

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

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

According to the U.S. General Services Administration (GSA), the U.S. government is the largest buyer of goods and services in the world, and executive branch agencies—led by the Department of Defense (DOD)—make most of these purchases. Many (although not all) acquisitions by executive branch agencies are subject to the FAR. Members, congressional committees, and staff regularly (1) consider legislation that would amend the FAR to save money, promote transparency, or further other public policies; (2) conduct oversight of executive agencies’ performance in procuring goods and services; and (3) respond 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 In addition, certain commentators have recently suggested that some or all FAR provisions should be withdrawn.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, which is codified in Title 48 of the *Code of Federal Regulations* (C.F.R.), generally governs acquisitions of goods and services by executive branch agencies. The FAR 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 also addresses the acquisition process, from acquisition planning to contract formation and contract management. Depending upon the topic, the FAR may provide contracting officers with (1) the government’s basic policy (e.g., giving small businesses the “maximum practicable opportunity” to participate in acquisitions); (2) any requirements agencies must meet (e.g., obtaining full and open competition through the use of competitive procedures); (3) any exceptions to the requirements (e.g., when and how agencies may limit competition); and (4) any required or optional clauses to be included, or incorporated by reference, in the solicitation or contract (e.g., terminating contracts for the government’s convenience).

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 the GSA, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration (NASA), acting on behalf of the Federal Acquisition Regulatory Council (FAR 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.

The FAR contains the principal rules of the federal acquisition system, but 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, while 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 that 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 U.S. government buys more goods and services than any other entity in the world,¹ with the Department of Defense (DOD) making the most purchases of all federal agencies.² Many (although not all) acquisitions by executive branch agencies are subject to the Federal Acquisition Regulation (FAR). As a result, Members and committees of Congress and their staff often

- consider legislation that would prompt amendment of the FAR to save the federal government money, promote transparency, or further other public policies;³
- conduct oversight of executive agencies' performance in procuring goods and services, including their compliance with the FAR;⁴ and
- respond to questions from constituents regarding executive branch procurement activities.⁵

This report answers frequently asked questions regarding the FAR. These questions and their answers are organized into six broad categories: (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, and policies); (4) the FAR in relation to Congress, courts, and other tribunals; (5) the relationship between the FAR and federal procurement contracts; and (6) other miscellaneous 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.

¹ See, e.g., *Federal Acquisition Policy Division*, U.S. GEN. SERVS. ADMIN. (Aug. 24, 2024), <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/office-of-acquisition-policy/governmentwide-acq-policy/federal-acquisition-policy-division> (characterizing the federal government as the “largest buyer of goods and services in the world”).

² See, e.g., *A Snapshot of Government-Wide Contracting for FY 2023 (Interactive Dashboard)*, U.S. GOV'T ACCOUNTABILITY OFF. (June 25, 2024), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2023-interactive-dashboard> (listing DOD contracting at \$456.0 billion with other agencies totaling a combined \$303.2 billion for FY2023).

³ See, e.g., Preventing Organizational Conflicts of Interest in Federal Acquisition Act, P.L. 117-324, 136 Stat. 4439 (2022) (“Not later than 18 months after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall revise the Federal Acquisition Regulation....”); Keep China Out of Solar Energy Act of 2023, S. 968, 118th Cong. § 2(b) (2023).

⁴ See, e.g., *Made in China: Is GSA Complying with Purchasing Restrictions?: Hearing Before the Subcomm. on Cybersecurity, Information Tech., and Gov't Innovation of the H. Comm. on Oversight & Accountability*, 118th Cong. (2024); *VA Contracting: Challenges in Competition and Conflicts of Interest: Joint Hearing Before the Subcomm. on Tech. Modernization and Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs*, 118th Cong. (2023).

⁵ Cf. CRS Report RS22536, *Overview of the Federal Procurement Process and Resources*, by Dominick A. Fiorentino (2023).

What Is the FAR?

The FAR is a regulation, codified in Title 48, Parts 1-53, of the *Code of Federal Regulations*. As is discussed in more detail below,⁶ each part of the FAR (e.g., Part 37, “Service Contracting,” is divided into subparts (e.g., Subpart 37.1, “Service Contracts—General”). Subparts are divided into sections (e.g., FAR 37.113, “Severance Payments to Foreign Nationals”), which may be divided into subsections (e.g., Section 37.113-2, “Solicitation Provision and Contract Clause”). The FAR also contains standard solicitation provisions and contract clauses⁷ and forms.⁸

The various agency FAR supplements, codified in Title 48, Chapters 2-61, and the Cost Accounting Standards (CAS), codified in Title 48, Chapter 99, 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 Publishing Office as part of the *Code of Federal Regulations*⁹ or from private publishers. PDF and HTML versions of the FAR are also available online.¹⁰

What Agencies Are Subject to the FAR?

The FAR applies to certain purchases¹¹ by any *executive agency*, which the FAR defines to mean “an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. § 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. § 9101.”¹²

Notwithstanding this broad definition, the FAR does not apply to all executive branch agencies or to all organizational components of a particular executive branch agency.¹³ Exceptions include, for example, the Federal Aviation Administration (FAA), which Congress has authorized to

⁶ See *infra* “What Does the FAR Include?”

⁷ FAR pt. 52.

⁸ FAR pt. 53.

⁹ U.S. Gov’t Publ’g Off., *CFR*, U.S. GOVERNMENT BOOKSTORE, <https://bookstore.gpo.gov/CFR> (last visited Sept. 17, 2024).

¹⁰ E.g., *Access the Federal Acquisition Regulation*, ACQUISITION.GOV, <https://www.acquisition.gov> (last visited Sept. 17, 2024); Nat’l Archives, *Title 48, CODE OF FED. REGULS.*, <https://www.ecfr.gov/current/title-48> (last visited Sept. 17, 2024); U.S. Gov’t Publ’g Off., *Code of Federal Regulations*, GOVINFO, <https://www.govinfo.gov/app/collection/cfr/2023/title48> (last visited Sept. 17, 2024).

¹¹ See *infra* “What Purchases Are Subject to the FAR?”

¹² FAR 2.101.

¹³ When it was established, the Transportation Security Administration was authorized to use the Federal Aviation Administration’s (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 (2001) (formerly codified at 49 U.S.C. § 114(o)). However, in 2008, Congress eliminated this statutory provision. See Consolidated Appropriations Act, 2008, P.L. 110-161, § 568, 121 Stat. 2092 (2007) (striking § 114(o)).

establish its own acquisition system,¹⁴ and the U.S. Mint.¹⁵ The FAR also generally does not apply to mixed-ownership government corporations, such as the Federal Deposit Insurance Corporation,¹⁶ or to executive agencies that are funded with nonappropriated funds (i.e., from sources other than discretionary funds from an appropriations act), such as the Office of the Comptroller of Currency, which is a bureau within the Department of the Treasury.¹⁷

The FAR does not apply to legislative branch agencies or judicial branch entities, although agencies in the other branches of government (or otherwise not required to follow the FAR) may adopt the FAR as a matter of policy or promulgate or otherwise be subject to requirements similar to those in the FAR. For example, the Library of Congress, a legislative branch agency, has stated that its policy is to follow the FAR “to the extent consistent with the Library’s interests.”¹⁸ (For more information, see “Could an Agency or Transaction Not Subject to the FAR Be Subject to Requirements Similar or Identical to Those in the FAR?” below.)

The FAR does not directly regulate federal contractors or prospective federal contractors, although such vendors are affected by contracting officers applying the FAR’s definitions, policies, procedures, and requirements. For example, the FAR provides policies and procedures related to types of contracts,¹⁹ subcontracting,²⁰ contract termination,²¹ and payments to contractors.²² The FAR also requires agencies to incorporate various contract clauses in the contracts that directly bind contractors. (For more information, see “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?,” both below.)

What Purchases Are Subject to the FAR?

Most executive branch agencies are generally subject to the FAR when making *acquisitions* of *supplies* and *services* with appropriated funds.²³

The FAR defines *acquisition* to mean

[T]he 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

¹⁴ See Department of Transportation and Related Agencies Appropriations Act, 1996, P.L. 104-50, § 348, 109 Stat. 460–61 (1995) (directing the Administrator of the FAA to develop and implement an acquisition system for the FAA).

¹⁵ 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”).

¹⁶ *Id.* § 9101(2).

