PROCUREMENT ROUND TABLE

www.procurementroundtable.org

28 July 25

Dear Federal Acquisition Regulatory Council Members,

We write to offer the Federal Acquisition Regulatory (FAR) Council our thoughts concerning the efforts to drive revolutionary regulatory streamlining resulting in increased speed and savings in federal procurement. The Procurement Round Table supports the goals of streamlining the FAR, reducing "red tape," and obtaining better quality and pricing for government procurement. We note that there have been a number of efforts, since the publication of the FAR on April 1, 1984, to streamline the FAR and its agency supplements.

We have formed a subgroup of Procurement Roundtable (PRT) Directors who reviewed the Revolutionary FAR Overhaul (RFO) FAR Parts 18, 39 and 43. We will continue to review the RFOs as they are published. As a result of our review of the RFOS for FAR Parts 18, 39, and 43, we offer the FAR Council historical perspectives and our considered advice regarding your efforts. For your information, our comments on RFOs on the use of Agency Deviations and on FAR Parts 18, 39 and 43 are attached.

The PRT would like an opportunity to engage with the FAR Council RFO members on an ongoing basis to offer our support and advice on both the substance of specific RFOs as well as what we see as the required procurement leadership changes to help you achieve regulatory streamlining.

The PRT is a non-profit, non-partisan organization with substantial federal procurement experience in both the public and private sectors. We are private citizens who serve pro bono to advise and assist the government in improving federal acquisition. As each of you know, some of our Directors have had active roles in acquisition reform initiatives since the Section 800 Panel, https://www.dmi-ida.org/knowledge-base-detail/streamlining-defense-acquisition-laws, and have supervised the implementation of various changes since the early 1990s. We include former senior federal government officials from the executive and legislative branches who currently serve as private sector CEOs or senior acquisition officials, university professors, consultants, heads of non-profits and associations, authors, commentators, and senior partners, attorneys and officers in major law firms and think tanks.

For more information on the PRT and its Directors see https://procurementroundtable.org/.

We are ready to meet with, support and advise the FAR Council in its revolutionary procurement reform efforts, should you desire our assistance. Please feel free to contact me if the PRT can be of assistance.

For the Procurement Round Table,

David A Drabkin

David A. Drabkin
Chairman
Procurement Round Table
www.procurementroundtable.org
drabkind@gmail.org
+1.703.927.1116

PRT comments on RFOs relating to the use of Agency Deviations, and specific comments on FAR Parts 18, 39 and 43:

I. Agency Deviations

A FAR deviation by its nature is supposed to be limited. The FAR overhaul revisions here are extensive and not directed by Congressional action or some emergency requiring their implementation now. Rather, the result of an Executive Order 14275, "Restoring Common Sense to Federal Procurement," Restoring Common Sense to Federal Procurement – The White House, that directs the FAR overhaul be issued by September 2025. The Executive Order at Section 5(d) provides in pertinent part:

> (d) The Administrator and the FAR Council shall issue deviation and interim guidance, ***as appropriate and consistent with applicable law***, until final rules reforming the FAR are published. [Emphasis added]

The FAR Overhaul has not gone through the official rulemaking process and is being done piecemeal – removing items that the FAR Council determines are duplicative of other sections even if they are congressionally authorized. Given that the overhaul is a work in progress, we have real concern that this deviation process that rolls out for immediate implementation stripped down versions of FAR Sections may implement provisions that are missing critical items. The Office of Federal Procurement Policy Act, 41 U.S.C. Sec.1301 et seq. (OFPP Act), provides for implementation of the FAR "in a single Government-wide procurement regulation called the Federal Acquisition Regulation". 41 U.S.C. Sec. 1303(a). It also calls for consistent regulations and a 60-day period of notice and comment for FAR rule changes. 41 U.S.C. Sec. 1303(a)(3) and (a)(4).

What we are seeing is a myriad of changes to the FAR on a piecemeal basis which agencies are rolling out using class deviations to implement these changes piecemeal. Given the scope and seriousness of the FAR Overhaul, the PRT cautions against such a piecemeal roll out. Rather, we advocate, consistent with the OFPP Act, the FAR Council and agencies, issue the complete overhaul of the FAR and provide a full opportunity for rulemaking notice and comment of the resulting overhauled FAR. We also suggest that the normal 60-day comment period will not be sufficient for a meaningful review of the overhauled FAR.

