

## Defense Federal Acquisition Regulation Supplement (DFARS) Operating Guide

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## **Defense Federal Acquisition Regulation Supplement (DFARS) Operating Guide**

### **I. Structure**

#### **A. Defense Procurement and Acquisition Policy (DPAP)**

The Director of Defense Procurement, by delegation from the Secretary of Defense and the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) is responsible for:

- Developing, coordinating, issuing, and maintaining the FAR, DFARS, and supplementing DoD regulations.
- Approving or disapproving regulations relating to procurement proposed to be issued by components of the DoD, pursuant to section 25(d) of the Office of Federal Procurement Policy Act.
- Acting for the USD(AT&L) in the administration of the FAR, DFARS, and any supplementing DoD regulations, including—
  - Approving or disapproving any individual or class waiver or deviation from the FAR, DFARS, or supplementing regulations that is required to be approved above the level of the DoD component.
  - Acting as the “head of the agency” or “agency head” for components other than the military departments for functions that are required by the FAR or supplementing regulations to be performed by the USD(AT&L) or other official within the Office of the Secretary of Defense.
- Acting for the USD(AT&L) in making any determination and approving any waiver, exception, or exemption, required or permitted by law, that pertains to the conduct of procurement.

#### **B. DAR Directorate**

The DAR Directorate is headed by the Deputy Director of Defense Procurement (Defense Acquisition Regulations), or DAR Director. He/She reports directly to the Director of Defense Procurement and serves as Director of the DAR Council and supervises the activities of the DAR Directorate. Under the supervision of the DAR Director, the DAR Directorate—

- Maintains the official case files.
- Performs all case management functions.
- Publishes the DFARS and PGI.

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- Serves as liaison with the Regulatory Secretariat, *Federal Register*, OFPP, and OIRA.
- Obtains OMB clearances required by the Paperwork Reduction Act.
- Maintains the Management Information System and provides reports, upon request, to the DAR Directorate and DAR Council members.
- Prepares and tracks all deviations and approved military department/defense agency clauses.
- Refers matters for appropriate coordination with the Office of the Secretary of Defense (OSD) and presents the views of OSD on all matters discussed at the DAR Council.

### C. DAR Council (DARC).

The Defense Acquisition Regulations Council (DARC) provides recommendations to the Department of Defense (DoD) for publication of proposed, interim, and final rules to amend the DFARS. These recommendations are made based on reports provided by the DFARS committees and/or the Defense Acquisition Regulations System (DARS) staff case managers.

The Deputy Director, Defense Procurement and Acquisition Policy (DARS), is the DARC Director. For DFARS cases, the Council members, who must be Government employees, are the DARC Director and one each policy and legal representative of the following:

- Army.
- Navy.
- Air Force.
- Defense Logistics Agency.
- Defense Contract Management Agency.

A current listing of DARC members and contact information is at [http://www.acq.osd.mil/dpap/dars/dar\\_council.html](http://www.acq.osd.mil/dpap/dars/dar_council.html).

### D. DFARS Committees.

**1. Assignment of Cases.** Cases are assigned to one of the two types of committees or to a DARS staff member.

(a) *Standing DFARS Committees.* There are 22 standing DFARS committees, each with assigned parts or subparts of the DFARS (see Attachment 1). Cases involving DFARS parts or subparts not listed in the table will be assigned based on the unique nature of the case. Each of the standing committees is comprised of

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“core” members and/or “rotational” members. Core members, or their designated representatives, attend all committee meetings. Rotational members are committee members assigned for a specific case that impacts their assigned areas of responsibility. Supplemental advisors may also support the committees on a particular case or for cases that involve a particular subject area. Supplemental advisors have no voting rights.

The DARC Director establishes the number and composition of the standing DFARS committees and maintains the official list, including member names, e-mail addresses, and telephone numbers. The current standing committees and their DFARS part and subpart assignments are located at Attachment 1 and [http://www.acq.osd.mil/dpap/dars/dfars\\_committees.html](http://www.acq.osd.mil/dpap/dars/dfars_committees.html).

(b) Ad Hoc Committees. Ad Hoc Committees are established on a case-by-case basis to handle special taskings. The DARC Director determines whether to establish an ad hoc committee and assigns members based on the special tasking.

(c) DARS Staff. DARS staff members are responsible for non-complex cases. The DARC Director is responsible for the assignment of DARS case managers to non-complex cases.

