchases Are Subject to the FAR?”).<sup>144</sup> GAO reached this conclusion because the Small Business Act, which governs price evaluation and other preferences for HUBZone small businesses, “does not limit the type of contract to which it applies” (unlike the FAR, which applies only to procurement contracts).<sup>145</sup> Because the Small Business Act “broadly applies to all

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<sup>141</sup> See generally CRS Report R41230, *Legal Protections for Subcontractors on Federal Prime Contracts*, by Kate M. Manuel.

<sup>142</sup> 691 F. Supp. 2d 1351, 1368 (N.D. Ga. 2009).

<sup>143</sup> Under narrow circumstances, persons who are not parties to a contract, but are “third party beneficiaries” to it, are entitled to enforce the contract’s terms. However, this is generally only the case when the purpose of the contract is to confer a gift on the third party, or when the purpose of one party to the contract is to discharge an actual, supposed, or asserted duty to the third party. See, e.g., *Young Ref. v. Pennzoil*, 46 S.W.3d 380 (Tex. App. 2001). The contractor’s failure to abide by the requirements of the FAR, or the terms of the contract, could potentially be a factor in determining whether the contractor was negligent in a tort suit. However, such a failure is generally not deemed to constitute negligence *per se*. See generally CRS Report R41755, *Tort Suits Against Federal Contractors: An Overview of the Legal Issues*, by Vivian S. Chu and Kate M. Manuel.

<sup>144</sup> The Argos Group, B-406040 (Jan. 24, 2012). For more on the inapplicability of the FAR to purchases and leases of real property, see *supra* note 22.

<sup>145</sup> The Argos Group, B-406040 (quoting 15 U.S.C. § 657a(b)(3)(B) (“[I]n any case in which a *contract* is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price (continued...)”).

federal contracts that involve full and open competition,” and a lease of real property is a contract, GAO rejected GSA’s assertion that price evaluation preferences for HUBZone small businesses are required only in procurements of goods and services (i.e., procurements subject to the FAR).<sup>146</sup>

In other cases, statutes impose requirements like those implemented, in part, by the FAR on entities or transactions that are not subject to the FAR. The American Recovery and Reinvestment Act (ARRA) of 2009, for example, imposed “Buy American” requirements upon certain grant recipients, and “Davis Bacon” requirements upon certain loan recipients, who would not have been subject to these requirements pursuant to the FAR or the statutes that the FAR, in part, implements.<sup>147</sup> In yet other cases, an agency adopts regulations or guidance with provisions modeled on or akin to those in the FAR, as noted previously (see “What Agencies Are Subject to the FAR?”). For example, GSA has adopted certain FAR provisions “as a matter of policy” in its regulations regarding leases of real property.<sup>148</sup> Similarly, the procurement guidelines of the U.S. Postal Service include a “Suspensions and Delay” clause like that in the FAR,<sup>149</sup> while the Senate Procurement Regulations include provisions on the ratification of unauthorized commitments like those in the FAR.<sup>150</sup>

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offered by the otherwise lowest, responsive, and responsible offeror.”) (emphasis added)).

<sup>146</sup> In finding that a lease constitutes a contract, GAO cited the precedent of Supreme Court and other cases treating leases as contracts for purposes of the Antideficiency Act and the Contract Disputes Act. *See, e.g.,* *Leiter v. United States*, 271 U.S. 204, 206-07 (1926) (Antideficiency Act); *Forman v. United States*, 767 F.2d 875, 879 n.4 (Fed. Cir. 1985) (Contract Disputes Act).

<sup>147</sup> *See* P.L. 111-5, § 406, 123 Stat. 145 (Feb. 17, 2009) (requiring, as a condition of the renewable energy and electric power transmission loan guarantee program, that “each recipient ... provide reasonable assurance that all laborers and mechanics employed in the performance of the project for which the assistance is provided ... will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with ... the ‘Davis-Bacon Act’”); *id.*, § 1605(a), 123 Stat. 303 (“None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.”).

<sup>148</sup> 48 C.F.R. § 570.101(d).

<sup>149</sup> *Compare Postal Service Supplying Principles and Practices* 481 (2011), at <http://about.usps.com/manuals/spp/spp.pdf> (Clause B-16) with 48 C.F.R. § 52.242-14 (Suspension of Work clause).

<sup>150</sup> *Compare Senate Procurement Regulations* (1999), at § 1.10 (copy on file with the authors) with 48 C.F.R. § 1.602-3.