¹⁷ See, e.g., FAR 1001.104; OFF. OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP’T OF THE TREASURY, CONGRESSIONAL BUDGET JUSTIFICATION AND ANNUAL PERFORMANCE PLAN AND REPORT FY 2024 (2023), <https://home.treasury.gov/system/files/266/25.-OCC-FY-2024-CJ.pdf>.

¹⁸ Library of Congress Regulation 7-110, § 3(A).

¹⁹ FAR pt. 16.

²⁰ FAR pt. 44.

²¹ FAR pt. 49.

²² FAR pt. 32.

²³ FAR 1.104.

performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.²⁴

The FAR further defines terms used in this definition—including *appropriated funds*, *supplies*, and *services*—which can influence whether the FAR is applicable to particular transactions.

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.”²⁵ An *appropriation* is “[a]uthority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes.”²⁶

Supplies are

[A]ll 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.²⁷

Generally, *services* refer 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.”²⁸ The FAR provides the following nonexhaustive list as examples of areas in which service contracts may be found:

- (1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- (2) Routine recurring maintenance of real property.
- (3) Housekeeping and base services.
- (4) Advisory and assistance services.
- (5) Operation of Government-owned equipment, real property, and systems.
- (6) Communications services.
- (7) Architect-Engineering....
- (8) Transportation and related services....
- (9) Research and development....²⁹

²⁴ FAR 2.101.

²⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-261SP, I PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-4 to 2-5 (3d ed., 2004); *see also* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause).

²⁶ I PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 21, at 2-5; *see also* CFPB v. Cmty. Fin. Servs. Ass'n, 601 U.S. 416, 416–17 (2024) (discussing constitutional definition of “appropriation”); *but see* Int'l Line Builders, 67 Comp. Gen. 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, 2005 WL 924199 (Comp. Gen. 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 on whether the procurement at issue is being conducted by a “federal agency,” as that term is defined in the Competition in Contracting Act).

²⁷ FAR 2.101.

²⁸ FAR 37.101.

²⁹ FAR 37.101.

What Transactions Fall Outside the FAR's Coverage?

The FAR only applies to procurement contracts, which are contracts through which appropriated funds are used to acquire supplies or services for the direct use of the United States.³⁰

Transactions not subject to the FAR include

- grants and cooperative agreements;³¹
- “other transactions” (i.e., nonprocurement contracts that authorized agencies may use for the research and development of prototypes);³²
- purchases or leases of real property;³³ and
- transactions where Congress has authorized a government entity to acquire goods or services “notwithstanding any other provision of law.”³⁴

Subcontracts under federal prime contracts (i.e., contracts that federal contractors enter into with third parties) are also not subject to the FAR. In some cases, the FAR requires agencies to include terms in prime contracts obligating prime contractors to “flow down” certain requirements to subcontractors.³⁵ As a result, the FAR, at times, indirectly subjects subcontractors to various contractual terms. However, not all requirements flow down, and the federal government cannot directly enforce against subcontractors the terms that do flow down. Certain FAR provisions that pertain primarily to the conduct of procurements by executive branch agencies are inapplicable to subcontractors. For example, although the FAR generally requires federal agencies to provide for “full and open competition” in the selection of contractors, agency contractors are generally not required to provide for “full and open competition” in the selection of subcontractors.³⁶

What Does the FAR Include?

The various parts of the FAR impose different types of requirements, as illustrated below. Parts 1 through 51 establish policies, obligations, exceptions, practices, and procedures to guide members of the acquisition workforce in performing their responsibilities. Parts 52 and 53 provide standard

³⁰ 31 U.S.C. § 6303.

³¹ FAR 2.101; *see also* 31 U.S.C. §§ 6301–6309.

³² Several agencies, including the National Aeronautics and Space Administration (NASA), DOD, and Department of Homeland Security (DHS), have statutory authority to enter into what are known as *other transactions* (OTs). *See, e.g.*, 51 U.S.C. § 20113(e) (“[NASA] is authorized ... to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate....”). 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 Part 2 defines acquisitions as “the acquiring *by contract*....” *See* FAR 1.104, 2.101 (emphasis added). OTs are agreements that are not contracts within the meaning of the statute and are thus not covered by the FAR. *See, e.g.*, 51 U.S.C. § 20113 (authorizing NASA to enter into “contracts ... or other transactions”).

³³ *See* FAR 2.101.

³⁴ *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.”).

³⁵ *See, e.g.*, FAR 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 for submission of certified cost or pricing data in FAR 15.403-4(a)(1) on the date of the subcontract award.”).

³⁶ *But see* FAR 44.204(c) (generally requiring the inclusion of 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); *id.* 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.”).

solicitation and contract clauses and forms. While much of the FAR is 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 inform the rest of the FAR and federal procurement generally. These guiding principles include satisfying the customer, minimizing administrative operating costs, promoting competition, operating with fairness and integrity, and furthering public policies.

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 and Information Matters
Part 5—Publicizing Contract Actions
Part 6—Competition Requirements
Part 7—Acquisition Planning
Part 8—Required Sources of Supplies and Services
Part 9—Contractor Qualifications
Part 10—Market Research
Part 11—Describing Agency Needs
Part 12—Acquisition of Commercial Products and Commercial Services
Part 13—Simplified Acquisition Procedures
Part 14—Sealed Bidding
Part 15—Contracting by Negotiation
Part 16—Types of Contracts
Part 17—Special Contracting Methods
Part 18—Emergency Acquisitions
Part 19—Small Business Programs
Part 20—Reserved
Part 21—Reserved
Part 22—Application of Labor Laws to Government Acquisitions
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
Part 39—Acquisition of Information Technology
Part 40—Information Security and Supply Chain Security
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

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 contract types.³⁷ Additionally, the FAR defines terms governing the federal procurement system.³⁸

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”³⁹ and identifies acceptable procedures for full and open competition (e.g., sealed bidding, competitive proposals).⁴⁰ Subpart 6.3, in turn, identifies the circumstances in which *other than full and open competition* is permitted (e.g., when there is only one responsible source or there are 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 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 must consider in making certain determinations or the grounds on which agencies may take certain actions. For instance, 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.⁴¹ Part 9 similarly describes the grounds on which agency suspension and debarment officials may exclude persons from federal contracting for a period of time.⁴² 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, and the System for Award Management [SAM]).⁴³

³⁷ See FAR pts. 7, 5, 8, and 16.

³⁸ See FAR pt. 2. In some cases, other parts of the FAR, including the standard solicitation or contract clauses, provide additional or context-specific definitions. See, e.g., FAR 9.301 (defining “approval” for purposes of the FAR provisions on first article testing and approval); *id.* 52.204-3 (defining “common parent” for purposes of the clause regarding taxpayer identification).

³⁹ FAR 6.101(a).

⁴⁰ FAR 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.” FAR 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. FAR 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.” FAR 6.102(d)(2)(i).

⁴¹ FAR 9.104-1.

⁴² FAR 9.400–404.

⁴³ FAR 9.105-1.

Other FAR provisions articulate the responsibilities of various agency personnel in administering contracts. For example, contract administration may include a variety of tasks and responsibilities, depending on the type of contract and the goods or services acquired. Part 42 of the FAR provides guidance for acquisition personnel regarding audits, postaward contractor orientations, production surveillance and reporting, and the collection of contractor performance information. Additionally, FAR 42.302(a) includes a detailed list of 71 specific contract administration functions to be used by the contract administration officer.

Parts 52 and 53

Parts 52 and 53 differ from the other parts of the FAR in that they provide agencies with standard provisions, clauses, and forms to be included, or incorporated by reference, in solicitations or contracts, 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 or clause has a unique identification number.⁴⁴ For example, FAR 52.249-1 provides the standard, short-form “Termination for Convenience” contract clause for fixed-price contracts, which states

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government’s interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with part 49 of the Federal Acquisition Regulation in effect on the date of this contract.⁴⁵

Part 53 contains standard, optional, and agency-prescribed acquisition forms, such as Standard Form 30, “Amendment of Solicitation/Modification of Contract”; Optional Form 17, “Offer Label”; and DOD Form DD 254, “Contract Security Classification Specification.”⁴⁶

Guiding Principles for the Federal Acquisition System

In addition to providing procedures and requirements discussed above that, collectively, make up the procurement process, 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.”⁴⁷ In brief, the four performance standards are

1. satisfying customers in terms of cost, quality, and timeliness of the delivered product or service;
2. minimizing administrative operating costs;
3. conducting business with integrity, fairness, and openness; and
4. fulfilling public policy objectives.⁴⁸

⁴⁴ 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.