### 2. Appointment to Committees.

Committee chairs, deputies, and members are nominated by their respective agencies and appointed by the DARC Director.

## II. Roles and Responsibilities.

### A. DARC Director

- Decide whether to open a new case or close an on-going case without DFARS changes. Except in rare instances, closing a case will be done after coordination with the DARC.
- Approve opening case management records (CMRs) prepared by the DARS case managers (see Attachment 2).
- Assign cases to the appropriate committee.
- Provide specific direction to the committees on case objectives when necessary.
- Approve/disapprove proposed due dates for committee reports, as well as any requests for due-date extensions.
- Obtain staff for all committees.
- Provide input on committee members' performance to their respective agencies, and provide appropriate recognition for outstanding committee performance.

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- Ensure committee members and their managers understand that DFARS cases are a high-priority job assignment.
- Review committee reports and assess the responsiveness of the report to the tasking. If non-responsive, return the report to the committee for additional action.
- Provide timely, constructive feedback to committee chairs, deputies, and members on the quality and timeliness of committee findings and recommendations, reports, and related documents.
- Provide appropriate committee-related training to the chairs, deputies, and committee members.

### **B. DAR Council Policy Members**

For committees sponsored by the DARC policy member:

- Communicate any tasking to the committee chair.
- Provide a CMR to the DARC Director and DARC to submit a committee report to the DAR Council or to request an extension. The CMR shall be prepared in accordance with Attachment 2.
- Notify the DARC Director of any issues or problems the committee chair is confronting in completing the assigned task;
- Review the committee reports for compliance with the requirements of this guide as well as case objectives;
- Provide timely feedback to the DARC Director on any problems regarding the quality and/or timeliness of committee reports; and
- Provide department or agency final policy views on matters before the DARC.

### **C. DFARS Committee Chairs**

- Convene and preside at committee meetings.
- Ensure members are provided appropriate background materials prior to committee meetings (e.g., copies of tasking CMR and related documents).
- Prior to committee meetings, assign the responsibility for the preparation of a case strawman, including a draft Federal Register Notice (FRN), to be used to initiate committee discussions.
- Obtain the appropriate expert and functional advice.
- Arrange for a Deputy Chair or another committee member to perform their duties during absences.
- Manage case workload and equitably assign to committee members the lead responsibility for drafting quality committee reports, proposed DFARS and/or PGI coverage and draft FRN, and recommendations that consider all relevant issues within established timelines.
- Obtain needed training for members.

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- Meet established due dates and provide timely notification to the assigned DAR case manager and the DARC Director when extensions are needed. Requests for extensions shall include an explanation of the need for the extension. All extensions must be approved by the DARC Director.
  - Prepare and submit high-quality, complete, and accurate reports in accordance with paragraph 5d.
  - Attend DARC meetings upon request.
  - Ensure members are provided a full opportunity to provide timely input on all aspects of each case.
  - Provide input to the DARC Director on members' performance and make recommendations to recognize outstanding committee member performance.
  - Maintain records of attendance and coordination.
  - Inform the DARC Director of any non-responsive members or agencies.
  - Keep the DARC Director informed of any significant events affecting a particular case or the committee as a whole.

### **D. DFARS Committee Members**

- Review all provided materials in advance of committee meetings.
- Attend all meetings and participate in case discussions.
- Provide broad and/or specific acquisition expertise to develop rules for DoD application.
- At the direction of the committee chair-
  - Assume lead responsibility for drafting quality strawman, draft/final reports, proposed DFARS and/or PGI coverage and draft FRN, and recommendations that consider all relevant information for deliberation by the full committee and for meeting the established due dates.
  - Attend DARC meetings when requested.
  - Keep the chair informed of any change in work status (e.g., leave, extended travel, or change in phone or e-mail address).

### **E. Supplemental Advisors**

- Provide needed expert advice.
- Assist in research and in the development or review of strawman, proposed changes, and reports.

