

# GovCon 101 – FAR Process – What is it, Your Role in it, and Why it Matters to You

# Co-Host – Dave Drabkin

- Independent consultant with 44-plus years of federal government contracting experience in both the public and private sector.
- Chairman of the Procurement Round Table
- Chairman of The Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), <https://discover.dtic.mil/section-809-panel/>
- Commissioner of the Service Acquisition Reform Act (SARA) and the Multiple Award Schedule (MAS) Panels
- Senior Procurement Executive/Deputy Chief Acquisition Officer/Suspension Debarment Official of the General Services Administration
- Deputy Program Manager Pentagon Renovation Program
- Assistant Deputy Under Secretary (Acquisition Reform) (Acquisition Process and Policies) DoD
- Staff Member Homeland Security and Government Affairs Committee (HSGAC) of the U.S. Senate
- Corporate Director Contracts Northrop Grumman Corporation
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# Today' Guest Host: Dr. Terry L. Raney

- Commissioner – Section 809 Panel – Congressional Mandated Advisory Panel on Streamlining and Codifying Acquisition Regulations
- Senior Vice-President and Division Group Manager - Acquisition Support Group of CACI International providing program and acquisition management support to over 40 Federal Civilian and DoD customers
- Colonel, USAF, Retired - Contract Management experience at operational, contract administration, major weapons systems and headquarters levels
- Air Force Acting Associate Deputy Assistant Secretary (Contracting), Chief of Contract Policy and Policy Member Defense Acquisition Regulations (DAR) Council
- Department Chair - Defense Systems Management College (DSMC) and Course Director DSMC Advanced Program Management Course
- Deputy Department Head Air Force Academy Department of Economics and Director of Acquisition Research
- PhD economics Georgetown University, MA economics University of Memphis
- Past President of National Contract Management Association and Six Year Board of Directors Member
- Vice Chair Procurement Round Table



# In the Beginning

The Constitution does not mention government contracting

1831 - US v Tingey, 30 U.S. (5 Pet.) 115

- “The United States has in its political capacity a right to enter into a contract or to take a bond in cases not previously provided by law. It is an incident to the general right of sovereignty, and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers.” **30 U.S. (5 Pet.) 115**

1884 - Anti-Deficiency Act

1947 – Administrative Procedures Act (APA)

1947 - Armed Services Procurement Act

1949 - Federal Property and Administrative Services Act

1974 – Office of Federal Procurement Policy (OFPP) Act

1984 - Competition in Contracting Act (CICA)

1994 - Federal Acquisition Streamlining Act

2003 - Services Acquisition Reform Act

Annual National Defense Appropriations Act

# 40 Years In the Desert

- At the end of World War II there were multiple regulations governing the government's acquisition/procurement process.

Congress replaced the War Powers Act with the passage of the Armed Services Procurement Act of 1947 (ASPA). The regulations implementing the ASPA were entitled the Armed Service Procurement Regulations (ASPR) and applied to DoD.

The civilian agencies converted the Treasury Department regulations to the Federal Procurement Regulation (FPR) following the passage of the Federal Property and Administrative Services Act of 1949 (FPASA) which created the US General Services Administration and gave them central purchasing authority on behalf of the civilian agencies.

Depending on which agency you did business with the rules, processes and forms were different..

- There were separate statutory provisions
- There were separate regulatory provisions

# Congress Said “Let there be Light”

In response to outcries about inconsistencies in the rules from both government and industry, Congress passed in 1974 the Office of Federal Procurement Policy (OFPP) Act establishing the Federal Acquisition Regulation (FAR) System as a single codification of rules across the entire Federal government.

- Created the Administrator of OFPP
- It created the FAR Council with three voting members
  - Administrator, US General Services Administration (GSA)
  - Administrator, National Aeronautics and Space Administration (NASA)
  - Secretary of Defense (DoD)
- It created two subordinate councils
  - The Civilian Agency Acquisition Council (CAAC) – Civilian Agencies – Chaired by GSA
    - The CAAC membership consists of all civilian agencies wishing to participate
  - The Defense Acquisition Regulatory Council (DARC) – DoD & NASA – Chaired by DoD
    - The DARC has policy and legal members from the three Departments (ARMY, NAVY & Air Force) NASA, Defense Logistics Agency, Defense Contract Management Agency (NASA is no longer part of the DARC)

The OFPP Act created a separate rulemaking process for the creation and maintenance of the FAR and the agency supplements.