⁴⁵ FAR 52.249-1.

⁴⁶ FAR 53.301–.303.

⁴⁷ FAR 1.102(a).

⁴⁸ FAR 1.102(b); *see also* FAR 1.102-2(a)–(d).

The FAR defines the *acquisition team* to include contracting officers and certain other agency personnel, the taxpayer “customers they serve,” and contractors.⁴⁹ “The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs.”⁵⁰ Government members of the team “must be empowered to make acquisition decisions within their areas of responsibility ... [and] must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on a specific contract.”⁵¹ The contractor is also encouraged to be prepared for performance of the contract through training, professional development, and other measures.⁵²

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, the agencies that typically promulgate regulations amending the FAR, the roles of the OFPP and the OMB in revising and implementing the FAR, and the length of time 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).⁵³ Generally, the FPR applied to civilian agencies and the DAR applied to the DOD and its components, although the then-Atomic Energy Commission, Central Intelligence Agency, NASA, Tennessee Valley Authority, and Bonneville Power Administration, among others, each had “semiautonomous procurement regulations.”⁵⁴

In 1969, Congress established the Commission on Government Procurement to issue a report on the status of the federal procurement system.⁵⁵ As noted in its 1972 report, the commission 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.”⁵⁶

The report provided an impetus for attempting to bring order to the “mass and maze” of procurement regulations. Notably, Congress enacted the Office of Federal Procurement Policy Act Amendments of 1979,⁵⁷ which amended the Office of Federal Procurement Policy Act⁵⁸ to authorize the Administrator of the OFPP, with the concurrence of the Director of the OMB, to “issue policy directives ... for the purpose of promoting the development and implementation of

⁴⁹ FAR 1.102(c).

⁵⁰ FAR 1.102(d).

⁵¹ FAR 1.102-5(a).

⁵² FAR 1.102-5(c).

⁵³ The Armed Services Procurement Regulation was renamed the DAR in 1978.

⁵⁴ COMM’N ON GOV’T PROCUREMENT, I REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, 33 (1972).

⁵⁵ Office of Federal Procurement Policy Act Amendments of 1979, P.L. 96-83, 93 Stat. 684.

⁵⁶ COMM’N ON GOV’T PROCUREMENT, *supra* note 51, at 31.

⁵⁷ P.L. 96-83.

⁵⁸ P.L. 93-400, 88 Stat. 796 (1974).

the uniform procurement system.”⁵⁹ Subsequently, OFPP released Policy Letter 80-5. This document 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 GSA, DOD, 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.⁶⁰

The FAR was initially published on September 19, 1983, and took effect on April 1, 1984.⁶¹ It has been amended periodically since then.⁶²

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 of 1947⁶³ and the Federal Property and Administrative Services Act of 1949,⁶⁴ codified in Titles 10 and 41 of the *U.S. Code*. These laws respectively govern the procurements of defense and civilian agencies. A number of other statutes might also apply to agency procurements, including the Anti-Kickback Act;⁶⁵ Brooks Act of 1972;⁶⁶ Buy American Act;⁶⁷ Buy Indian Act;⁶⁸ Competition in Contracting Act of 1984;⁶⁹ Contract Disputes Act;⁷⁰ Contract Work Hours and Safety Standards Act;⁷¹ Davis-Bacon Act;⁷² Defense Production Act;⁷³ Economy Act;⁷⁴ Federal Activities Inventory Reform (FAIR) Act;⁷⁵

⁵⁹ *Id.* § 6(h) (as amended by P.L. 96-83 § 4(e), 93 Stat. at 650). Additionally, the act required that “[t]he policy directives shall be followed by executive agencies.” *Id.*

⁶⁰ Federal Acquisition Regulation System; Other Procurement Rules and Regulations, 45 Fed. Reg. 48074, 48076 (July 17, 1980).

⁶¹ Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42102 (Sept. 19, 1983).

⁶² See *infra* “What Is the Relationship Between the FAR and Procurement or Other Statutes?”; “How Is the FAR Amended?”; and “Who Typically Promulgates Regulations Amending the FAR?”

⁶³ Pub. L. No. 80-413, 62 Stat. 21 (1948) (codified as amended throughout Title 10 of the *U.S. Code*).

⁶⁴ Pub. L. No. 81-152, 63 Stat. 377 (1949) (codified as amended throughout Title 41 of the *U.S. Code*).

⁶⁵ Act of Mar. 8, 1946, ch. 80, 60 Stat. 37 (codified as amended at 41 U.S.C. §§ 8701–08).

⁶⁶ Pub. L. No. 92-582, 86 Stat. 1278 (1972) (codified as amended at 40 U.S.C. §§ 1101–04).

⁶⁷ Act of Mar. 3, 1933, ch. 212, tit. III, 47 Stat. 1489, 1520 (codified as amended at 41 U.S.C. §§ 8301–05).

⁶⁸ Act of June 25, 1910, ch. 431, § 23, 36 Stat. 855, 861 (codified as amended at 25 U.S.C. § 47).

⁶⁹ P.L. 98-369, Title VII, §§ 2701–53, 98 Stat. 494, 1175–1203 (1984) (codified as amended in scattered sections of the *U.S. Code*).

⁷⁰ Contract Disputes Act of 1978, P.L. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–09).

⁷¹ Contract Work Hours Standards Act, Pub. L. No. 87-581, 76 Stat. 357 (1962) (codified as amended at 40 U.S.C. §§ 3701–08). The name of the act was amended to its current form in 1969. Pub. L. No. 91-54, § 2, 83 Stat. 96, 98 (1962).

⁷² Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494 (codified as amended at 40 U.S.C. §§ 3141–48).

⁷³ Defense Production Act of 1950, ch. 932, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501–68).

⁷⁴ Act of Mar. 4, 1915, ch. 143, § 1, 30 Stat. 1062, 1084 (codified as amended at 31 U.S.C. §§ 1535–37).

⁷⁵ Federal Activities Inventory Reform Act of 1998, P.L. 105-270, 112 Stat. 2382 (codified as amended at 31 U.S.C. § 501 note).

Miller Act;⁷⁶ Office of Federal Procurement Policy Act;⁷⁷ Prompt Payment Act;⁷⁸ Service Contract Act;⁷⁹ Small Business Act;⁸⁰ Trade Agreements Act;⁸¹ Truth in Negotiations Act;⁸² and Walsh-Healy Public Contracts Act.⁸³ In addition, Congress regularly implements procurement policy through appropriations acts and national defense authorization acts.⁸⁴

The FAR implements many such statutory provisions. 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 nonprocurement regulations of other agencies.⁸⁵ However, there are some procurement-related provisions in statute—especially in permanent provisions of appropriations laws⁸⁶—that are not reflected in the FAR or the agency FAR supplements discussed below.⁸⁷ 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.⁸⁸

On the other hand, because certain statutes grant the executive branch broad discretion to regulate federal contracting,⁸⁹ there are provisions in the FAR that do not have a direct counterpart in federal statute. Examples include (1) the grounds for administrative debarment and suspension, (2) the requirement that contractors disclose “credible evidence” of certain offenses to federal officials, and (3) the procedures surrounding the government’s termination of contracts for

⁷⁶ Act of Aug. 24, 1935, ch. 642, 49 Stat. 793 (codified as amended at 40 U.S.C. §§ 3131–34).

⁷⁷ Office of Federal Procurement Policy Act, P.L. 93-400, 88 Stat. 796 (1974) (codified as amended at 41 U.S.C. §§ 1101–02).

⁷⁸ Prompt Payment Act, P.L. 97-177, 96 Stat. 85 (1982) (codified as amended at 31 U.S.C. §§ 3901–07).

⁷⁹ Service Contract Act of 1965, Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 6701–07).

⁸⁰ Small Business Act of 1953, ch. 282, tit. II, 67 Stat. 230, 232 (codified as amended at 15 U.S.C. §§ 631–57u).

⁸¹ Trade Agreements Act of 1979, P.L. 96-39, 93 Stat. 144 (codified as amended at 19 U.S.C. §§ 2501–81).

⁸² Pub. L. No. 87-653, 76 Stat. 528 (1962) (codified as amended at 10 U.S.C. §§ 3701–08).

⁸³ Act of June 30, 1936, ch. 881, 49 Stat. 2036 (codified as amended at 41 U.S.C. §§ 6501–11).

