

How Requirements Get Into Contracts

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Background Information



- Over 80 % of NASA's budget is spent extramurally: contracts, grants, and agreements, etc.
- Federal procurement is regulated by a maze of complex, voluminous, and constantly changing body of laws and regulations , e.g., Federal Acquisition Regulation (FAR) & NASA's FAR Supplement (NFS), Executive Orders, statutes, and much more.
- These rules apply to contracts in addition to the actual work requirements.
- Only a contracting officer can award a contract or make subsequent changes to contracts.
- Contractors cannot be directed to do something that is not required under their contract, i.e., within scope. Nor can NASA employees supervise contractor employees.
- Changing the terms under an existing contract requires a modification which may provide the contractor an opportunity to get an equitable adjustment.



How Do Requirements Get into a Contract?

1. Contract Work Requirements
 - a. Performance Work Statement
 - b. Specifications
2. *Technical Evaluation Criteria*
3. NASA Clauses
4. FAR Clauses



This presentation will cover getting requirements in **contract clauses**, specifically in the NASA Federal Acquisition Supplement (NFS)—a codified regulation

Point to Remember



You cannot add a term to a contract through an NPR—it has to be addressed in the contract.



First question to ask: Do we need a new clause or do we have a current clause which may fit?



Working with a Current Clause

Under two circumstances a FAR or NFS clause can altered/tailored to a procurement:

- “Substantially the same as” or
- Deviation to FAR/NFS

Clause Deviations

- A temporary fix
- Should not be used to create a new clause.
 - If you need a new clause for NASA contracts, then it falls into the rulemaking process.

New Policy or FAR Deviation?

Under prescribed circumstances, we may request a deviation to a current FAR or NFS clause.

FAR defines a deviation as –

- (a) The issuance or use of a policy or contract clause that is inconsistent with the FAR.
- (b) The omission of any solicitation provision or contract clause when its prescription requires its use.
- (c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR.
- (d) The use of a contract clause prescribed by the FAR on a “substantially as follows” or “substantially the same as” basis if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.
- (e) The authorization of lesser or greater limitations on the use a clause.
- (f) The issuance of contracting policies or procedures that did not follow rulemaking requirements.

Types of FAR Deviations

- **1.403 Individual deviations.**

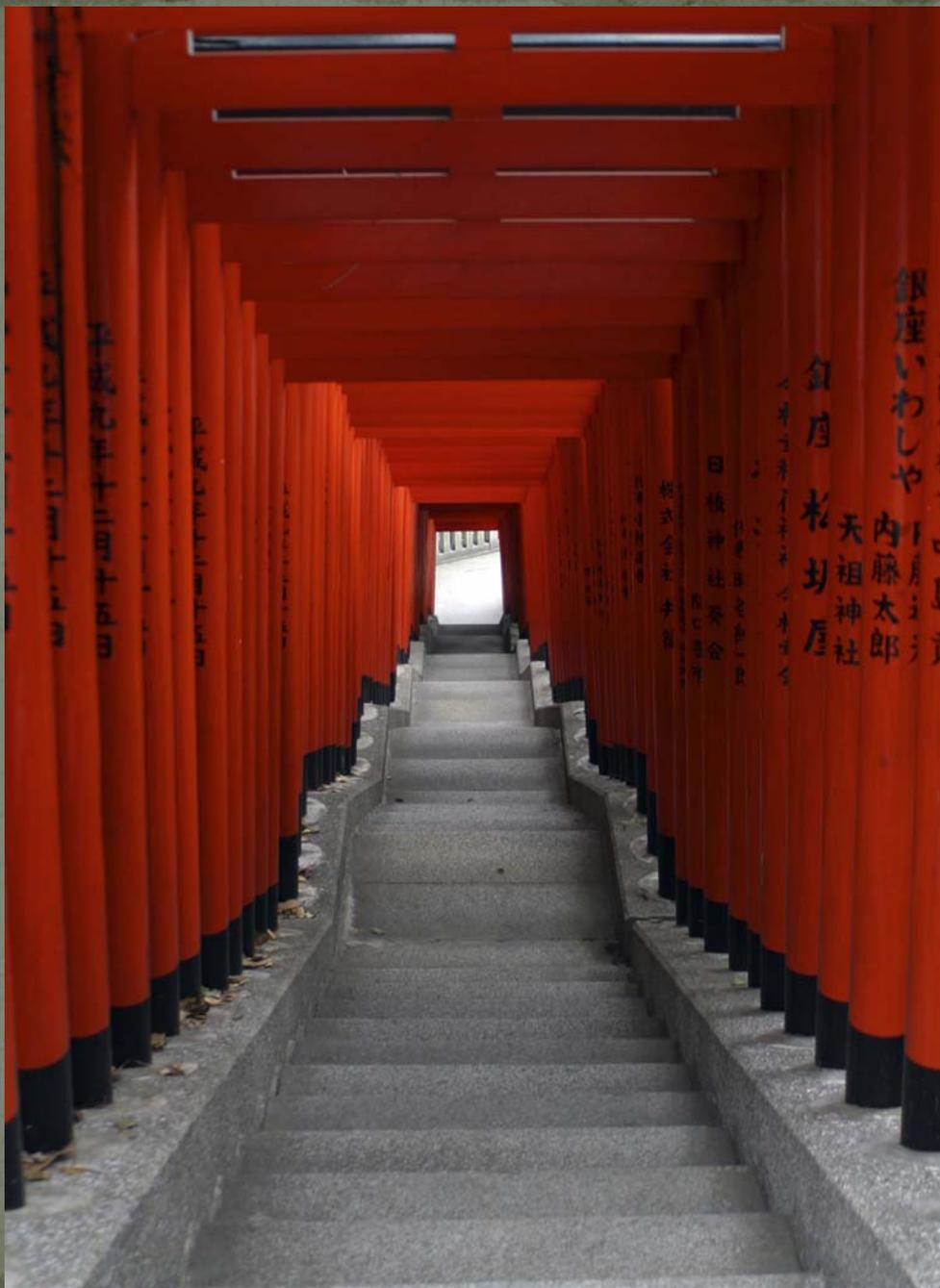
Individual deviations affect only one contract action, and, unless [1.405](#)(e) is applicable, may be authorized by the agency head. The contracting officer must document the justification and agency approval in the contract file.