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### F. DAR Case Managers

- For cases assigned to a committee that is not sponsored by a DARC policy member, perform all the duties listed for DARC policy members sponsoring a committee. For all cases, prepare and distribute CMRs to open a new case or task the committee to analyze public comments/prepare a draft final rule. This includes preparing and distributing CMRs requesting a time extension and submitting a committee report to the DAR Council.
- Prepare all CMRs in accordance with Attachment 2 and obtain approval of a case-opening CMR from the DARC Director. Any CMR that includes a tasking shall contain a due date for the report.
- Serve as committee members (if not the chair or deputy) for assigned cases.
- Schedule and present cases to the DARC.
- Maintain case record files and databases.
- Advise the DARC Director on the progress of committee assignments for assigned cases.
- Work with the DAR editor to process rules for publication (i.e., through OFPP, OIRA, and DoD).
- Provide committee members copies of the DFARS and/or PGI language and Federal Register Notices after the DARC has agreed to the rule.

### G. Legal Support

Each DFARS committee is provided with legal support. This support includes a committee counsel and may also include a committee deputy counsel. In addition, support is also available from the DARC and the DoD Office of General Counsel. The duties/roles are summarized below:

**Counsel.** Counsels have been assigned to each of the DARC committees. The committee counsel is that committee's point of contact for legal support. Any legal issues identified by the committee shall be directed to the assigned committee counsel. In addition, the committee counsel shall be on the general distribution list and included on all e-mails and other notifications/document distributions.

The committee counsel responsibilities include the following:

- Providing the committee with timely and informative legal input;
- Informing the DARC legal member of any legal issues where the issue or advice is novel, has a potentially far-reaching impact, or is otherwise likely to generate high visibility from within DoD, other parts of the Government, or the public;
- Informing the committee chair when the committee deputy counsel will be the lead in providing legal support on a particular case or issue; and

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- Attending committee meetings. The committee counsel shall work with the committee chair to find a mutually agreeable meeting date that is, to the maximum extent practical, consistent with the established committee schedule. When necessary, the committee counsel may appoint a committee deputy counsel (if one is assigned to the committee) to attend in lieu of the committee counsel. Attendance at committee meetings by teleconference is an acceptable alternative to accommodate the particular circumstances (e.g., the committee counsel is located outside the geographic area where the committee meeting is held).

***Committee Deputy Counsel.*** Some, but not all, of the DARC committees have been assigned committee deputy counsels. The committee deputy counsel is an alternate for the committee counsel when the committee counsel is not available. Thus, the committee deputy counsel shall be on the same general distribution list as the committee counsel.

The committee deputy counsel responsibilities include the following:

- Working any legal issues assigned to him/her by the committee counsel;
- Informing the committee counsel of the status and content of those issues; and
- Attending meetings when requested by the committee counsel and/or committee chair. Committee deputy counsels, in consultation with the committee counsel, are also encouraged to attend and participate in all other committee meetings.

***DARC Legal Member and DoD Office of General Counsel.*** Each committee legal counsel has been assigned a DARC legal member as his/her point of contact at the DARC. The DARC legal member is responsible for informing the applicable point of contact in the DoD Office of General Counsel of the key legal issues. Unless the DoD Office of General Counsel coordinates on any legal advice rendered to the DARC or DARC committee, the legal advice rendered is not being provided on behalf of the DoD Office of General Counsel.



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### III. Procedures

Follow procedures in the FAR Operating Guide, appropriately tailored to DoD, unless otherwise specified in the DFARS Operating Guide.

#### A. Opening and Closing DFARS Cases

**1. Opening New DFARS Cases.** The DARC Director must approve the opening of all new DFARS cases by approving a CMR that includes a due date.

**2. Closing DFARS Cases.** Cases are closed when the final DFARS rule is published in the Federal Register. Cases may be closed without publication of a rule only with the approval of the DARC Director (after appropriate consultation with the DARC).

**3. Placing DFARS Cases on Hold.** Cases may only be placed on hold with the approval of the DARC Director.

#### B. Standing DFARS Committee Procedures

##### 1. Committee Tasking

The DFARS Committees are tasked using a CMR (see Attachment 2). The tasking CMR provides detailed information on what is expected of the committee, including any recommended course of action or conditions of implementation and the report due date, which should generally include input from the chair. The due date will be based on the complexity of the subject matter, case priority, coordination required, and existing committee workload.

##### 2. Committee Meetings

Committees meet as frequently as necessary to complete their taskings by the established due dates. Committees must complete the tasking as outlined in the tasking CMR and may also propose alternative solutions with supporting rationale. Committees should begin discussions with a case strawman that contains, at a minimum, a summary of the issues (either the issues to be addressed by the committee or, in the case of published proposed/interim rules, a summary of the issues identified by the public comments).