⁸⁴ See, e.g., Consolidated Appropriations Act, 2024, P.L. 118-42, § 514, 138 Stat. 25, 169 (establishing supply chain risk review requirements for acquisitions of certain information systems); National Defense Authorization Act of 2024, P.L. 118-31, Div. A, tit. I, 137 Stat. 136, 164 (authorizing and limiting various procurement authorities for Department of Defense programs).

⁸⁵ See *infra* “What Is the Relationship Between the FAR and Other Regulations (i.e., Non-FAR Supplements)?”

⁸⁶ See, e.g., District of Columbia Appropriations Act for FY2001, P.L. 106-553, app’x B, tit. I, § 119, 114 Stat. 2762A-69 (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 21, at 2-33 to 2-39 (discussing when general provisions of an appropriations act may be construed as permanent legislation).

⁸⁷ See *infra* “What Is the Relationship Between the FAR and Agency FAR Supplements?”

⁸⁸ See, e.g., 42 U.S.C. § 7606 (statutory debarment for certain violations of the Clean Air Act); *id.* § 17141 (prohibition upon the purchase or installation of general service incandescent lamps at certain Coast Guard facilities); Consolidated Appropriations Act, 2014, P.L. 113-76, 128 Stat. 5, 306–07 (authorizing noncompetitive contracts for hazardous fuels reduction activities and associated training and monitoring). Provisions like the one in P.L. 113-76 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 (2007).

⁸⁹ 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).

convenience or default.⁹⁰ Often the FAR provisions without direct statutory counterparts have developed in response to executive orders,⁹¹ judicial decisions,⁹² or policy recommendations.⁹³

How Is the FAR Amended?

The DOD, GSA, and NASA, acting on behalf of the FAR Council (or the Administrator of the OFPP, as discussed below⁹⁴), issue proposed and final rules amending the FAR in accordance with the procedures primarily codified at 41 U.S.C. § 1707. These rulemaking procedures are similar to the “notice-and-comment” procedures of the Administrative Procedure Act (APA)⁹⁵ that are the default procedures used by agencies to promulgate regulations. Section 1707 generally requires publication in the *Federal Register* of a proposed rule.⁹⁶ These rules may not take effect until at least 60 days after publication unless “there are compelling circumstances for [an] earlier effective date.” If such compelling circumstances are present, the rule may not take effect for at least 30 days.⁹⁷ Section 1707 also generally requires a minimum of 30 days for interested persons to submit comments on the proposal.⁹⁸ The agencies must consider the comments received before

⁹⁰ 48 C.F.R. §§ 9.400–9.409 (debarment and suspension); 48 C.F.R. §§ 3.1000–3.1004 (mandatory disclosure rule); FAR 49.000–49.607 (termination for convenience and default).

⁹¹ See, e.g., Federal Acquisition Regulation: Sustainable Acquisition, 76 Fed. Reg. 31395 (May 31, 2011) (implementing, in part, Executive Order 13,514, Federal Leadership in Environmental, Energy, and Economic Performance, 74 Fed. Reg. 52117 (Oct. 8, 2009)).

⁹² For example, the FAR Council amended the FAR in 2014 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*, 545 F.3d 1023 (Fed. Cir. 2008). See Federal Acquisition Regulation; Federal Contracting Programs for Minority-Owned and Other Small Businesses: Final Regulation, 79 Fed. Reg. 61746 (Oct. 14, 2014) (codified at 48 C.F.R. pts. 1, 2, 4, 12, 14, 15, 19, 22, 26, 36, 52, 53).

⁹³ 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 closeout of a federal contract. See 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 generally prompted by certain recommendations made by the Department of Justice, although Congress did enact legislation requiring that contracts (1) for commercial items or (2) 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.

⁹⁴ See *infra* “Who Typically Promulgates Regulations Amending the FAR?”

⁹⁵ 5 U.S.C. § 553. The rulemaking procedures of the APA do not apply to “a matter relating to ... public property, loans, grants, benefits, or contracts.” *Id.* at 553(a); see also *Bayaud Enters., Inc. v. U.S. Dep’t of Veterans Affs.*, 440 F. Supp. 3d 1230, 1238 (D. Colo. 2020) (discussing the applicability of 41 U.S.C. § 1707, rather than the APA’s notice-and-comment rulemaking procedures, to an agency action involving federal procurement contracts). The judicial review provisions of the APA (5 U.S.C. §§ 701-706), however, do apply to claims alleging that a FAR rulemaking did not comply with applicable rulemaking procedures. *Alphapointe v. Dept. of Veterans Affs.*, 416 F. Supp. 3d 1, 7 (D.D.C. 2019); *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998) (“As far as Counts I–III are concerned, Southfork’s real complaint was that the Department of Education and DOD had acted arbitrarily in promulgating the regulations that the Air Force followed in conducting the Lackland procurement. If a bidder wishes to challenge the validity of a regulation governing a procurement, the proper method of doing so is to bring an action in federal district court under the Administrative Procedure Act, 5 U.S.C. § 702.”). For more information on judicial review under the APA, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

⁹⁶ 41 U.S.C. § 1707(a), (b). Under § 1707(a), publication of a proposed rule is required “if it relates to the expenditure of appropriated funds and has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or has a significant cost or administrative impact on contractors or offerors.”

⁹⁷ *Id.* § 1707(a).

⁹⁸ *Id.*

issuing a final rule.⁹⁹ The notice-and-comment requirements of Section 1707(a) and (b) can be waived “if urgent and compelling circumstances make compliance with the requirements impracticable.”¹⁰⁰ Rules issued under this waiver authority may only be “effective on a temporary basis” but may be finalized after being published in the *Federal Register* and after a 30-day comment period.¹⁰¹

Additionally, FAR amendments are subject to the procedural requirements of various generally applicable administrative procedure laws and executive orders, such as the Regulatory Flexibility Act,¹⁰² the Paperwork Reduction Act,¹⁰³ and Executive Order 12,866.¹⁰⁴

Who Typically Promulgates Regulations Amending the FAR?

Typically the DOD, GSA, and NASA jointly issue the *Federal Register* notices proposing or announcing amendments to the FAR.¹⁰⁵ These three agencies issue the *Federal Register* notices in accordance with federal statutes and regulations that 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.”¹⁰⁶ The amendments proposed and announced by DOD, GSA, and NASA are developed through and with the concurrence of the FAR Council. This council—which consists of the Administrator of OFPP, the Secretary of Defense, the Administrator of National Aeronautics and Space (NASA Administrator), and the Administrator of General Services (GSA Administrator), or their designees¹⁰⁷—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,”¹⁰⁸ as well as to “manage, coordinate, control, and monitor the maintenance of, issuance of, and changes in, the Federal Acquisition Regulation.”¹⁰⁹

⁹⁹ *Id.* § 1707(b).

¹⁰⁰ *Id.* § 1707(d).

¹⁰¹ *Id.* § 1707(e).

¹⁰² 5 U.S.C. §§ 601–612.

¹⁰³ 44 U.S.C. §§ 3501–3521.

¹⁰⁴ Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993).

¹⁰⁵ *See, e.g.*, 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).

¹⁰⁶ 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 of title 10, chapter 137 of title 10 legacy provisions ... , 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* Federal Acquisition Regulation System; Other Procurement Rules and Regulations, 45 Fed. Reg. 48076 (July 17, 1980).

¹⁰⁷ *See infra* “What Roles Do OFPP and OMB Play in Revising and Implementing the FAR?”; 41 U.S.C. § 1302(b)(1)–(2).

¹⁰⁸ *Id.* § 1302(a).

¹⁰⁹ *Id.* § 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 (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 (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 (continued...)”).

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.¹¹⁰ The FAR Council establishes each team with representatives from military and civilian agencies and OFPP advisory representatives.¹¹¹ The Civilian Agency Acquisition Council (CAA Council) and the DAR Council (DAR Council) oversee the FAR teams. The FAR teams coordinate their activities to ensure agreement and cooperation between civilian and defense acquisition personnel.¹¹² The relevant FAR team drafts and submits potential FAR amendments to the CAA Council and the DAR Councils for review.¹¹³ After the councils have reviewed a potential FAR amendment, they submit it to OFPP and OIRA for additional review.¹¹⁴ After these reviews, FAR signatories within GSA, DOD, and NASA conduct a final approval of the amendments and then submit the proposed, interim final, or final rules for publication in the *Federal Register*.¹¹⁵

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.”¹¹⁶ 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.¹¹⁷

Congress has regularly passed legislation requiring or prompting FAR amendments.¹¹⁸

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.”).