- **1.404 Class deviations.**

Class deviations affect more than one contract action. When an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision, if appropriate.

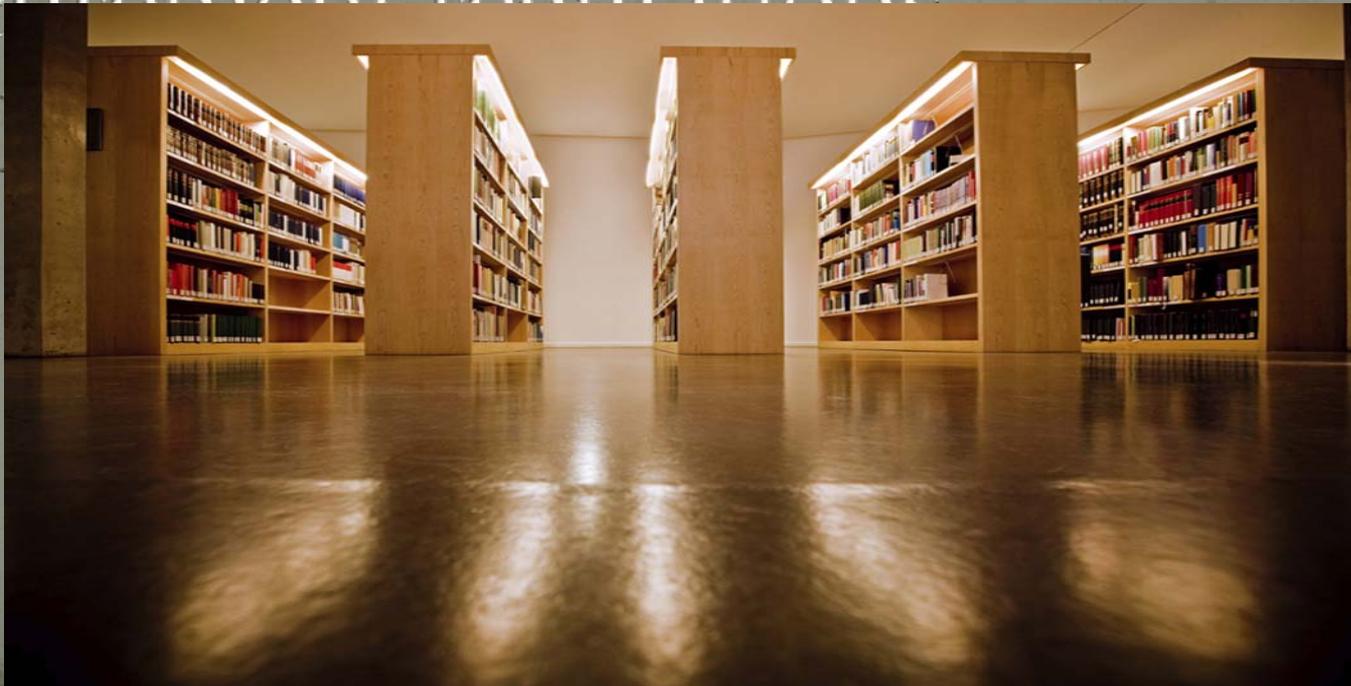
Procedures for Requesting FAR or NFS Deviations

