

Rule-Making Like Molasses

Written by Nick Sanders
Friday, 25 October 2019 00:00

Well, *finally*. On October 2, 2019, the FAR Councils finally published two proposed rules that would implement the statutory changes made by the 2017 and 2018 National Defense Authorization Acts (NDAAs). Hey, it's good news!

It's good news even though these mandated rule-making revisions should have sailed through like a hot knife through butter. Instead, like molasses, they moved *slowly*—leaving contracting officers and their contractors to rely on controversial theories (such as whether a statutory threshold trumped the regulatory threshold upon which it was based) and Class Deviations issued by individual Federal agencies.

Okay, what are we talking about?

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[FAR Case 2018-004](#) would increase the micro-purchase and simplified acquisition thresholds to \$10,000 and \$250,000 (respectively).

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[FAR Case 2018-005](#) would increase the threshold at which certified cost or pricing data is required to be provided to \$2,000,000. In addition, the threshold at which Cost Accounting Standards is applicable is also raised to \$2 million.

Right, good news.

But if you've read this blog before, you know it wasn't easy getting these regulatory changes made. We devoted several articles (rants? pleas?) to this topic. Our last article was posted in June, 2018—about sixteen months ago. In [that article](#), we discussed changes to the DOD Class Deviation implementing the statutory changes ahead of the regulatory changes. In the months leading up to that article, we posted article after article, documenting the situation faced by acquisition professionals when the statute changed but not the implementing regulations.

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For example, see [this one](#) . In it, we wrote:

Do Contracting Officers need to follow the statute or the regulation? If they follow the statute and not the regulation, do they need an official FAR deviation? What about the sentence at FAR 1.602-1(b), which states *“No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.”* How can a Contracting Officer comply with that requirement if a statute and its implementing regulation are in conflict?

The job of the two FAR Councils and the FAR Secretariat is to make sure those conflicts are few and far between.

So here we are, nearly two years later. And now—*only now*—have the two FAR Councils and FAR Secretariat published rules that would address the concerns noted above. And they weren't even published as interim rules!

Like molasses, I tell you.