¹¹⁰ For additional information on the structure and responsibilities of the FAR Teams, see the *Defense Pricing and Contracting, FAR Operating Guide* (2015), https://www.acq.osd.mil/dpap/dars/docs/far_dfars_guide/FAR_Operating_Guide_July_2015.pdf.

¹¹¹ FAR 1-201-1. See also Memorandum from Robert A. Burton, Assoc. Adm’r of OFPP, to Fed. Acquisition Council Senior Agency Procurement Execs. (Mar. 11, 2004), <https://apps.dtic.mil/sti/tr/pdf/ADA439360.pdf#page=109>; see also *Close the Contractor Fraud Loophole Act Hearing and Real Property Disposal Enhancement Act: Hearing on H.R. 5712 and H.R. 5787 Before the Subcomm. on Gov’t. Mgmt. Org. & Procurement of the H. Comm. on Oversight & Gov. Reform*, 110th Cong. 34–36 (2008) (statement of David Drabkin, Acting Chief Acquisition Officer and Senior Procurement Exec., Gen.l Svcs. Admin.).

¹¹² The CAA Council 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 DAR Council (DAR Council) and the [Civilian Agency CAA Council].” FAR 1.201-1(a).

¹¹³ FAR Operating Guide § II.A. (June 2015).

¹¹⁴ *Id.* § I.C.

¹¹⁵ *Id.* § I.B.

¹¹⁶ 41 U.S.C. § 1121(d). As is discussed in greater detail below (see *infra* “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).

¹¹⁷ See *infra* “Does the FAR Include All the Government’s Procurement Policies?”; see, e.g., 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 CAS in Title 48, Part 99 of the *Code of Federal Regulations*. See, e.g., CAS: Elimination of the Exemption from CAS for Contracts and Subcontracts Executed and Performed Entirely Outside the United States, Its Territories, and Possessions, 76 Fed. Reg. 49365 (Aug. 10, 2011) (to be codified at 48 C.F.R. pt. 9903). However, Part 99 is not part of the FAR (see *supra* “What Is the FAR?”).

¹¹⁸ See *infra* “What Can Congress Do to Prompt Amendment of the FAR?”

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

The OFPP provides overall direction for the government-wide procurement policies, regulations, procedures, and forms for executive agency acquisitions that are covered by the FAR.¹¹⁹ The Administrator for Federal Procurement Policy is responsible for directing the development of the procurement policies that are implemented, in part, through the FAR. The Administrator also establishes procedures to ensure that executive agencies are complying with the FAR.

The Administrator serves as the chair of the FAR Council, which “assist[s] in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities.”¹²⁰ The Secretary of Defense, NASA Administrator, and GSA Administrator are the other members of the FAR Council. As discussed in the previous section, these three agency heads are primarily responsible for implementing the FAR, in consultation with the FAR Council. In the event that these three agency heads are unable to reach agreement regarding revisions to the FAR, the Administrator of OFPP has the authority to prescribe certain revisions without their concurrence, as discussed above.¹²¹

OMB provides oversight and review of proposed changes and amendments to the FAR.¹²² These responsibilities are largely carried out by OMB’s Office of Information and Regulatory Affairs (OIRA).¹²³ Rules amending the FAR are subject to the same rulemaking requirements applicable to executive agencies, which typically include review by OIRA.¹²⁴ Both OFPP and OIRA review proposed changes to the FAR to ensure that they are consistent with the law and Administration policies.¹²⁵

The OFPP Administrator, in concurrence with the OMB Director, may also rescind any procurement-related government-wide regulation issued by any executive agency upon determining that it is inconsistent with federal procurement policies, procedures, or rules.¹²⁶

How Long Does It Take to Amend the FAR?

The full process of amending the FAR can take anywhere from months to years (and, in some cases, proposed changes are never finalized).¹²⁷ The timeline for finalizing FAR amendments varies based on factors such as how the regulation is promulgated, the complexity of the proposed rule, and the number of comments received about a proposed rule. Although some amendments required by statute are subject to statutory deadlines, a FAR amendment could potentially take

¹¹⁹ 41 U.S.C. § 1121. The OFPP was established as part of the OMB in 1974 by the Office of Federal Procurement Policy Act, P.L. 93-400, 88 Stat. 796 (1974).

¹²⁰ 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, 102 Stat. 4055.

¹²¹ 41 U.S.C. § 1121(d); see *supra* “Who Typically Promulgates Regulations Amending the FAR?”

¹²² See generally Exec. Order 14094, 88 Fed. Reg. 21879 (Apr. 6, 2023).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 41 U.S.C. § 1121(e).

¹²⁷ 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 Feb. 28, 2012, that would have required contractors to certify their compliance with labor laws).

longer than those prescribed deadlines.¹²⁸ However, rules generally have the force of law even if they are enacted after any statutory deadline for their promulgation.¹²⁹ In cases of extreme delay, the APA authorizes lawsuits seeking court orders to compel agency action.¹³⁰ Congressional prerogatives on how quickly an agency should promulgate regulations are only one factor in determining whether an unreasonable delay warrants judicially compelled agency action.¹³¹ 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.¹³²

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 Agency FAR Supplements?

The FAR expressly authorizes agency heads to issue agency-specific procurement regulations that implement or supplement the FAR.¹³³ These agency-specific regulations are codified in separate chapters of Title 48 of the *Code of Federal Regulations*, immediately following the FAR.¹³⁴ One example is the DOD's DFARS, which is found in Chapter 2 of Title 48.

¹²⁸ See *infra* "How Is the FAR Amended?"; see, e.g., Small Business Jobs Act, P.L. 111-240, § 1334, 124 Stat. 2542–43 (2010) (to be codified at 15 U.S.C. § 657q) (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). The Small Business Administration promulgated regulations implementing this provision of the Small Business Jobs Act in 2013. See Small Business Admin., Small Business Subcontracting: Final Rule, 78 Fed. Reg. 42390 (July 16, 2013) (codified, in part, at 13 C.F.R. § 125.3(c)(5)). However, amendments to the FAR implementing these provisions of the Small Business Jobs Act were not proposed until July 2015. See Federal Acquisition Regulation: Small Business Subcontracting Improvements, 80 Fed. Reg. 32909 (June 10, 2015) (to be codified at 48 C.F.R. pts. 1, 2, 15, 19, 52).

¹²⁹ 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 coercive sanction" (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)); *PM Farms, Inc. v. Young*, 233 F. Supp. 3d 706, 720 (S.D. Iowa 2017) (collecting cases in which in which "a deadline seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed"). Courts have applied this principle in the acquisitions context as well. See, e.g., *Women's Chamber of Com. v. Small Bus. Admin.*, No. 04-CV-01889, 2005 WL 3244182, at *18 (D.D.C., Nov. 30, 2005) (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").

¹³⁰ 5 U.S.C. § 706(1).

¹³¹ See, e.g., *Telecomm. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

¹³² *Id.*

¹³³ FAR 1.301(a)(1).

¹³⁴ *Id.*

Agency FAR supplements generally do not differ significantly from the FAR except where a statute imposes or authorizes unique procurement procedures for an agency.¹³⁵ Agency FAR supplements may not conflict with the FAR, except as authorized by law.¹³⁶

The FAR contains requirements that agencies must follow when promulgating agency-specific 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).¹³⁷ Additionally, agencies must comply with other federal laws, such as the Paperwork Reduction Act and Regulatory Flexibility Act.¹³⁸

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

(Not all chapter numbers are currently in use)

- 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 17—Office of Personnel Management
- 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)

¹³⁵ FAR 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”).

¹³⁶ *See infra* “May Agencies Deviate from the FAR?”; FAR 1.304(b)(2); *see, e.g.,* Desciose v. Delbalzo, No. CV-93-01901, 1998 WL 764453 at *1 (9th Cir. Oct. 29, 1998) (explaining that, if the GSA regulation in question were to conflict with the FAR, then the FAR would control).

¹³⁷ FAR 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.”).

¹³⁸ FAR 1.301(b). The Paperwork Reduction Act is codified at 44 U.S.C. §§ 3501–21, and the Regulatory Flexibility Act is codified at 5 U.S.C. §§ 601–12.