1. Must be submitted to HQ OP by the Center Procurement Officer
2. Request must address (among other things):
 - the circumstances in which it will be used and the contract action(s) to which it applies;
 - a description of its intended effect;
 - detailed reasons supporting the request, including any pertinent background information.
3. Counsel's concurrence or comments.
4. Both class and individual deviations must be approved by the Assistant Administrator, Office of Procurement.



Why So Many
Steps to
Create a New
Clause?

... Because our clauses are
procurement regulations
per



FAR Subpart 1.3

(Authorizes Supplements)

(a)(1) Subject to the authorities in paragraph (c) of this section and other statutory authority, an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR . . .

Another Consideration

(c) Agencies shall evaluate all regulatory coverage in agency acquisition regulations to determine if it could apply to other agencies. Coverage that is not peculiar to one agency shall be recommended for inclusion in the FAR.

- (The goal is to avoid, if possible, numerous agency-specific supplements contractors must follow.)

Developing New Policies

- NPD 1400.2C: It is NASA's policy to issue notices to provide information of public interest and initiate rulemaking proceedings to amend its regulations that are codified in the Code of Federal Regulations (CFR).
 - The NFS is in Title 18 of the CFR.
- Office of Federal Procurement Policy Act also requires procurement policy to be published.

... But you have to follow
these rules . . .

- Publish for comment in the *Federal Register* as required by section 22 of the Office of Federal Procurement Policy Act, as amended ([41 U.S.C. 418b](#)), . . .
- Comply with the Paperwork Reduction Act ([44 U.S.C. 3501](#), *et seq.*) as implemented in 5 CFR 1320 (see [1.106](#)) and
- Comply with the Regulatory Flexibility Act ([5 U.S.C. 601](#), *et seq.*). Normally, when a law requires publication of a proposed regulation, the Regulatory Flexibility Act applies and agencies must prepare written analyses, or certifications as provided in the law.

Internal Review

- NFS Part 1801 and NPD 1400.C2 authorizes the Associate Administrator for Procurement to amend the NFS and to issue a notice of proposed rulemaking proposes to add, change, or delete regulatory text and contains a request for public comments in the Federal register
- Before publishing a proposed rule, it is reviewed at a minimum by the Office of General Counsel, and the affected procurement and program organizations.

Federal Register (FR)

- Rules can't be enforced if not published in the FR.
- The FR notice must state the legal basis and purpose of the actions
- Public participation is required (notice and comment rulemaking)

External Reviews

- Office of Management and Budget (OMB)
- Small Business Administration (SBA)
- Information Clearance, also OMB

Office of Information and Regulatory Affairs (OIRA)

- OIRA is within OMB.
- Its Administrator of OIRA is appointed by the President subject to Senate confirmation.
- It is the central office of regulatory review for the White House.

Cass R. Sunstein



Sunstein (along with his coauthor Richard Thaler) has elaborated the theory of [Libertarian paternalism](#). In arguing for this theory, he counsels thinkers, academics, and politicians to embrace the findings of behavioral economics as applied to law, maintaining freedom of choice while also steering people's decisions in directions that will make their lives go better. With Thaler, he coined the term [choice architect](#).

Small Business Administration (SBA) Review

Regulatory Flexibility Act (5 U.S.C. 601-612)
("Reg Flex") **requires rules which would the rule**
"have a significant economic impact on a
substantial number of small entities to contain a
regulatory flexibility analysis.

A provision of the Act allows court challenges to an
agency's non-compliance with Reg Flex.

Regulatory Flexibility Analysis

For any rule that an agency determines will affect a significant number of small entities, a Regulatory Flexibility Analysis (RFA) must be prepared at both the proposed rule and final rule stages.

This analysis must include:

- (1) an estimate of the number and type of small entities to be affected;
- (2) a detailed description of the recordkeeping and compliance requirements for the rule; and
- (3) a discussion of the alternatives that the agency has considered that would reduce the burden that the rule would impose on small entities.

SBA's Office of Advocacy

Mission Statement

America's small businesses -- some 25 million strong -- are the strength of our nation's economy. They account for 50 percent of the country's private nonfarm gross national product, create between 60 and 80 percent of the net new jobs and are 13 to 14 times more innovative per employee as large firms are.