##### 3. Voting

Committees generally accomplish business on a consensus basis. If necessary, the chair may call for a vote to reach agreement. Each chair, deputy, and committee

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member has one vote. Supplemental advisors do not have a vote. In the case of a tie, the chair shall cast the deciding vote.

### 4. Committee Reports

Committees prepare reports in accordance with Attachment 3. The required attachments to committee reports are described in Attachment 3. The report should reflect the views of all members who concur with the report.

All Committee reports are addressed to the DARC Director. Chairs (or Acting Chairs) that are from the Services, DLA, or DCMA submit their reports through the DARC policy member from their service/agency. For all other chairs, the reports are submitted directly to the DARC Director.

If the chair cannot submit a required report by the established report due date, the chair must request an extension from the DARC Director and provide an explanation on a CMR of why the extension is needed. The chair must submit requests for extensions to the DARC Director through his/her respective DARC policy member or the DAR case manager, as applicable. If requested, the committee chair will submit periodic progress reports.

### 5. Minority Opinions

If a committee member or members do not concur with the committee report, the member(s) may submit a minority opinion. Members must submit the minority opinion to the chair in time for the committee to prepare a rebuttal. The chair may establish a due date for the minority opinion. Both the minority opinion and the rebuttal are included in the committee report. The minority opinion should include a detailed discussion of the basis of the dissent and the suggested alternative.

## C. DARC Deliberations

### The DARC deliberates cases using either-

1. **Formal Discussion.** Formal discussions are used for **complex cases** and some **non-complex cases**. A formal discussion means that the DARC meets and deliberates the case.

2. **“Reclama”.** “Reclama” is an expedited review that does not require formal discussion (e.g., concurrence/input is requested via e-mail rather than holding formal discussions). This streamlined procedure is used for many (but not all) **non-complex cases**. The procedure is also used for cases previously discussed by the DARC or when a proposed or interim rule is being converted to a final rule without change and there were no significant public comments received.

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### D. Marking Changes

Committees must *not* use the Microsoft Word track-changes function in any document submitted to the DARC (e.g., DFARS revisions). Use the rules in the FAR Operating Guide instead.

### E. Disclosure of DARC Materials

#### 1. Background:

The DARC is part of the rulemaking process for DoD. Thus, the rulemaking activities of the DARC staff and DARC members are DARC activities subject to various privileges against disclosure. Such prohibited disclosure includes not only public disclosure, but disclosure beyond the group of DARC staff and DoD personnel tasked with providing input to the DARC's rulemaking activities.

The DARC Committee structure is part of the DARC's rulemaking process. Committee members and committee counsels act on behalf of the DARC in fulfilling their DARC committee duties. Any records, files, or materials created by the committee members or committee counsels in fulfilling their duties are part of the work-product of the DARC committee, and by extension, part of the work-product of the DARC, and are subject to the various privileges available to the DARC against disclosure. The privileges extend to records created by other DoD personnel tasked with providing input to the rulemaking process, e.g., subject-matter experts within the Military Services or Defense Agencies who provide their DARC Policy Members with input, comments, and recommendations.

#### 2. Privileges. The most common privileges applicable to the DARC are:

**(a) *Deliberative Process Privilege.*** Activities performed on behalf of the DARC and DARC committees by the DARC staff, and DoD personnel tasked with providing input to the DARC, are all part of rulemaking for DoD. Thus, DARC activities are subject to the deliberative-process privilege. This privilege permits the Government to withhold materials relating to policy formulation from public disclosure. The purpose of this privilege is to encourage open and independent discussion among those who develop Government policy. Any records (including files, e-mails, or any other documents) created by the DARC staff and DoD personnel tasked with providing input to the DARC (including DARC members, DARC committee members or committee counsels in fulfilling their duties, and DoD personnel tasked with providing input) are part of the work-product of the DARC and are therefore subject to this privilege. All participants in the process must therefore assure that they do not distribute records in a manner that results in public disclosure.

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**(b) Attorney-Client Privilege.** The attorney-client privilege protects from public disclosure those matters that are the subject of confidential communications between the attorney and the committee members, DARC members, or DARC staff as representatives of the client.

**(c) Attorney Work-Product Privilege.** The work-product privilege protects from public disclosure materials (e.g., legal advice, work-product) prepared by, or for, the attorney in connection with matters on which DoD might face litigation.