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 (reserved)
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 agency FAR supplements (discussed above)¹³⁹ 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 apply to the award and administration of energy savings performance contracts by federal agencies.¹⁴⁰ 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.¹⁴¹ The Department of Energy regulations expressly provide that they are “controlling with regard to energy savings performance contracts notwithstanding any conflicting provisions of the Federal Acquisition Regulation and related Federal agency regulations.”¹⁴²

Other agency regulations directly or indirectly pertaining to federal procurement include regulations governing contracting with small businesses;¹⁴³ governing contracting with Federal Prison Industries/UNICOR;¹⁴⁴ implementing labor laws under the Davis-Bacon and Service Contract Acts, among others;¹⁴⁵ governing contracting with AbilityOne, which employs the blind and severely disabled;¹⁴⁶ and imposing contractors’ antidiscrimination and affirmative action obligations.¹⁴⁷

Depending upon the requirements of the specific underlying statute, including the identity of the officer or agency charged with implementing the statute, FAR provisions may need to conform to

¹³⁹ See *supra* “What Is the Relationship Between the FAR and Agency FAR Supplements?”

¹⁴⁰ 10 C.F.R. § 436.30.

¹⁴¹ 48 C.F.R. §§ 225.7017-1, 225.7017-4 (DOD).

¹⁴² 10 C.F.R. § 436.30(a).

¹⁴³ Codified in various sections throughout Title 13 of the *Code of Federal Regulations*.

¹⁴⁴ Codified in various sections throughout Title 28 of the *Code of Federal Regulations*.

¹⁴⁵ Codified in various sections throughout Title 29 of the *Code of Federal Regulations*.

¹⁴⁶ 41 C.F.R. §§ 51-1–51-99.

¹⁴⁷ Codified in various sections throughout Title 41 of the *Code of Federal Regulations*.

another agency's regulations.¹⁴⁸ In other cases, the FAR and another agency might issue regulations with each other's concurrence.¹⁴⁹

Does the FAR Include All the Government's Procurement Policies?

Various procurement policies, requirements, and guidance are issued by the OFPP or the OMB as circulars, guides, memoranda, and policy letters.¹⁵⁰ 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," builds on FAR Subpart 7.5, which lists examples of functions that are 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 performance."¹⁵¹ Policy Letter 11-01 provides specific guidance regarding how agencies are to manage the performance of functions delineated in FAR Subpart 7.5.¹⁵² Various OFPP memoranda address other procurement topics that are not expressly addressed in the FAR. Examples include FAIR Act inventories, service contract inventories, and the quality of federal procurement data.¹⁵³

The FAR and Congress

This section includes questions and answers that address what Congress can do to prompt amendment of the FAR and what Congress can do if it disapproves of a potential amendment to the FAR.

¹⁴⁸ 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); Task and Delivery Order Contracts, Bundling, Consolidation: Notice of Proposed Rulemaking, 77 Fed. Reg. 29130 (May 16, 2012) (codified at 13 C.F.R. pts. 121, 124, 125, 126, 127) ("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.").

¹⁴⁹ 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.").

¹⁵⁰ For links to procurement-related circulars, guides, memoranda, policy letters, and other documents, see the "Policy Information" section of the OFPP's website. *Office of Federal Procurement Policy*, THE WHITE HOUSE, <https://www.whitehouse.gov/omb/management/office-federal-procurement-policy> (last visited Sept. 20, 2024).

¹⁵¹ FAR 7.503(d).

¹⁵² See 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).

¹⁵³ Memorandum from Lesley A. Field, Acting Adm'r, Off. of Fed. Procurement Pol'y, to Heads of Exec. Dep'ts & Agencies (Mar. 26, 2012), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2012/m-12-09_0.pdf; Letter from Leslie A. Field, Acting Adm'r, Off. of Fed. Procurement Pol'y, to Jason Chaffetz, Chairman of the H. Comm. on Oversight & Gov't Reform (Jan. 17, 2017), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2017/service_contract_inventories.pdf; Memorandum from Daniel I. Gordon, Adm'r, Off. of Fed. Procurement Pol'y, to Chief Acquisition Officers, Senior Procurement Execs & Small Agency Council Members (May 31, 2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/procurement/memo/improving-data-quality-guidance-for-annual-verification-and-validation-may-2011.pdf.

What Can Congress Do to Prompt Amendment of the FAR?

Congress regularly prompts the executive branch to amend the FAR. In some cases, Congress effectively prompts amendment of the FAR by enacting or amending a law that is implemented, at least in part, through the FAR.¹⁵⁴ Congress can explicitly direct that the FAR be amended¹⁵⁵ through legislation and may also direct the FAR Council to finalize an amendment by a certain time (although not all FAR amendments required by Congress are made within the prescribed time frame).¹⁵⁶

As discussed above,¹⁵⁷ the FAR Council and OFPP have general statutory authority to amend the FAR. In some cases, the FAR Council initiates some FAR amendments in response to policy concerns or litigation.¹⁵⁸ 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.¹⁵⁹ Members of Congress and congressional committees could, through letters or other means short of new legislation, encourage the FAR Council or OFPP to amend the FAR pursuant to their general rulemaking authority.¹⁶⁰

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), through comments submitted as part of the proposed rulemaking, or through the exercise of oversight. Congress may also enact legislation that effectively or expressly rescinds amendments to the FAR. For example, Congress could enact legislation containing requirements that are inconsistent with certain potential amendments to the FAR. This happened, for example, in 2008, when Congress required that contracts for commercial items or services that are performed overseas be subject to any “mandatory disclosure rule”

¹⁵⁴ See, e.g., Small Business Jobs Act of 2010, P.L. 111-240, § 1313, 124 Stat. 2538–39 (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). The SBA amended its regulations to address the Small Business Jobs Act’s restrictions on consolidation in October 2013. Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61114 (Oct. 2, 2013) (codified at 13 C.F.R. pts. 121, 124, 125, 126, 127). Subsequently, in July 2015, DOD, GSA, and NASA proposed amendments to the FAR addressing bundling and consolidation. See Federal Acquisition Regulation; Consolidation and Bundling of Contract Requirements: Proposed Rule, 80 Fed. Reg. 31561 (June 30, 2015) (to be codified at 48 C.F.R. pts. 2, 5, 7, 8, 10, 12, 15, 16, 19, 52).

¹⁵⁵ See, e.g., Small Business Jobs Act of 2010, P.L. 111-240, § 1334, 124 Stat. 2542–43 (“Not later than 1 year after September 27, 2010, the Federal Acquisition Regulatory Council established under section 1302(a) of title 41 shall amend the Federal Acquisition Regulation issued under section 1303(a) of title 41 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.”).

¹⁵⁶ See *supra* “How Long Does It Take to Amend the FAR?”

¹⁵⁷ See *supra* “Who Typically Promulgates Regulations Amending the FAR?”

¹⁵⁸ See *supra* notes 92–93.

¹⁵⁹ See *supra* note 91.

¹⁶⁰ For example, absent a statute expressly authorizing such awards, the FAR Council would arguably lack the authority to amend the FAR to allow agencies to make sole-source awards to “local firms,” because such awards would not fall within one of the statutory exceptions to the general requirement that agencies select contracts through full and open competition. See 41 U.S.C. §§ 3301, 3304.

promulgated by the FAR Council (in contrast to the rule in place at the time that excluded contracts performed entirely outside the United States).¹⁶¹ Congress could also enact legislation that bars agencies from imposing certain requirements on contractors or from using appropriated funds to implement specific rules, regulations, or executive orders pertaining to contract-related matters.¹⁶²

In addition, the Congressional Review Act¹⁶³ provides Congress with expedited procedures to overturn final rules, including rules amending the FAR, through the enactment of joint resolutions of disapproval within 60 congressional session days from the day the rule is received by Congress. If passed by Congress and signed into law by the President, a joint resolution of disapproval results in the rule having no “force or effect” and bars the agency from implementing a substantially similar rule.¹⁶⁴

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 preexisting contracts, and what happens if a contract clause 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 a contract applies to both the agency and the contractor. Thus, the terms in the contract, not provisions of the FAR, bind the contractor. That said, terms or clauses required by the FAR that are missing from a given contract may be read into the contract in certain circumstances.¹⁶⁵

Although the FAR and a contract both legally bind the government, they do so in different ways. Courts and tribunals often deploy different rules and devices when interpreting the ambiguous terms of procurement contracts, on the one hand, and federal procurement statutes and regulations, on the other. For example, while courts and other tribunals generally prioritize the

¹⁶¹ Close the Contractor Fraud Loophole Act, 2008, P.L. 110-252 § 6102, 122 Stat. 2386 (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.”).