Despite their importance to the economy, small businesses are heavily burdened by the costs of government regulation and excessive paperwork. Advocacy research shows that firms with fewer than 20 employees annually spend 45 percent more per employee than larger firms do to comply with federal regulations.

In 1976, the U.S. Congress created the Office of Advocacy within the U.S Small Business Administration to protect, strengthen and effectively represent the nation's small businesses within the federal government's legislative and rule-making processes. The Office of Advocacy works to reduce the burdens that federal policies impose on small firms and maximize the benefits small businesses receive from the government. Advocacy's mission, simply stated, is to encourage policies that support the development and growth of American small business.

Sample of OA Comments

Advocacy Urges FAA to Further Analyze Small Entity Impact of the Proposed Rule on Drug and Alcohol Misuse Prevention Programs

On August 16, 2004, the U.S. Small Business Administration's Office of Advocacy (Advocacy) filed comments on the Federal Aviation Administration's (FAA) proposed rule requiring contractors and subcontractors at any tier to establish mandatory alcohol and drug testing programs for employees performing maintenance functions for the aviation industry. A copy of Advocacy's letter can be found at: www.sba.gov/advo/laws/comments.

- In a supplemental notice of proposed rulemaking, the FAA makes clear that the proposed rule requires repair stations, contractors, and subcontractors at any tier to establish mandatory drug and alcohol testing programs if their work is "safety-sensitive," resulting in a far broader application of current requirements. Under the new rule, many small shops, such as machine shops, parts fabricators, chrome plating and other metal finishing shops, and others will be required to establish expensive testing programs. The FAA did not take into account these other industries in its economic analysis of the rule and certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The full extent of the economic impact is uncertain because of data inadequacies in the certification.
- Advocacy recommends that the FAA do a full initial regulatory flexibility analysis, expand the analysis to small entities outside the aviation industry, provide more specific data on the economic impacts on these small entities, and further explain the criteria by which it determined that the rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

(44 U.S.C. 3501-3520)

If the rule requires a "collection of information" (reporting, disclosure, or recordkeeping), then NASA must prepare an information collection clearance package (ICR) for OMB review and approval, and prepare request for public comments.

Paperwork Reduction Act (PRA)

- The PRA explicitly prohibits an agency from conducting or sponsoring a "collection of information" unless it has in advance obtained OMB approval of the collection and an OMB control number "to be displayed upon the collection of information." 44 U.S.C. § 3507(a).
- The OMB approval cannot extend beyond three years. 44 U.S.C. § 3507(g). Prior to getting from OIRA an extension of any approval, the agency must seek public comment on the continued need for, and burden imposed by the collection of information. 44 U.S.C. § 3507(h).
- A "collection of information" is defined by the PRA to include a "causing of facts to be obtained for the agency" which calls for identical recordkeeping or reporting requirements on ten or more non-governmental persons. 44 U.S.C. § 3502(3). All forms, and reporting and recordkeeping requirements fall within this definition.

PRA Requirements

In order to obtain OMB approval, the agency must certify and provide a record supporting the certification, including public comments received by the agency, that each collection of information submitted to the Director for review:

1. Is really necessary for the proper performance of the functions of the agency, it has "practical utility;"
2. Is not unnecessarily duplicative;
3. Reduces as much as possible the burden on those providing the information, with special consideration for small businesses;
4. Is written using "plain, coherent, and unambiguous terminology" and is understandable to those who are to respond;
5. Meshes, "to the maximum extent practicable," with existing industry reporting and recordkeeping practices;
6. Specifies record retention requirements;
7. Contains certain information about the collection required by the statute;
8. Has been developed by an office with enough resources to actually make use of the information;
9. To the maximum extent practicable, uses information technology to reduce burden on the public.

Information Collection Request

An Information Collection Request (ICR) is a set of documents that describe reporting, record keeping, survey, or other information collection requirements imposed on the public by a Federal agency. Each request must be sent to and approved by OMB before a collection begins. The ICR provides an overview of the collection, and estimates the cost and time for the public to respond.

Approved ICRs

- Each agency must publish a list of its approved ICRs
- NFS 1801.106 (1) contains the list of approved procurement-related ICRs. (*See next slide*)

Approved ICRs

NFS Segment	OMB Control Number
1804.470	2700-0098
1804.74	2700-0097
1819	2700-0073
1819.72	2700-0078
1823.271	2700-0106
1827	2700-0052
1831	2700-0080
1843	2700-0054
1843.71	2700-0094
NF 533	2700-0003
NF 1018	2700-0017

Public Comments

- As stated in FAR Part 1 and required by section 22 of the Office of Federal Procurement Policy Act, as amended ([41 U.S.C. 418b](#)), an agency must provide the public the opportunity to submit written comments for consideration by the agency.
- As required by Public Law No. 107-347, agencies must provide for submission of comments by electronic means and must make available online the comments and other materials included in the rulemaking docket under 5 U.S.C. 553 (c).
- Executive Order 12866 established 60 days as the standard for the comment period. The holding of a public hearing is discretionary unless required by statute or agency policy.