- This process is excepted from the rulemaking processes of the Administrative Procedures Act (APA) of 1946.
- The OFPP Act streamlines and simplifies rulemaking for acquisition/procurement rules
- In 1979 a team of DoD and civilian agency personnel was formed to develop the FAR.
  - It took approximately 5 years to develop a fully integrated government wide regulation, the FAR and to provide for a process allowing agencies to supplement this regulation to accommodate unique agency requirements.

# The Administrative Procedure Act (APA)

The Administrative Procedure Act (APA), enacted on June 11, 1946, governs the process by which federal agencies develop and issue regulations. It includes requirements for publishing notices of proposed and final rulemaking in the Federal Register and provides opportunities for the public to comment on notices of proposed rulemaking.

**Note that FAR Rulemaking is not governed by the Administrative Procedure Act (5 U.S.C. 553).**

# Hierarchy

- Statutes

- Case Law

Executive Orders

Federal Acquisition Regulation

Federal Acquisition Regulation Agency Supplements

- Note: None of the above take effect in federal government contracting until they are implemented in the FAR



# How FAR Rules are Promulgated

- The two councils, CAAC and DARC, divide up responsibility for the parts of the FAR
  - There are 53 parts of the FAR
  - There are a number of parts that are currently reserved for later use
  - The FAR Council has assigned “primary” responsibility for maintenance of each part of the FAR to the DARC or the CAAC

## Sources of material for FAR changes

- Appropriations Acts
- Authorization Acts
- Miscellaneous Legislative Provisions
- Executive Orders
- Executive Policy
- Departmental Policy
- Suggestions from the public and private sectors

# FAR Operating Guidance

- The FAR Operating Guide provides procedures for the processing of FAR rules by the FAR Principals, Case Managers, FAR Teams, and CAAC and DARC.

The Statutory Foundation, 41 U.S.C. subtitle I, Federal Procurement Policy, established the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget.

The Administrator for Federal Procurement Policy is responsible for providing overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies.

Specifically, 41 U.S.C. 1707, Publication of proposed regulations, governs the publication of the Federal Acquisition Regulation (FAR).

- Any regulation that has a significant effect beyond the internal operating procedures of the Federal Government or has a significant cost or administrative impact on contractors or offerors must be published in the Federal Register for public comment, generally for 60 calendar days. [FAR Operating Guide July 2015.pdf \(osd.mil\)](#)

# FAR 1.101 Purpose

- The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in [1.301\(a\)\(2\)](#).

## FAR 1.102 Guiding Principles for FAR

(a) The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.

# FAR 1.102(d) Acquisition Team

- The Acquisition Team, vice FAR Team, consists of Government Representatives:
  - Technical
  - Supply
  - Procurement
  - Customers

Note: The team also includes Contractors

# Acquisition Team Roles

- The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs.

In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, the strategy, practice, policy or procedure is a permissible exercise of authority.

**“If it is not prohibited, it’s permitted!”**

# Hierarchy

- Statutes

- Case Law

Executive Orders

Federal Acquisition Regulation

Federal Acquisition Regulation Agency Supplements, for example the DFARS, HSAR, NASA FAR Supplement

# How a Rule Gets Started

- The Council responsible for the impacted part of the FAR opens a FAR “Case” and assigns responsibility to prepare a report and regulatory language to a standing or an ad hoc FAR Team/committee based on input (statute, executive order, etc.)

