Driving Change
The Time is Right for Innovation
By Brad Riddle and Leslie Deneault

Across the spectrum of defense contracting, a fresh blast of energy has been directed toward reforming the way the United States’ Department of Defense does business. From President Trump’s Executive Order 13777 (Note #1) to the congressionally mandated “Section 809 Panel” (Note #2), our nation’s senior leaders are actively searching for ideas to simplify defense acquisition and make the DoD an attractive client to industry. More than ever, the time is right for innovation!

The defense acquisition system has been under constant reform over the years – embracing commercial processes, raising review thresholds, and promoting small businesses. Yet despite all this change, few people are aware of how to “have their voice heard,” and share their ideas for change. This presentation presents three ways that ANYONE, from Government to Industry, can influence change to acquisition regulations and make the defense procurement process better.

In this article, we briefly explain how regulations are formed. Then, we describe three specific ways to give inputs for improving the defense acquisition process. Finally, we conclude with a charge to the government and commercial acquisition community to submit their ideas to drive innovative change!

First, in order to make positive change now, we need to understand a few things about how regulations are formed.

Statutes and Executive Orders Drive Regulations

Many additions and modifications to acquisition regulations are based upon a law passed each year known as the “National Defense Authorization Act” (NDAA). For example, the FY17 NDAA resulted in the opening of 35 new “cases” which begins the process of writing new language for the Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Regulations Supplement (DFARS) (Note #3). Thus, we see a significant relationship between the NDAA and current regulations.

The NDAA is authored by the House Armed Services Committee (HASC) and the Senate Armed Services Committee (SASC). This law typically follows the enactment of the President’s Budget, and states which DoD programs will be started, continued or cancelled.
The NDAA includes specific language that shapes acquisition policy for DoD.

**National Defense Authorization Act (NDAA)
Enactment Process**

- **House Armed Services Committee (HASC)**
  - House Version
  - Authorization Conference—
    - Publish Committee Report/Pass Resolution
    - Full House Floor Vote
  - President for signature into Law

- **Senate Armed Services Committee (SASC)**
  - Senate Version
  - Full Senate Floor Vote

For example, the most recent NDAA (from Fiscal Year 2017, Public Law 114-328, at congress.gov) reveals a standard format for understanding how Congress relays statutory language. Each NDAA includes a “Title VIII--Acquisition Policy, Acquisition Management, and Related Matters.” Title VIII contains specific language which creates or changes statutory direction for DoD in conducting acquisition (Note #4). The FY17 NDAA, Title VIII, and other titles, established more than 100 statutory requirements for the DoD to abide by (Note #5).

Another common statute that influences DoD acquisition is the Defense Appropriations Act, which developed and passed in parallel with the NDAA. The Appropriations Act is the budget authority from Congress for DoD to obligate funds. The Defense Authorization Act and the Defense Appropriations Act are passed closely together, and levy significant influence on DoD acquisition.
In addition to statutes, there are several other authoritative sources that drive changes to regulations, including Executive Orders, court decisions, inspection and audit recommendations, OMB and /DoD Policy memorandum, and ideas from individuals. From FY 14 through FY 17, the FAR System has finalized and/or is currently working on ten cases directed by Executive Order, 109 cases directed by congressional statute, and 140 cases which were a result of recommendations from other sources (Note #3). Next, we will look at how the acquisition regulations are established.
Regulations are Established by Rulemaking

FAR System regulations are created and changed through the “rulemaking process” (Note #6). We refer to “rulemaking” as the process for writing, reviewing, modifying and publishing regulatory language. What many contracting professionals don’t understand is that we cannot use the new statutory language until it has been implemented in the FAR, DFARS, or DFARS PGI, through rulemaking. As a practical matter, it is extremely important that contracting activities wait for the consistent and clear FAR/DFARS implementation language provided by the rule making process and do not interpret and implement statute directly (rulemaking can take one to two years). The rule making process allows the public, including industry, to comment on the new rule, and allows for interested parties, including Government Agencies to come to an agreement on the specific implementation wording.

For federal agencies, the administration and drafting portion of the rulemaking process is stated in the FAR Operating Guide. For the DoD, the similar process is stated in the DFARS Operating Guide (Note #7). The text and principles of these guides are established from 41 U.S.C. Section 1707. While the rulemaking process for FAR and DFARS is similar, linked and overlapping, the rest of this article focuses on the DFARS rulemaking process.