Comment Resolution

- **Comments are addressed in the final rule**
- **Final rule is out for 30 days before rule takes effect**

Second Chance to Comment

- Based on court decisions, if an agency makes significant substantive changes between the NPRM and the final rule, the public must be given an opportunity to comment on the revisions.
- In such a case, the agency issues an another FR notice and considers comments on that notice before proceeding to the final rule.

Unified Regulatory Agenda

The Unified Regulatory Agenda provides information concerning agency rules under development or review.

The Unified Regulatory Agenda is published in the Federal Register in the spring and fall of each year.

NASA's Regulatory Agenda

(as published in the Federal Register in Nov 2008)

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Ch. V

Regulatory Agenda

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Semiannual regulatory agenda.

SUMMARY: NASA's regulatory agenda describes those regulations being considered for development or amendment by NASA, the need and legal basis for the actions being considered, the name and telephone number of the knowledgeable official, whether a regulatory analysis is required, and the status of regulations previously reported.

ADDRESSES: Acting Assistant Administrator, Office of Internal Control and Management Systems, Office of Institutions and Management, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Cheryl E. Parker, (202) 358-0252.

SUPPLEMENTARY INFORMATION: OMB guidelines dated July 7, 2008, "Fall 2008 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions" require a regulatory agenda of those regulations under development and review to be published in the **Federal Register** each April and October. This edition of the Unified Agenda of Federal Regulatory and Deregulatory Actions includes The Regulatory Plan, which appears in part II of this issue of the **Federal Register**. NASA's Statement of Regulatory Priorities is included in part II. The complete Unified Agenda will be published at www.reginfo.gov.

Dated: August 25, 2008.

NAME: Lou Becker,

Assistant Administrator, Internal Controls and Management Systems.

Regulations.gov Monday, November 24, 2008 Unified Agenda 1

The 19 Regulatory Agendas

National Aeronautics and Space Administration - Proposed Rule

Title	Regulation Identifier Number
NASA FAR Supplement: Government Property	2700-AD37
NASA FAR Supplement, Mentor-Protégé Program	2700-AD41
NASA FAR Supplement, Drug and Alcohol Testing	2700-AD42
NASA FAR Supplement; Patents, Data, and Copyrights	2700-AD43
NASA FAR Supplement, GIDEP Clause	2700-AD44
NASA FAR Supplement—IT Security Clause	2700-AD46
NASA FAR Supplement, Pre-Proposal Conference and Periods of Performance	2700-AD47
NASA Grant and Cooperative Agreement Handbook; Update, Streamline, and Reorganize	2700-AD48
NASA FAR Supplement, Revision to Protection of Florida Manatee Clause	2700-AD49

National Aeronautics and Space Administration - Final Rule

Title	Regulation Identifier Number
Earned Value Management System (EVM)	2700-AD29
NASA FAR Supplement: Administrative Changes to NASA FAR Supplement	2700-AD36
NASA FAR Supplement: Contractor Personal Identity Verification	2700-AD38
Supplemental Standards of Ethical Conduct of the National Aeronautics and Space Administration	2700-AD39
Authority and Delegations To Take Certain Actions Relating to Patents and Other Intellectual Property Rights	2700-AD45
Inventions and Contribution Board	2700-AD50
Inventions and Contributions	2700-AD51

National Aeronautics and Space Administration - Completed Action

Title	Regulation Identifier Number
Development Work for Industry in NASA Wind Tunnels	2700-ACR1
Revision Impacting Organizational Location and Responsibilities of the NASA Inventions and Contributions Board	2700-AD23
NASA Grant and Cooperative Agreement Handbook—Committee on Academic Science and Engineering (CASE) Report (NF 1356)	2700-AD40

National Aeronautics and Space Administration (NASA)

RIN: 2700-AD37

[View Related Documents](#)**Title:** NASA FAR Supplement: Government Property**Abstract:** This rule revises the NFS to be consistent with the recently revised FAR part 45, Government Property. Corresponding NFS Clauses in 1852.245 will also be changed.**Priority:** Substantive, Nonsignificant**Agenda Stage of Rulemaking:** Proposed Rule