Most of us in this crazy business remember Executive Order 13771, issued January 30, 2017—literally days after President Trump took office. That E.O. called for executive agencies—including the Department of Defense—to eliminate two old regulations for every new regulation issued. The impact of that E.O. was to effectively freeze agency rule-making while rule-makers sorted things out. Of particular note was the impact to the FAR Councils and, most especially, to the DAR Council. For quite some time after the E.O. was issued, rule-making just … stopped.

Of course, lawsuits were filed. This is America; lawsuits are our national public discourse. One suit called the E.O. "unconstitutional, illegal and stupid." Fourteen states filed *amicus curiae* briefs, arguing that the E.O. fell within Presidential authority and would benefit state governments. (Bet you can guess which ones filed the briefs.) That suit was dismissed by the DC District Court, which found a lack of standing. (The suit was subsequently revived.)

More recently, another lawsuit was filed, this time by the state of California, joined by the states of Minnesota and Oregon. The suit argues that the E.O. "harms the states by preventing, delaying and discouraging federal regulations addressing public health, safety, and environmental concerns." As far as we know, nobody has yet argued that the E.O. prevents the executives agencies with complying with public laws, such as the annual National Defense Authorization Act, that require new rules to be promulgated—often within specified time limits.

Meanwhile, after years of paralysis, the executive agencies seem to have found a path forward. We've noted that the DAR Council has managed to eliminate several regulations in the past year or so. On April 1st, in what was definitely not an April Fool's Day trick, DFARS Case 2018-D059 was issued as a final rule. The final rule eliminated two words ("general public" and "non-governmental entities") from DFARS Section 202.101.

But it counts!

On that same day—literally 35 years to the day after the FAR was first issued—the DAR Council also published four other final rules plus an additional three proposed rules. It's not exactly "2 for 1" but, you know, it's something. Perhaps nobody will notice.

We are not going to discuss each proposed and final rule in this article. But we will point out one or two that seem to bear some significance.

DFARS Case 2018- **D065** (final rule) implements "section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which amends section 893 of the NDAA for FY 2011 … regarding consent to subcontract requirements. Specifically, section 893 requires contracting officers to have written approval from the program manager prior to withholding consent to subcontract for DoD contracts with contractors that have approved purchasing systems, as defined in [FAR] 44.101." So if you have an approved purchasing system, not only are some actions not subject to consent requirements, but the ones that are should not be held up by a contracting officer unless the program manager agrees. That's a good thing, in our view.

DFARS Case 2017- **D024** (proposed rule) would, if implemented as drafted, "implement [Sections 829 and 830] of the National Defense Authorization Act for Fiscal Year 2017 that requires the preference for the use of fixed-price contracts in the determination of contract type, requires review and approval for certain cost-reimbursement contract types at specified thresholds and established time periods, and requires the use of firm fixed-price contract types for foreign military sales unless an exception or waiver applies." Essentially, the proposed rule would impose additional approval requirements if a contracting officer believes that an other-than-fixed-price contract type would be appropriate at certain dollar thresholds. Cost-reimbursement contracts valued at more than $50 million would require Head of Contracting Activity (HCA) approval if awarded before 01 October 2019; and cost-reimbursement contracts valued at more than $25 million would require HCA approval if awarded after that date. Also, the proposed rule would mandate that every FMS contract award must be firm, fixed-price (FFP) type.

Is the proposed rule a good thing? Not in our view. It adds an additional delaying step in awards of major weapon system contracts, many of which are often R&D or LRIP—which do not easily lend themselves to fixed-price contracting. For an example of what can go wrong, check out our many articles on Boeing's KC-46a Pegasus aerial refueling tanker. Further, mandating that every single FMS contract must be FFP implies that no customization can or should be done to the product slated for export. In our experience, that implication is unrealistic.

All that said, the DAR Council is simply following Congressional direction. What can they do? What can you do if you don't like the proposed rule? Not much. We mean, you *can* write in, objecting to the rule as drafted. And perhaps you should do so! But we strongly suspect the DAR Council will collectively shrug their shoulders and tell you they are just following

Congressional direction. Then the final rule will be promulgated without much in the way of revision. Because that's how the machine works. (When it works at all.)

Well, that last couple of sentences ends things on a bit of a downer, doesn't it? We didn't mean to do that!

In related news, the FAR Councils are years behind implementing SBA rule revisions. We'll have a blog article on *that* uplifting topic soon!