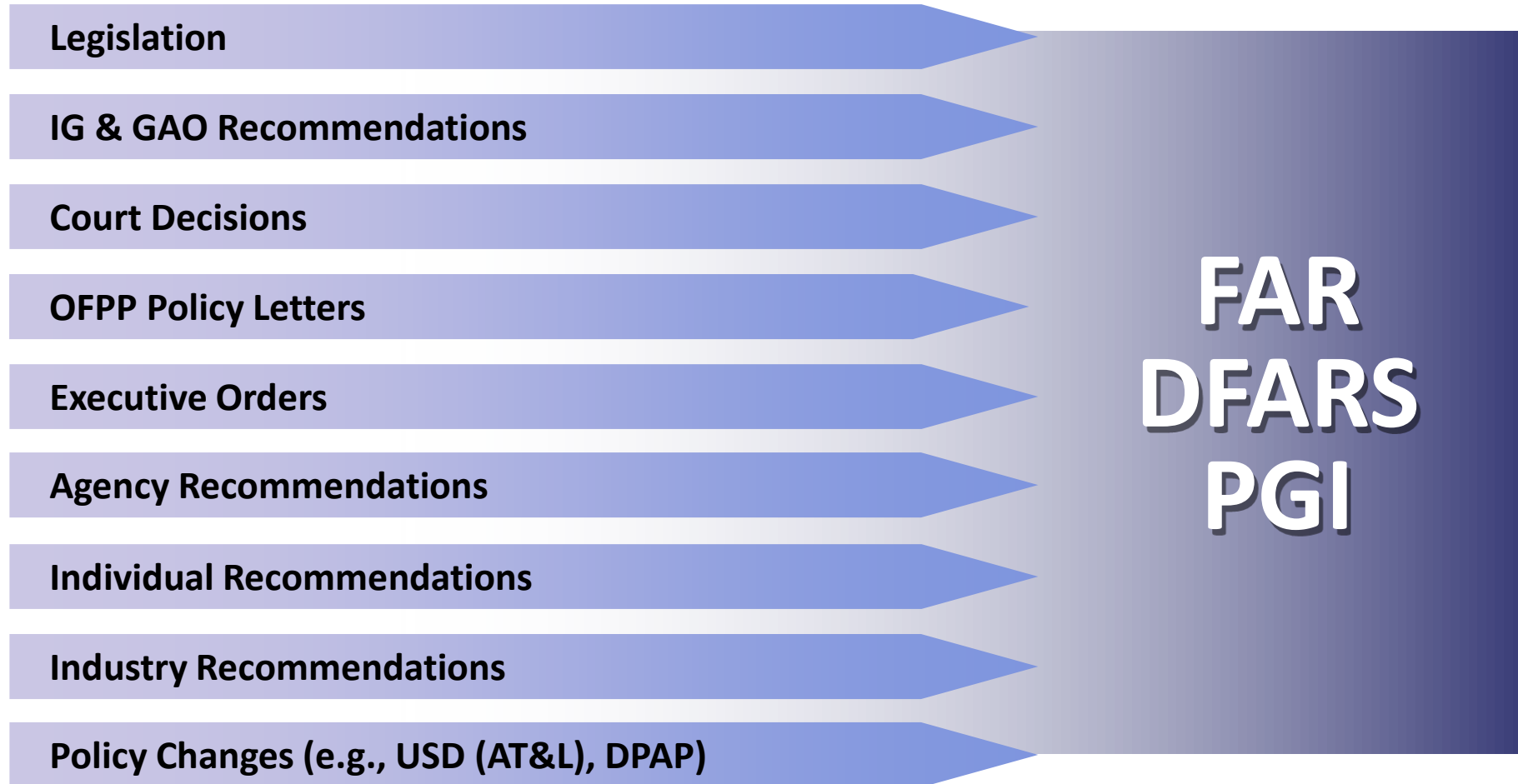
The committee reports out its language to CAAC or the DARC, as applicable, its proposed language which reviews the case, recommends amendments, checks with their respective agencies and then following a second or third reading forwards the rule to the other council (CAAC or DARC).

The other council follows the same process.

If there are differences the case goes back to the opposing council and the process is repeated until consensus is achieved.

- Once consensus is achieved the rule is submitted to the FAR Council (DOD, GSA and NASA) for review and approval.
- If there is a disagreement between three FAR signatories, the Administrator of OFPP gets to vote.

# Sources of FAR/DFARS/PGI Changes





# Executive Review

If the FAR Council agrees on a rule the rule is then submitted to OFPP for review, any issues are worked out between OFPP and the FAR Council.

Following the OFPP review the rule is then submitted to the Office of Information and Regulatory Affairs (OIRA), Executive Office of the President.

- Note for some rules there is a simultaneous review between OFPP and OIRA

OIRA's role is to review all rules issued by the Executive Agencies to ensure their consistencies with the President's policies and to measure the burden in terms of "cost" of those rules on the public.

OIRA reviews the rule for consistency with Administration policy and then coordinates the rules, again, with the agencies

- Normal review time is 30 days
- If OIRA determines a rule is "Major" it has 90 days to complete its review
- Comments received must be resolved before the rule is approved for publication and are returned to the Councils for resolution
- Rules may not be published without OIRA clearance

Once OIRA clears a rule for publication, it is signed by the FAR signatories and then prepared for publication in the Federal Register

- The Federal Register is the repository for publication for all Federal rules and notices, regardless of the applicable rulemaking process
- The Federal Register provides transparency into the rulemaking process and is available to the public 24/7.

# Types of Rules

- Under the OFPP Act there are four types of rules:
  - Advanced Notice of Proposed Rulemaking (ANPR)
    - Identifies an area the government is interested in making a rule
    - Solicits public input in terms of whether a rule is needed and what the rule should be
  - Proposed Rule (PR)
    - Provides a draft rule
    - Solicits comments on the language
  - Interim Rule (IR)
    - Provides language which generally takes effect immediately
    - Solicits comments on the language
  - Final Rule (FR)
    - Provides final language
    - Generally effective 30 days from publication

# The Comment Process

- The rulemaking process provides multiple methods for providing comments, electronic and hardcopy

Once the comment period closes all comments are provided to the FAR Team that drafted the rule for analysis and disposition

All comments are addressed in the final rule

Editorial comment – Generally, once a proposed or interim rule is published the FAR Council rarely makes any significant change to the rule.