As mentioned earlier, the rulemaking process begins when a statute, Executive Order, OMB and DoD policy memorandum, GAO report, or other authoritative input warrants a change to current acquisition regulation. When one of these authoritative changes happens, a team known as the Defense Acquisition Regulation (DAR) Council studies the change, and assesses which parts of the DFARS could be affected. DAR Council members (policy and legal representation from the military services, Defense Logistics Agency and Defense Contract Management Agency) review statutory language and any conference report and engage subject
matter experts, and the appropriate congressional staff members to understand why the change was established. Then they consider whether DoD should address the change with new policy, training, and/or a formal revision to regulations.

If the DAR Council committee determines a regulation revision is necessary, a council committee will draft a “Committee Report” with new recommended regulatory language. This leads us down the first path to big change.

First Path to Drive Change: “Early Engagement Opportunity”

For capturing ideas for change, the Director of Defense Acquisition Regulations System (DARS) established the “Early Engagement Opportunity.” This avenue is specifically designed to capture our ideas for changing regulations based upon each year’s NDAA and specific, important cases. To share your input, visit http://www.acq.osd.mil/dpap/dars/index.html. Your ideas will be evaluated by the DAR Council team responsible for drafting new regulation language. We were told by the DAR staff that they were always interested in your input and that this mailbox was checked daily.

GIVE YOUR IDEAS TO CHANGE DEFENSE REGULATIONS AT

Early Engagement Opportunity
Provide input regarding the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017
To provide inputs to DARS on implementation of the NDAA for FY 2017 in the acquisition regulations, please click here.
Please cite the NDAA for FY 2017 section number applicable to each input submitted.
To see copies of any early inputs received by DARS, please click here.

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Archived Early Engagement Opportunities
2016
2015

Visit this website, and click here to submit your idea!
Second Path to Drive Change: the Federal Register

When a change to the DFARs is necessary, the rulemaking process (reflected in the flowchart below) requires a DAR Council team, with representatives from the Army, Air Force, Navy, Defense Logistics Agency and Defense Contract Management Agency, to draft, discuss and refine new regulatory language. When the DAR Council team begins this work, they open a “DFAR Case,” and assign it a DFAR Case Number. All of these DFAR Cases are publicly posted and tracked on the DPAP website in a report under “Open DFARS Cases”, at http://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf.

In the “Status” column of this report, the DAR Council states the progress of the case. This report is updated weekly. As a best practice, acquisition professionals review this report each month, search for upcoming regulation changes that apply to their mission area, and are poised...waiting for their next opportunity to give input! This leads us to the second path to make change—the Federal Register!

The Federal Register is “The Daily Journal of the United States Government,” and is published by the National Archives and Records Administration. Through the Federal Register, the general public can read how its Government leaders intend to change regulations, and why—a remarkable reflection of transparency in our Government!

With respect to a regulation change, when the DAR Council team has completed its deliberations, the DAR Editor publishes the draft language in the Federal Register. A regulation changes is published in the Federal Register as a “Proposed Rule” or “Interim Rule”, and is open for public comment typically for 60 days (For definitions on the different types of “rules,” and their public comment timeframes, see the DFARS Operating Guide, Note #7). Also, in certain significant cases, an Advanced Notice of Proposed Rulemaking will be posted in the Federal Register. This is an opportunity for the public to participate in an open meeting in order to provide comments or just listen for better understanding.
The lower/right area of the flowchart (circled) reflects the rulemaking process’s time for “Public Comment.” This is a critical point in the rulemaking process. The proposed language is posted in the Federal Register on the world-wide-web, where the public (including DoD contracting professionals and contractors), can review the language and offer comments.

To share your ideas for shaping regulations through the Federal Register:
1. Visit the DPAP Website (the same one where we found the “Open DAR Cases”), under the Defense Acquisition Regulations System” tab, click on “Publication Notices” at http://www.acq.osd.mil/dpap/dars/out_for_public_comment.html. This tab lists all of the proposed changes to the DFARS that have been published in the Federal Register.