II. Comments on FAR Parts

A. FAR Parts 18 and 39:

FAR Part 18 "Emergency Acquisitions" and FAR Part 39 "Acquisition of Information Technology" are short FAR Parts, each being roughly five pages. Both FAR Parts were created because of perceived FAR weaknesses; specifically, that the FAR was too slow and cumbersome to address emergencies (Part 18) and technology was moving too fast to be acquired under traditional procurement methods (Part 39). In a FAR rewrite, FAR Part 18 could be revised to include a brief mention that there are acquisition flexibilities available in emergency acquisition situations and the specific guidance on emergency acquisitions could be in a separate guidance document. Similarly, FAR Part 39 could be rewritten to comprise a short outline of the issues and policies that must be followed in acquiring information technology and much of the existing

FAR Part 39 could be placed in a separate guidance document.

Additional, more specific, comments on these parts are provided below.

B. FAR Part 18: Emergency Acquisitions

i. History

FAR Part 18 "Emergency Acquisitions" was created as a result of the perception that FAR-related acquisition issues following emergencies such as Hurricane Katrina needed to be addressed. Its primary purpose was to provide a consolidated reference to existing acquisition flexibilities already within the FAR which could be utilized during emergencies, contingencies, or situations demanding urgent action. The aim was to streamline the procurement process, allowing the federal government to acquire necessary supplies and services quickly and efficiently in response to various crises, including natural disasters, military operations, public health emergencies, and national security threats. The concern that led to its creation included the acquisition workforce's lack of awareness of the processes that already existed in the FAR.

ii. Addressing the problem

FAR Part 18 addresses timely procurement during emergencies by identifying acquisition flexibilities that are available for emergency acquisitions. These flexibilities are specific techniques or procedures that may be used to streamline the standard acquisition process. This FAR Part includes-

(1) Generally available flexibilities and
(2) Emergency acquisition flexibilities that are available only under prescribed circumstances.

FAR Part 18 states that additional flexibilities may be authorized in an executive agency supplement to the FAR.

FAR Part 18 references acquisition flexibilities and instead of detailing every procedure it now directs contracting officers to existing FAR sections or online resources including the Emergency Procurement List (EPL) for specific flexibilities. This streamlines the document itself and ensures access to the most current information.

In addition, it highlights the ability to increase micro-purchase and simplified acquisition thresholds under emergency circumstances, potentially speeding up smaller procurements.

iii. Rewrite

FAR Part 18 was created to facilitate faster and more flexible procurement during emergencies. It provides tools and references in multiple sources that are resources available for this purpose. The rewrite effort could result in the FAR mentioning that emergency acquisitions should use the available tools and resources to assist in the emergency situation and the rewrite could move the material referenced in this FAR Part to a separate guidance document.

C. FAR Part 39: Acquisition of Information Technology

i. History

FAR Part 39 governs the acquisition of information technology. It has evolved considerably since the initial issuance in order to address changes in technology and government challenges associated with acquiring complex and critical systems.

FAR Part 39 was initially designed for an era when IT primarily involved servers, licenses, and help desks. However, the scope of the rule has been broadened in recent years, encompassing the acquisition of information technology, Internet of Things devices, operational technology, and new or emerging technology.

ii. Addressing the problem

This FAR Part prescribes acquisition policies and procedures for use in acquiring: (a) Information technology, including financial management systems, consistent with other parts of this regulation, OMB Circular No. A-127, Financial Management Systems and OMB Circular No. A-130, Management of Federal Information Resources; and (b) information and communication technology.

FAR Part 39 applies to the acquisition of Information technology by or for the use of agencies except for acquisitions of information technology for national security systems. It also applies to information and communication technology by or for the use of agencies or for the use of the public, unless an exception or an exemption applies. Among other guidance points, this FAR Part instructs contracting officers not to purchase any hardware, software, or services developed or provided by Kaspersky Lab, prohibited under Section 889, or TikTok.

