

Another Class Deviation

Written by Nick Sanders

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On November 8, 2017, the Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) published a DFARS Class Deviation (designed 2018-O0001). This [one](#) provided that special authorities granted to the head of the agency by another Class Deviation (DFARS Class Deviation 2017-O0007, dated September 1, 2017) were delegated, for DoD-funded appropriations only, to heads of contracting activities.

What does that all mean? It means that for certain missions, the heads of contracting activities may exempt contracting officers and contractors from complying with certain requirements that would otherwise apply.

What are those “certain” missions?

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Contingency operations

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Defense attack against or recovery from cyber, nuclear, biological, chemical, or radiological

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International disaster assistance

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Support response to an emergency or major disaster

What are those “certain” requirements?

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Exempts DoD unique item identification

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Permits treating items as commercial items that don't normally meet that definition

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Exempts recompetes/additional efforts when only one offer is received

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Eliminates justification of T&M contract types

Basically, the DFARS Class Deviation rolls-back requirements that have been imposed relatively recently—but only for certain missions. For everything else, the burdensome requirements still apply.

Why did the DAR Council issue the original Class Deviation? Because Congress implemented a Public Law (the 2017 National Defense Authorization Act) that rolled-back those requirements for those missions. Even though nearly a year has passed, the DAR Council still haven't issued implementing regulations. Apparently some folks thought giving the flexibility was a good idea, so the Class Deviation was issued in the interim.

Then some other folks thought that if the flexibility was really a good idea, then the authority should be delegated to a lower level.

What is going on over there? Why aren't these people implementing Congressional direction?

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A peek over at [the list](#) of open DFARS cases (as of 11/03/2017) reveals a whole lot of intent without much action. Or to use a description we applied in a different context: There's a whole lot of splashing without much swimming.

According to the 03 November 2017 list, there are more than 50 open DFARS cases. (Our count was 53, but we were just eyeballing.) Of those 50+ open cases, only four look close to hitting the Federal Register as a proposed rule seeking public comment. The rest seem to be in regulatory limbo.

For example, DFARS Case No. 2017-D042 would “permit closeout of contracts without reconciliation of low dollar residual amounts,” which would seem to be a very good thing, given the enormous mountain of contract closeouts facing the DoD. Despite the seeming importance of issuing that rule, the current case status reads “07/12/2017 DARC Director tasked Contract Administration Cmte. to draft proposed DFARS rule. Report due 08/09/2017. Report due date extended to 11/15/2017.” While it was probably ambitious to expect a “report” (whatever that is) is less than 30 days, we have a hard time understanding why the Contract Administration Committee was granted another 90 days for this task.

DFARS Case No. 2017-D038 would increase the dollar threshold associated with Contractor Purchasing System Reviews (CPSRs). You would think that would be an easy job, right? Pick a number. Somebody doesn't like it. Negotiate. Agree. Submit. How hard can that be? Yet the current status shows that “Case manager and DARS Regulatory Control Officer resolving issues.” And it's been that way for 60 days.

DFARS Case No. 2017D033 would simply move the definition of “information technology” from one part of the DFARS to another part of the DFARS. It should take about 30 minutes to figure that one out, right? Wrong. The proposed rule has been sitting at the DARS Regulatory Control Officer's desk since March—more than eight months.

Those are just a few examples of how slow the DAR Council moves, and why Class Deviations have been necessary in the face of that lack of action.

So when you see a FAR or DFARS rule published as “interim” and the rationale for publishing an interim rule without waiting for public comment is some comment about “urgency,” well. You

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know that's not true. There isn't any urgency anywhere in the DAR Council, which is one of the more significant problems with our defense acquisition environment.