More than one of these privileges may be applicable concurrently. These privileges are applicable in various circumstances, including FOIA (Freedom of Information Act) requests and litigation, even when the DoD is not a party to the litigation.

**3. Markings:** To ensure that all parties are aware of the protected status of DARC documents, all DARC documents pertaining to rulemaking, including e-mails and committee documents, shall be marked with the following legend as a footer:

**ATTENTION: THIS IS A CONFIDENTIAL, DELIBERATIVE, AND PRE-DECISIONAL DEFENSE ACQUISITION REGULATIONS SYSTEM DOCUMENT, PROTECTED FROM UNAUTHORIZED DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION ACT AND OTHER LEGAL AUTHORITIES. THIS DOCUMENT SHALL NOT BE DISTRIBUTED OUTSIDE AUTHORIZED RULEMAKING CHANNELS WITHOUT THE PRIOR APPROVAL OF A REPRESENTATIVE OF THE DEFENSE ACQUISITION REGULATIONS SYSTEM. IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, YOU MAY NOT READ, COPY, DISTRIBUTE, OR USE THE DOCUMENT OR INFORMATION CONTAINED THEREIN. FURTHERMORE, YOU MUST IMMEDIATELY NOTIFY THE SENDER BY REPLY EMAIL OR OTHER MEANS AND THEN DELETE OR DESTROY ALL COPIES OF THE DOCUMENT. ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND.**

**4. Waiver:** The Committee members do not have the authority to waive any applicable privileges on behalf of the Government. When a committee member believes that a waiver of applicable privileges is necessary, that member shall notify the DARC Director, who will take any appropriate action.

### IV. DFARS Committee Operating Guide Updates

#### A. Requesting Changes

Requested changes to this guide should be submitted by e-mail to the DFARS Committee Operating Guide editor at DFARS@OSD.mil, and should include the subject line: "DFARS Operating Guide". Updates to this DFARS Operating Guide shall be considered for approval when four changes have been requested or six months have elapsed since the last update, unless the requested change is of a critical nature.

#### B. Standard Timeline for DFARS Cases

(timeline to be added at a later time)

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ATTACHMENT 1: DFARS Committee Assignments

<b>Committee</b>	<b>DFARS Part(s)</b>	<b>DFARS Subject(s)</b>
Construction/A-E/Bonds	228.1 228.2 236	Bonds (None) Construction/A-E Contracts
Contract Administration	204.7 204.8 242  243 244 249	(None) Contract Files Contract Admin. & Audit Services Contract Mod's Subcontracting Termination
Contract Finance	232	Contract Financing
Contract Placement	201.6 201.7 204.1 -- 204.5  205 206 207 (not 207.1 – 207.3) 208 (not 208.4 or 208.11) 209.1 (w/ D&S) 209.2 209.3 210 211 214 215 (not 215.4) 216 217 (not 217.4)  248 251	Contracting Authority (None) Contract Exec'n; Class'd Info.  Publicizing Contract Actions Competition Rqmts. Acquisition Planning Required Sources . Responsible Contractors Qualifications Requirements (None) Market Research Describing Agency Needs Sealed Bidding Contracting by Negotiation Types of Contracts Special Contracting Methods (None) Use of Government Sources by Contractors
Contract Pricing	215.4 228.3 230 242.73	Contract Pricing Insurance CAS Administration Insurance/Pension Reviews
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ATTACHMENT 2: Instructions for Case Management Record (CMR)

- a. When a CMR is required.
  - (1) Opening a new case (includes a recommended report-due date).
  - (2) Submitting a report to the DARC (includes a recommended discussion date).
  - (3) Extending any due date, e.g., report-due date, or discussion date.
  - (4) Notifying the DARC of receipt of public comments and recommending a due date for the Committee's final report.
  - (5) Submitting a status report requested by the DARC.
  - (6) Closing a case without changing the DFARS.
  - (7) Putting a case on hold.
- b. Sample CMR. (See O/DPAP/DARS/2 Templates.)

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ATTACHMENT 3: List of Templates

- DFARS Case Management Report (CMR)
- DFARS Committee Report
- DFARS Case Federal Register Notice (FRN)
- DFARS Data Collection/Reporting Needs Checklist
- DFARS Case Training Form
- DFARS Committee Report Checklist