2. When you see a subject that interests you, access the actual Federal Register publication by clicking on the hot link in the text, “The Federal Register notice for this rule is here.” Or, access the website directly at http://regulations.gov, and search by DFARS Case Number, or keyword (Note #8). Typically, these notices are published and open for public comment for 60 days.

3. The Federal Register notice explains the source of the change, shows the actual draft language for the new regulation, and provides instructions to submit comments electronically, by fax, or even by regular mail!
In submitting ideas through the Federal Register, the public comment process allows individuals to submit comments completely on their own. However, a “best practice” and recommendation from the DAR Council is for submitters to think through and evaluate their ideas with supervisors and policy experts before submitting inputs.

This rulemaking process is rooted in statute (41 U.S.C. Section 1707), and requires that all comments, whether from a large, professional association, or one individual citizen, be evaluated by the DAR Council’s team before the final rule is released (Note #9). More specific instructions for submitting ideas to improve regulations for DoD and all federal agencies, see “The Guide to the Rulemaking Process” (Note #10).

Third Path for Driving Change—from the Top Tiers of our Government!

The “Section 809 Panel”

In the FY16 NDAA, Section 809, Congress chartered an independent advisory panel—a team of distinguished leaders—to reach out to innovative thinkers world-wide, across professional disciplines. This “Section 809 Panel’s” mission is to capture ideas to streamline defense acquisition processes, break down barriers to entry, and learn characteristics of successful programs. Specifically, the Panel is reviewing DoD regulations with the objective of improving the efficiency and effectiveness of the defense acquisition process and maintaining technological advantage. They will recommend regulations and statutes for modification or elimination.

So far, the panel has also stated that there are “a number of statutes, executive orders, and regulations” that support public policy that are “not directly tied to mission”. If the Section 809 Panel is successful, we can plan to see the FAR and DFARS get a little smaller and less complex, while at the same time make DoD more appealing to our commercial suppliers.

The Section 809 panel offers two avenues for us to offer ideas:

1. Innovators can submit general comments, questions and recommendations through its website at https://section809panel.org; and,

2. The Panel is hosting open sessions across the United States, with a purpose to discuss and capture our ideas. See the schedule on their website to find an open session near you!

Many people have already shared their ideas with the Section 809 panel. If you haven’t, it’s not too late—this opportunity to submit ideas is open through 2017.

Final Encouragement
Learning the complex network of statutes and regulations of the defense acquisition process can be overwhelming, but it is worthwhile endeavor! Our mastery of the process quickens support to the soldier, sailor, airman and marine, and promotes superiority in our nation’s defense. As contracting professionals, we also have a responsibility to make the process better, to work fresh ideas through the minds of decision makers, and drive positive and innovative change on every front.
Endnotes:

1. On February 24, 2017, President Trump issued Executive Order 13777, which directs all Federal agencies to find and eliminate regulations that cause unnecessary burden to the American people. For more information on Executive Order 13777 go to https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda The DFARS Subgroup of this task force is currently seeking input on provisions and clauses that may be repealed, replaced, or modified. Go to http://www.regulations.gov and type in “DFARS-RRTF-2017-01” into the “Search” portal. It is recommended that you go through your chain of command to make these inputs.


3. Numbers based upon count of open and published cases, as of June 2017, available at the DPAP link, http://www.acq.osd.mil/dpap/dars/case_status.html. Cases that have been closed or are in holding status were not counted.

4. Section VIII of the NDAAs is always devoted to “acquisition policy, acquisition management, and related matters”; but in addition, other sections may also contain rules that affect the FAR and DFARS. For example, the FY17 NDAA, Section XVIII contains” matters relating to small business procurement”.

5. Reference Section 800 of the FY 17 NDAA, which included 100 statutory requirements to DoD from Congress. About one third of them affected the FAR system. For example, Sections 217 and 821 of the FY17 NDAA asks us to revise DFARS to increases the micro-purchase threshold for the DoD procurements to $5,000 and to $10,000 for purposes of DoD basic research programs and science and technology reinvention laboratories.


8. To submit comments, and review other comments through the DFARS rulemaking process, see the Federal Register at https://www.regulations.gov/, and search by the DFARS Case Number or keyword.
9. Per 41 U.S.C. Section 1707, even before publication in Note #3, regulation changes are published in the Federal Register. To subscribe to and review regulation change notices in the Federal Register, visit https://www.federalregister.gov/my/sign_in

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