Recently we have noted a spate of Class Deviations issued by the Defense Procurement and Acquisition Policy (DPAP) Directorate. Generally speaking, the various Class Deviations relax certain requirements.

For example, DARS **2017-O0006** (July 13, 2017) increased the Micro-Purchase Threshold (MPT) to $5,000. (The MPT was increased to $10,000 for "acquisitions … for (i) basic research programs; and (ii) activities of the DoD Science and Technology Reinvention Laboratories (STRLs)" as listed in the Memo.) (The Class Deviation notes that the MPTs for other acquisitions remain unchanged.)

For another example, we discussed here Class Deviation DARS **2018-O0001** (November 8, 2017) that delegated to the Heads of Contracting Activity (HCAs) the ability to waive certain requirements for certain acquisitions. (It's complicated; see the article for more details.)

DCMA has issued its own Class Deviations relaxing certain requirements. For an example, see **this article**
where we reviewed the August 15, 2017 DCMA Class Deviation that modified Instruction 135 by—

… streamline[] the prior quick-closeout process for DCMA's Administrative Contracting Officers (ACOs) by removing requirements to obtain an audit report or Low-Risk AdequacyMemorandum from the Defense Contract Audit Agency (DCAA) prior to settling quick-closeout rates." The Class Deviation "authorizes ACOs to settle final overhead rates and close any and all physically complete contracts *regardless of dollar value or the percent of unsettled direct and indirect costs allocable to the contracts* . It applies to Cost-Reimbursement, Fixed-Price Incentive, Fixed-Price Redeterminable and Time-and-Materials Contracts.

(Emphasis added.)

We've asserted that the spate of Class Deviations stems from the lack of action by the DAR Council, the regulatory rule-making body charging with overseeing revisions to the DFARS (and for cooperating with the Civilian Agency Acquisition Council in making revisions to the FAR).

(See FAR Part 1.201.) The lack of regulatory action is noticeable. That's not to say that there is *no* action; however, the quantity of DFARS revisions has fallen markedly in the past year. Let's just say that DAR Council members may be working hard; but the output of those efforts is disappointing.

Meanwhile, Congress keeps on passing laws that should—in theory—compel the FAR Councils to act with a sense of urgency. Looking at the recently enacted 2018 NDAA, we counted three (3) separate changes to acquisition thresholds, as follows:

1. Micro-Purchase Threshold raised to $10,000 (for all DoD acquisitions)

2. Simplified Acquisition Threshold raised to $250,000

3. TINA Threshold raised to $2 million

Those are significant changes. But unless otherwise directed they impact only DoD and NASA acquisitions; they don't impact acquisitions by civilian agencies. Obviously, if you were on the CAA Council you would want to adopt requirement relaxations for your own agencies; but nothing compels you to do so.

In the meantime, how do DoD Contracting Officers implement requirement relaxations? Do they implement the new statutory thresholds, or do they wait for the DAR Council to implement the new public law via revisions to the acquisition regulations? Or does DPAP and/or DCMA issue appropriate Class Deviations while everybody waits for the DAR Council to work its bureaucratic processes?

Those questions matter, because the threshold changes impact solicitation requirements and contractor proposals submitted in response to those solicitations. If the requirements have been relaxed, then it behooves all parties to implement those changes quickly, because if contractors are subject to fewer burdensome requirements, then they can respond more quickly (and more cheaply).

The problem is more challenging for contractors subject to the requirements of the FAR contract clause 52.244-2 (“Subcontracts”) or the DFARS contract clause 252.244-7001 (“Contractor Purchasing System Administration”). Those contractors have purchasing systems that are subject to government review—primarily by DCMA—using this **CPSR Guidebook** . Those contractors are expected to comply with applicable rules and regulations and statutes. The CPSR Guidebook states that the government review should encompass 30 individual areas, and too many deficiencies in any of those areas can lead to a disapproved contractor purchasing system.

Those contractors have a problem right now. Do they use the statutorily revised thresholds, or do they wait for the Council(s) to update the regulations? For example, when considering compliance with “Truthful Cost or Pricing Data. Truth in Negotiations Act (TINA)” (Item 4.2.1.2 in the October 2017 Guidebook), do Contractors stick with the old (regulatory) threshold of $750,000, or to they immediately implement the new (statutory) threshold of $2 million? If they implement the $2 million threshold before the regulations catch up to the statute—which, based on recent history, could take a couple of years—will CPSR reviewers find them deficient and recommend system disapproval?

It’s a challenge.

Different companies respond differently to that challenge.

Some companies take a more conservative line and tell their buyers “nothing changes until the FAR is updated” to reflect that change. They don’t seem to trust that CPSR reviewers will accept statutory changes, and thus they are unwilling to risk the adequacy of their purchasing system until they have a regulation at which to point as the basis for their internal purchasing policy.

Other companies lean forward to take advantage of any relaxation of requirements, even if the requirement relaxation hasn't yet made it through the regulatory rule-making process. They see opportunities for accelerated schedules and less effort, and less procurement file documentation. They see opportunities for cost reduction and schedule reduction, and they are willing to trade a little risk for those opportunities.

Who's right?

It's not for us to say, since each company establishes its own policies, procedures, and practices.

We will offer this:

Essentially, the CPSR is an evaluation of the company's purchasing system documentation and compliance with those policies, procedures, and practices. If buyers comply with their internal requirements then perhaps the risk isn't as great as some would think. We've also heard of contractors getting gigged for not updating their procedures and instructions as the requirements change (in the regulations), so it might even be a good thing to be seen as leaning forward as requirements change (in the statutes).

Finally, Mark Hijar, an attorney focused on contractor purchasing system adequacy, offered this advice a few months ago on LinkedIn. He wrote "… assuming the contractor manages the [CPSR review] team effectively, raising the micro purchase threshold might upset the team and result in an easily-negotiated deficiency during the report phase. Best case, DCMA accepts the increase without question. … [Also] you really don't need to wait for the regs to be edited if you don't want to. The regs specify compliance with the law they articulate - order of precedence places the law above the reg, so differences between the two defer to the law itself."

As a contractor, you need to be aware of upcoming regulatory changes, be they changes to statute or to implementing regulation or made via Class Deviation. You can watch the Open FAR Case report or the Open DFARS Case report to see how the rule-makers are progressing. You can wait for them to complete the revision process, if you'd like. Or you can lean forward and adopt statutory changes as they are enacted into law.

It’s your call.