



The National Defense Authorization Act (NDAA) of 2015 required the Government Accountability Office (GAO) to review the rulemaking process used by the Department of Defense (DoD or DOD) for promulgating acquisition-related rules—i.e., revisions to the Defense Federal Acquisition Regulation Supplement (DFARS). That [GAO review](#) was released on April 17, 2015.

According to the report's letter of transmittal—

Our objectives were (1) to describe DOD's current rulemaking procedures, including relevant provisions for notice and comment, for Defense Federal Acquisition Regulation Supplement (DFARS) rules; (2) to determine the frequency with which DOD issued final and interim rules without prior notice and comment during fiscal years 2010 through 2014; (3) to determine the most common justifications given by DOD when issuing final and interim DFARS rules without prior notice and comment; and (4) to identify methods cited by DOD for promoting constructive communication between DOD, the public, and the acquisition industry during rulemaking.

As readers know, from time to time we've been critical of the rulemaking process used by the DAR Council, as well as the Civilian Agency Acquisition Council (collectively, the FAR Councils). We've accused them of delaying the rulemaking process in order to create a false sense of urgency to meet a congressionally imposed deadline, of treating public comments with disdain and, in some cases, of ignoring public input altogether. Our sense of the DoD rulemaking process has been that there are certain constituencies within DoD that are driving the rulemaking regardless of any public input received.

Accordingly, we were very interested to read the GAO report and see if they reached the same conclusions we had.

Consequently, we were very disappointed to see that the GAO did not address our concerns.

It's not really surprising, we guess. Look at the review objectives, quoted above. Where do they leave room for evaluating the DoD's analyses or justifications? Where do they cover an evaluation of the efficacy of the "communication between DOD, the public, and the acquisition industry during rulemaking"? Answer: nowhere. The review scope and objectives seem to have been established in order to create the ability for the reviews to address the superficialities of the DoD rulemaking process without addressing any of its substance.

Based on the review objectives, why should we have been surprised or disappointed to learn that the GAO reviewers had no findings and no recommendations for improvement? Why should we have been surprised and disappointed to read the following—

Our review and analysis of the text of the 139 DFARS rules published without prior public comments identified two primary justifications cited by DOD for waiving the public comment requirement. For 49 of these 139 DFARS rules, DOD cited 'urgent and compelling' circumstances, most frequently because acquisition requirements either needed to be addressed immediately (or within a short-time frame) to comply with a statute. Specifically, DOD cited specific language within a statute that required immediate implementation of a defense acquisition requirement as the 'urgent and compelling' circumstance for 31 of these 49 DFARS rules. Another 49 of the 139 DFARS rules issued without prior public comment were not subject to public comments because DOD determined that the rules were non-substantive or non-significant. Specifically, DOD stated that 46 of the rules did not have significant effects beyond DOD's internal operating procedures. The remaining 41 DFARS rules issued without public comments were technical amendments for which DOD did not provide justifications in the published rules, but which it also deemed to be non-substantive or non-significant.

As you read the foregoing paragraph, notice that the GAO reviewers simply accepted DoD's analysis at face value. For example, the DAR Council rulemakers decided that there were "urgent and compelling circumstances" because of statutory deadlines, but GAO never addressed whether the rulemakers created those circumstances by intentionally or negligently delaying their internal processes. There was no analysis of milestone dates—e.g., when the statute was passed, when the DAR Council started the process, how fast the process moved, and when the decision issue the rule without public input was made. Those dates are, for the most part, easily obtainable. The GAO reviewers chose not to obtain them.

GAO Clears DoD Rulemakers

Written by Nick Sanders
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In a similar fashion, note the following paragraph—

DOD officials identified multiple efforts to provide opportunity for public and industry participation during the rulemaking process. For example, DOD provides several mechanisms--such as a web-based email account--for the public and industry officials to ask questions, recommend changes, or comment on DFARS rules. Based on our review of the relevant criteria for issuance of DFARS rules and our audit work, we have no specific recommendations for opportunities to improve constructive communications between DOD, the public, and the acquisition industry during rulemaking.

Note how superficial the analysis was. Note that the process was described without evaluating its efficacy. What does it profit the public to have multiple opportunities to participate in the rulemaking process if the rulemakers don't accept the public's input? Where is the analysis of how public comments were evaluated? How many rule changes were recommended via public input, but not accepted by the DAR Council? What were their justifications for not accepting the public's input? Were those justifications valid?

All in all, a superficial GAO report that tells nobody anything of any substance. We were tempted to use the phrase "whitewash" but we don't think the GAO reviewers had that goal in mind. We think they were just treating the statutory report requirement with the minimum effort.

Or else they were just lazy.