¹⁶² See, e.g., National Defense Authorization Act for FY2012, P.L. 112-81, § 823, 125 Stat. 1502, 1502–03 (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, Div. C, tit. VII § 743, 125 Stat. 939 (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.”). Congress has included similar language in more recent appropriations measures. See Further Consolidated Appropriations Act, 2024, P.L. 118-47, Div. B, tit. VII § 735 (2024).

¹⁶³ 5 U.S.C. §§ 801–08.

¹⁶⁴ *Id.* § 802(a). For more information on the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis (2021).

¹⁶⁵ See *infra* “What Happens If Required Contract Clauses Are Not Included in a Particular Contract?”

plain meaning of a statute or regulation over the drafters' intent,¹⁶⁶ the intent of the parties to a contract can prevail over its plain text in certain cases, such as when other provisions of the contract evidence that the contract's language on a particular issue does not reflect their intentions.¹⁶⁷

While the FAR contains many standard contract terms and clauses, the details and specifics of a particular contract are often left to the procurement personnel of the relevant agency. For this reason, the drafting process that occurs for each contract can be highly important, as exemplified, for instance, through the application of economic price adjustments under the FAR and the contract. An *economic price adjustment* provides for the upward or downward revision of prices in a contract if certain conditions occur.¹⁶⁸ The FAR provides that there are three general types of economic price adjustments: (1) those based on established prices; (2) those based on actual costs of labor or material; and (3) those based on cost indexes of labor or material.¹⁶⁹ When including economic price adjustment in a contract, agency procurement personnel draft the contract to include contract-specific details, such as identifying the events that will trigger the price adjustments, incorporating applicable price indexes or established prices, and establishing price floors and caps.

Do Amendments to the FAR Apply to Preexisting Contracts?

Amendments to the FAR and procurement-related statutes generally apply only to contracts entered into on or after the date on which the amendment goes into effect, not to *preexisting contracts* (i.e., contracts entered into before an amendment).¹⁷⁰ This rule is intended to shield the government from liability stemming from unilaterally amending the terms of an existing contract to effectuate a regulatory change.¹⁷¹ Moreover, when a change to the FAR is prompted by a statute, this rule 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.¹⁷² Thus, if

¹⁶⁶ 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) (holding that “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).

¹⁶⁷ See *Alvin, Ltd. v. USPS*, 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 4 SAMUEL WILLISTON & WALTER H. E. JAEGER, 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.”). But see *infra* “What Happens If Required Contract Clauses Are Not Included in a Particular Contract?”

¹⁶⁸ FAR 16.203-1.

¹⁶⁹ FAR 16.203-1(a)(1)–(3).

¹⁷⁰ FAR 1.108(d) (“Unless otherwise specified— (1) FAR changes apply to solicitations issued on or after the effective date of the change; (2) Contracting 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) Contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.”).

¹⁷¹ *Id.* However, certain government contracts include a “Changes” clause, which authorizes the government to make certain types of unilateral modifications within the scope of the contract. FAR 52.243-4.

¹⁷² See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (“[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment... ”); *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“A law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’” (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981), *abrogated by* *Peugh v. United States*, 569 U.S. 530 (2013))); *Sturges v. Carter*, 114 U.S. 511, 519 (1885) (A retroactive statute is one that “‘takes away or impairs vested rights acquired under existing (continued...)”).

Congress wants to apply a newly enacted statute to alter the obligations under preexisting contracts, it should do so clearly and unambiguously, with the understanding that any such retrospective changes could necessitate the government to provide financial compensation to affected contractors.¹⁷³

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.¹⁷⁴ However, agencies have sometimes awarded contracts that lack a required clause,¹⁷⁵ prompting questions about whether the requirements governed by that clause apply.

In certain circumstances, courts and boards of contract appeals have read required clauses into contracts that lack them, treating the clause as a term of the contract despite its absence. The currently prevailing grounds for “reading in” clauses were articulated by the former Court of Claims, then acting as a predecessor to the current U.S. Court of Appeals for the Federal Circuit, in *G.L. Christian & Associates v. United States*.¹⁷⁶ The *G.L. Christian* court found that clauses authorizing the government to terminate procurement contracts for its convenience could be read into contracts because

1. the clause represented a “deeply ingrained strand of public procurement policy” and
2. federal regulations required agencies to incorporate the clause.¹⁷⁷

Courts have read in other required FAR clauses under the “*Christian* doctrine,” including clauses that allow the government to terminate contracts for default;¹⁷⁸ govern bid protests after award;¹⁷⁹ govern contractors' use of government property;¹⁸⁰ and require bonding in construction

laws, or creates a new obligation, imposes a new duty, or attaches a new disability.” (quoting *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814)). Courts also apply the presumption against retroactivity to agency regulations. *See, e.g., Bahr v. Regan*, 6 F.4th 1059, 1071 (9th Cir. 2021).

¹⁷³ *Sturges*, 114 U.S. at 519. At a minimum, retroactive contractual changes could require federal agencies to provide contractors “just compensation” as provided by the Takings Clause of the U.S. Constitution. U.S. CONST. amend. V.

¹⁷⁴ *See, e.g., FAR 22.1310(a)(1)* (directing contracting officers to “[i]nser[t] the clause at 52.222-35, Equal Opportunity for Veterans, in solicitations and contracts if the expected value is \$150,000 or more,” unless certain exceptions apply).

¹⁷⁵ *See, e.g., DODIG-2019-088, Evaluation of DoD Efforts to Combat Trafficking in Persons in Kuwait*, Dep't of Def. Inspector Gen. (June 11, 2019) (noting that “Army and Air Force contracting officers did not always confirm that contracts included the required [combating trafficking in persons FAR] clauses”).

¹⁷⁶ 312 F.2d 418 (Ct. Cl. 1963). Prior to the establishment of the modern federal procurement system and *G.L. Christian*, courts relied on other grounds to read certain terms into government contracts, such as that the government has an “inherent right” as a sovereign to terminate contracts for its convenience. *See Russell Motor Car Co. v. United States*, 261 U.S. 514, 521 (1923) (“With the termination of the [Civil] 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.”).

¹⁷⁷ *G.L. Christian*, 312 F.2d at 426–27.

¹⁷⁸ *Sabre Eng'g Corp.*, ASBCA No. 24144, 81-2 BCA ¶ 15,310.

¹⁷⁹ *COMSI, Inc.*, ASBCA No. 34588, 88-1 BCA ¶ 20,245.

¹⁸⁰ *Hart's Food Serv., Inc.*, ASBCA No. 30756, 89-2 BCA ¶ 21,789.

contracts.¹⁸¹ However, courts have, at times, declined to read in other clauses, often when the contractor, rather than the government, has sought to rely upon the missing, but required, clause.¹⁸²

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 processes not expressly addressed by the FAR, and whether agencies or transactions not subject to the FAR could be subject to requirements similar to those in the FAR.

May Agencies Deviate from the FAR?

Agencies are authorized to deviate from the FAR under certain circumstances. A *deviation* occurs when an agency engages in a procurement action that is not authorized by the FAR or “is inconsistent with the intent, principle, or substance” of the FAR absent express statutory authorization.¹⁸³ Deviations can include using a solicitation provision or contract clause that is inconsistent with the FAR or failing to incorporate a contract clause that is required by the FAR.¹⁸⁴ Agencies may only deviate from the FAR in accordance with the policies and procedures of FAR Subpart 1.4.¹⁸⁵ Notably, deviations are only authorized when necessary to meet the agency’s specific needs and requirements when the deviations are not otherwise “precluded by law, executive order, or regulation.”¹⁸⁶ Additionally, contracting officers must notify offerors and contractors when a deviation is included in a solicitation or contract by incorporating the *Authorized Deviations in Provisions* clause (solicitations) or the *Authorized Deviations in Clauses* clause (solicitations and contracts).¹⁸⁷

There are two types of deviations: individual and class. An individual deviation affects only a single contract.¹⁸⁸ Individual deviations generally may be authorized by an agency head, and contracting officers must document the justification for the deviation in the contract file.¹⁸⁹ Class deviations affect multiple contracts.¹⁹⁰ For civilian agencies other than NASA, class deviations

¹⁸¹ *K-Con, Inc. v. Sec’y of Army*, 908 F.3d 719 (Fed. Cir. 2018).

¹⁸² *See, e.g., United States v. Franklin Steel Prods., Inc.*, 482 F.2d 400 (9th Cir. 1973); *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1973).

¹⁸³ FAR 1.401 (defining “deviation” to include (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).

¹⁸⁴ *Id.*

¹⁸⁵ *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), *abrogated by Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005).