The fast pace of technological advancements was a key factor in the creation of this FAR Part. That reality has not changed, and agencies still need faster procurement processes to prevent obsolescence and ensure agencies have access to the latest tools. Also, FAR 39 promotes Interoperability and adaptability. This is important because technological solutions procured by the government must be compatible with existing systems and flexible enough to accommodate future changes. Given the increasing cyber threat landscape, FAR Part 39 emphasizes the secure deployment of new and emerging technologies.

iii. Rewrite

There is a need to focus on the specific issues inherent in FAR Part 39 acquisition procedures. The government continues to strive to improve its acquisition of technology. While the push for accelerated and more effective procurement is evident, the challenges cannot be addressed without clear guidance, robust training, and careful coordination to fully realize the benefits of the revised regulation. A movement of certain material from this five-page FAR Part to guidance is possible, but given the mandates that Part 39 addresses, a rewrite must retain the policies stated in the FAR Part and clearly communicate the importance of information technology acquisition processes. Removal of the prohibitions contained in FAR Part 39 because they are already contained in other FAR Parts does not provide the reader with the critical guidance needed to ensure that what is being acquired is uncompromised. Hence, simply stripping out

these “duplicative” provisions does not provide the regulatory instruction needed to assure that required elements are considered in the acquisition process. As with FAR Part 18, a roadmap of what needs to be considered and the processes available for that acquisition should be inserted as clear guidance for both government and industry.

D. Practitioner Album

The FAR overhaul is intended to result in a more streamlined set of rules for Federal procurement so that procurements can be done more efficiently and effectively to attract and improve competition. However, simply removing non-statutory provisions, as well as redundant provisions and out-of-date references is not going to be enough. To achieve better results, contract personnel and competitors alike need a FAR, and accompanying materials, which help them to understand basic contracting goals, clearly describe the concepts, and provide practical guidance concerning available tools to accomplish these goals. This means that a stripped down FAR is not enough. It must contain clear rules and then effective guidance, and training materials must be furnished for each of the parts. Only real experience applying these rules can drive home how these laws, rules and guidance actually work. Ongoing mentoring must be part of the process.

Given the goal of streamlining the FAR and the identification of these real needs for explaining the “lore” behind the “law,” the FAR Overhaul’s efforts to place everything but the kitchen sink in supplemental materials is not a positive step. What is needed is a well-crafted, clear regulation with targeted materials. In this regard, the initial roll out of the Procedures, Guidance and Information (PGI) accompanying the DFARS domestic preference provisions in DFARS Part 225, for example, was the kind of supporting guidance that aided both government and industry in the process. That PGI furnished statements of the applicable steps and points of contact for applying these domestic preference provisions. It also furnished links to the Memoranda of Understanding laying out what products and services were included in the exceptions to buying American for DFARS procurements.

The current FAR overhaul, for Part 39 for example, does not follow this lead. Instead, like the other FAR overhaul guidance being provided, the Smart Accelerators provided contain PowerPoints and embedded videos and podcasts that do not succinctly explain what is key. While some are too general and do not provide enough real information to constitute training, others are too dense and time-consuming for a reader to figure out what is needed in an efficient way.

Where the FAR Overhaul supplemental materials do succeed is when they link or cite written materials that are substantive and clear. For example, links to OMB Memoranda or NIST publications relevant to the particular aspect of the FAR Section. Efforts to link these types of guidance and to remove “feel good” materials that do not really train should be undertaken. Otherwise, the FAR Overhaul effort, intended to shorten and clarify, will send users down a rabbit hole and not serve its purpose. For example, the Practitioner’s Perspective; Buying Government Technologies in FAR Part 39 has a link to “An Introduction to ATOs [Authority to Operate],” which provides:

> **Why do we need ATOs?**
> When it comes to ATOs, fun is mandatory! You need to complete the ATO process

> before you use, buy, or build software for the government. ATOs can feel very bureaucratic—but they can also be a good opportunity to take stock of what you have and think about how to make it better. Of course, there are ways to improve the system this process can make your software more secure if you approach it intentionally. If you treat the experience only as a paperwork exercise, you will be missing out on ways to improve your product. Improving privacy and security are ways to protect your users and your agency.[1]

This type of content does not train or focus the user.

Further, the documentation provided in the accelerator content contains disclaimers, such as "This document does not provide authoritative definitions of IT terms and should not be interpreted as official policy or mandated action." Application Rationalization Playbook at 5 of 30. This too does not assist the user. Regulation that is meant to be relied on by both government and industry, followed by practical training is what is needed.

E. FAR Part 43 Contract Modifications

FAR Part 43 is one of the cleanest and clearest sets of revisions to date. The redactions do not remove substance and what remains leaves clear, to government and industry, what is intended to be covered in a contract modification. The Changes clauses retained provide the kind of clear guidance needed for government and industry to know what needs to be done and included for a change to be considered and implemented.

[1] An introduction to ATOs – Digital.gov .