Recently I took an opportunity to criticize the do-very-little CAS Board for doing so very little to implement Congressional direction (issued via public law) to do *something*. The CAS Board, of course, is not the only regulatory rule-making body to suffer from inertia, though it is a very prominent one.

In the September, 2020, issue of The Nash & Cibinic Report, George Washington School of Law Professor Emeritus, and the man credited for founding the academic discipline of government contracts law (along with the late John Cibinic), felt compelled to write about the current rule-making environment in comparison to the one under the pre-FAR/DFARS Armed Services Procurement Regulation (ASPR) system. Professor Nash wrote—

The members of the ASPR Committee were senior officials in their services—reflecting the idea that procurement regulations deserved the attention of highly competent and experienced people. Devoting significant amounts of such people's time to the process yielded a far better regulation than the Federal Acquisition Regulation.

It is sad to compare the current system to that one. Today regulations wend their way through the process at a snail's pace with many of them having to undergo significant alterations after the comments on a proposed regulation are received. Some linger in the system for years before they are abandoned (like the rewrite to the organizational conflict of interest regulation in FAR Subpart 9.5). In this part of the Government procurement process we have regressed rather than improved.

So look, it's not just Apogee Consulting, Inc. It's pretty much everybody, from consultants to contracting officers to the most esteemed legal minds. We are all saying that the system is broken, and one of the main areas in which it's broken is in the regulatory rule-making process.

Nonetheless, from time to time some rule-making does escape from the clutches of the bureaucrats and gets issued. Sometimes we get CASB Staff Discussion Papers; other times we get FAR or DFARS proposed rules. Infrequently, we get final rules. (Often months if not years after the underlying statutes were revised.)

Recently, the Defense Federal Regulation Supplement (DFARS) were revised by issuance of seven final rules and one proposed rule. Among the seven final rules, two of them eliminated something. The remaining five rules implemented something.

We're not going to discuss all five. But here are a couple of important ones for your information.

1.

DFARS Case 2019-D041 (Assessing Contractor Implementation of Cybersecurity Requirements) was issued as an **interim rule**. This means that the rule goes into effect without the benefit of public comments; however, the public may submit comments and the interim rule may be altered as a result. (See Professor Nash's thoughts on that aspect of the rule-making process in his quote above.) The interim rule implements the new Cyber-Security Maturity Model Certification (CMMC) and assessment approach. As most defense contractors know by now, DOD is going to be looking for CMMC assessments and certifications. This is not new news; however, the interesting aspect is that the clauses are being implemented in solicitations and contracts before the CMMC Accreditation Board knows how it is going to assess contractors.

2.

DFARS Case 2019-D036 (Inflation Adjustment of Acquisition-Related Thresholds) was implemented as a **final rule**. As the title indicates, certain thresholds were increased to account for inflation. Follow the link if you want to know which ones were increased.

3.

DFARS Case 2019-D029 (Treatment of Certain Items as Commercial Items) **was issued** as a final rule. The final rule implements several public law revisions from the 2017 National Defense Authorization Act (NDAA). The 2017 NDAA was signed into law in December, 2016. Yes, that was four years ago. (Talk about a "snail's pace"….) Anyway, this one is important because it (a) permits certain items valued at less than $10,000 to be treated as commercial items if purchased to inventory destined for multiple contracts, and (b) permits both goods and services acquired from non-traditional defense contractors (as that term is defined in DFARS) to be treated as commercial items. There is also something in the background that says "provide that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures" but we could not see where the DFARS was revised to implement that Congressional direction, so we're not claiming that's what the DFARS now says.

As does Professor Nash, we lament the current Federal acquisition rule-making system; however, when some change does slip out, we try to bring it to our readers' attention. So here you go.