¹⁸⁶ FAR 1.402. Deviations are not authorized with respect to the CAS regulations for solicitation provisions and contract clauses (FAR 30.201-3, 30.201-4) or the CAS Board regulations (FAR ch. 99). *See* FAR 1.402.

¹⁸⁷ FAR 52.107(e)–(f).

¹⁸⁸ FAR 1.403.

¹⁸⁹ *See* FAR 1.403.

¹⁹⁰ FAR 1.404.

may generally be authorized by agency heads or their designees after consultation with the CAA Council chair.¹⁹¹ Additionally, a copy of each class deviation must be provided to the FAR Secretariat.¹⁹² For DOD, the FAR provides that class deviations must be issued in compliance with the DFARS,¹⁹³ which generally authorizes the Director of Defense Procurement and Acquisition Policy to issue them.¹⁹⁴ Similarly, the FAR authorizes NASA's Assistant Administrator for Procurement to issue class deviations applicable to that agency in accordance with NASA's FAR supplement.¹⁹⁵ If any agency requires a permanent class deviation, then it should propose an appropriate FAR revision in accordance with the procedures specified in FAR 1.404.¹⁹⁶

For example, DOD issued a class deviation involving the System for Award Management (SAM) shortly after this database came into use.¹⁹⁷ 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.¹⁹⁸ However, once agencies began to use the SAM, users reported "performance issues that ... affected the timely processing of awards."¹⁹⁹ These issues prompted DOD to issue a class deviation permitting contractors to use alternative measures to meet their registration and certification requirements until the problems with SAM were resolved.²⁰⁰ DOD rescinded this deviation once the issues had been corrected.²⁰¹

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

The FAR authorizes acquisition personnel to use any "specific strategy, practice, policy, or procedure" not addressed by the FAR so long as it is in the government's best interest and is not prohibited by law.²⁰² 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 their needs. For example, the Government Accountability Office (GAO), in a bid protest decision, upheld an agency's use of a reverse-auction source-

¹⁹¹ FAR 1.404(a)(1).

¹⁹² FAR 1.404. The FAR Secretariat performs various administrative tasks related to updating and maintaining the FAR. *See* FAR 1.201-2.

¹⁹³ FAR 1.404(b).

¹⁹⁴ FAR 201.402. DOD's current and archived class deviations are available on the Defense Procurement and Acquisition Policy website. *Class Deviations*, DPCAP, https://www.acq.osd.mil/dpap/dars/class_deviations.html (last visited Sept. 20, 2024).

¹⁹⁵ FAR 1.404(c).

¹⁹⁶ FAR 1.404.

¹⁹⁷ *See* Memorandum from Richard Ginman, Dir., Def. Procurement & Acquisition Policy, DARS Tracking No. 2012-O0015 (Aug. 21, 2012), <https://www.acq.osd.mil/dpap/policy/policyvault/USA004926-12-DPAP.pdf>.

¹⁹⁸ *Id.* at 1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See* Memorandum from Richard Ginman, Dir., Def. Procurement & Acquisition Policy, DARS Tracking No. 2012-O0015 (Dec. 12, 2012), <https://www.acq.osd.mil/dpap/policy/policyvault/USA007351-12-DPAP.pdf>.

²⁰² FAR 1.102(d), 1.102-5(e) ("If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to [be] innovative and use sound business judgment that is otherwise consistent with law and within the limits of their authority.").

selection method, despite the FAR not expressly addressing reverse auctions, on the grounds that “a procurement procedure is permissible where not specifically prohibited.”²⁰³

Could an Agency or Transaction Not Subject to the FAR Be Subject to Requirements Similar or Identical to Those in the FAR?

Agencies 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, statutes impose requirements similar to those implemented by the FAR on entities or transactions that are not subject to the FAR. For example, the American Recovery and Reinvestment Act of 2009 imposed Buy American requirements on certain grant recipients and Davis-Bacon requirements on certain loan recipients who would not have been subject to these requirements pursuant to the FAR.²⁰⁴

Additionally, some agencies whose acquisitions are not subject to the FAR have voluntarily adopted regulations or internal rules of practice modeled after or akin to the FAR.²⁰⁵ For example, GSA has adopted certain FAR provisions “as a matter of policy” in its regulations regarding real property leases,²⁰⁶ and the U.S. Postal Service and the Senate, through its Senate Procurement Regulations, have adopted procurement guidelines with provisions similar to the FAR.²⁰⁷

²⁰³ MTB Group, Inc., B-295463 (Feb. 23, 2005), 2005 WL 433615 (Comp. Gen. Feb. 23, 2005) (citing FAR 1.102(d)). GAO further noted that the use of reverse auctions is consistent with the simplified acquisition methods in FAR Part 13.

²⁰⁴ See American Recovery and Reinvestment Act of 2009, P.L. 111-5, § 406, 123 Stat. 145 (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) (“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.”).

²⁰⁵ See *supra* “What Agencies Are Subject to the FAR?”

²⁰⁶ FAR 570.101(d) (“The FAR does not apply to leasehold acquisitions of real property. Where referenced in this part, FAR provisions have been adopted based on a statutory requirement applicable to such lease acquisitions or as a matter of policy, including, but not limited to ‘Federal agency procurement’ as defined at FAR 3.104.”).

²⁰⁷ Compare USPS, SUPPLYING PRINCIPLES AND PRACTICES 508, cl. B-16 (2023), <http://about.usps.com/manuals/spp/spp.pdf> (cl. B-16), with FAR 52.242-14 (Suspension of Work clause); compare Senate Procurement Regulations, 168 CONG. REC. S9619, S9621 (daily ed. Dec. 20, 2022) (publishing the Senate Procurement Regulations as adopted by the S. Comm. on Rules & Admin. on Dec. 19, 2022), with FAR 1.602-3.

Appendix. Table of Acronyms and Abbreviations

Table A-1. Table of Acronyms and Abbreviations

Administrative Procedure Act	APA
Agency for International Development Acquisition Regulation	AIDAR
American Recovery and Reinvestment Act	ARRA
Armed Services Procurement Regulation	ASPR
Atomic Energy Commission	AEC
Central Intelligence Agency	CIA
Civilian Agency Acquisition Council	CAAC
Congressional Review Act	CRA
Contract Administration Officer	CAO
Cost Accounting Standards	CAS
Defense Acquisition Regulation	DAR
Defense Acquisition Regulations Council	DAR Council
Defense Federal Acquisition Regulation Supplement	DFARS
Department of Agriculture Acquisition Regulation	AGAR
Department of Commerce Acquisition Regulation	CAR
Department of Defense	DOD
Department of Defense Federal Acquisition Regulation Supplement	DFARS
Department of Education Acquisition Regulation	EDAR
Department of Energy Acquisition Regulation	DEAR
Department of Health and Human Services Acquisition Regulation	HHSAR
Department of Homeland Security Acquisition Regulation	HSAR
Department of Housing and Urban Development Acquisition Regulation	HUDAR
Department of Justice Acquisition Regulation	JAR
Department of Labor Acquisition Regulation	DOLAR
Department of State Acquisition Regulation	DOSAR
Department of the Interior Acquisition Regulation	DIAR
Department of the Treasury Acquisition Regulation	DTAR
Department of Transportation Acquisition Regulation	TAR
Department of Veterans Affairs Acquisition Regulation	VAAR
Environmental Protection Agency Acquisition Regulation	EPAAR
Federal Acquisition Regulation	FAR
Federal Acquisition Regulatory Council	FAR Council
Federal Activities Inventory Reform	FAIR
Federal Aviation Administration	FAA
Federal Awardee Performance and Integrity Information System	FAPIIS

Federal Procurement Regulations	FPR
General Services Administration	GSA
General Services Administration Acquisition Regulation	GSAR
Historically Underutilized Business Zone	HUBZone
Inspector General	IG
National Aeronautics and Space Administration	NASA
National Aeronautics and Space Administration Federal Acquisition Regulations Supplement	NFS
Nuclear Regulatory Commission Acquisition Regulation	NRCAR
Office of Federal Procurement Policy	OFPP
Office of Information and Regulatory Affairs	OIRA
Office of Management and Budget	OMB
Office of Personnel Management	OPM
Office of Personnel Management Federal Employees Health Benefits Acquisition Regulation	FEHBAR
Small Business Administration	SBA
Social Security Acquisition Regulation	SSAR
System for Award Management	SAM
Tennessee Valley Authority	TVA
Transportation Security Administration	TSA
Women-Owned Small Business	WOSB

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