# Public Meetings

- The FAR Council is authorized to conduct public meetings where the public is invited to attend and make statements concerning a matter in the rulemaking process.

Public meetings are used infrequently

There are no transcripts of the public meeting

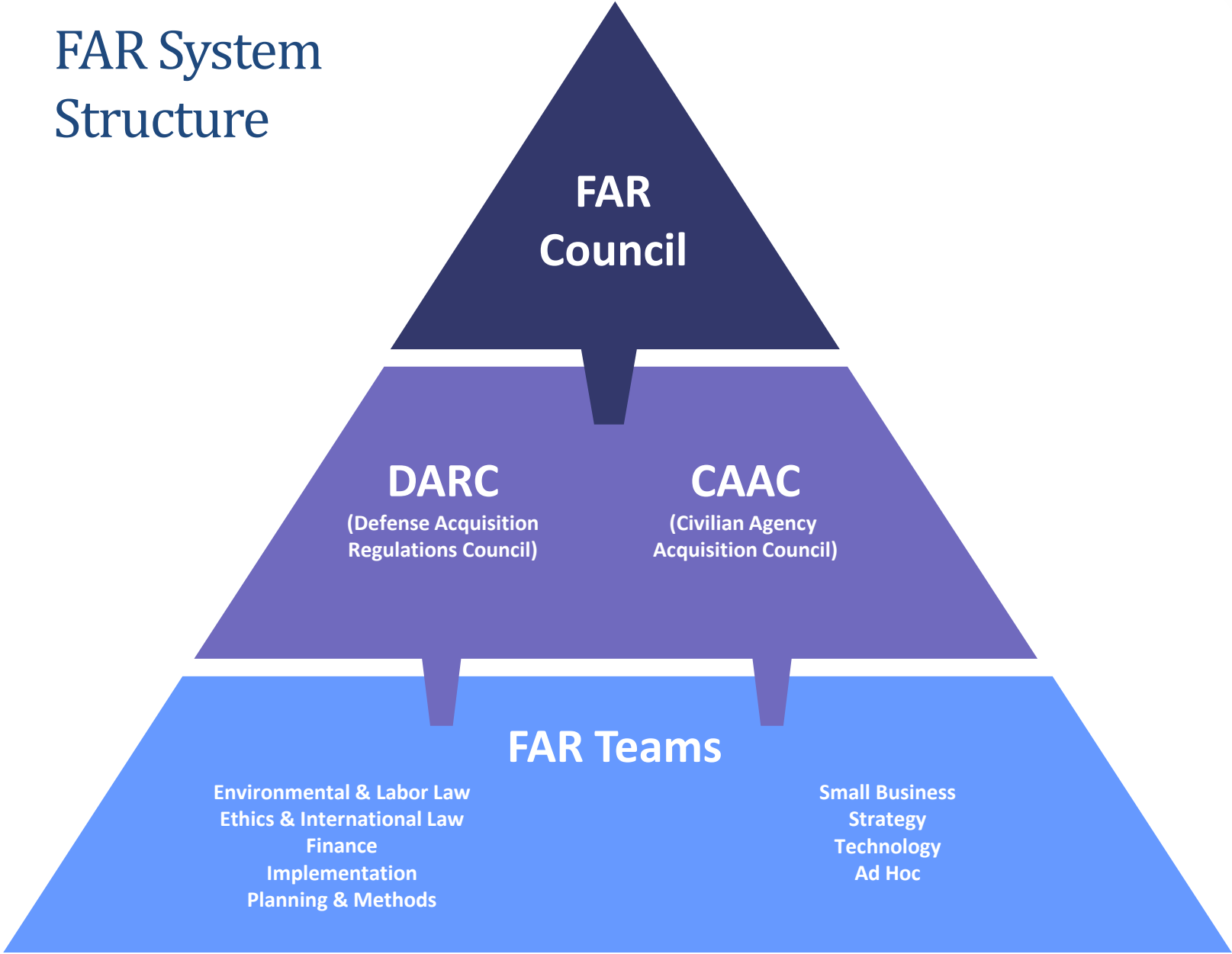
The only records are the submissions, if any, provided participants

Normally, although permissible, the government regulators do not engage in a dialogue with the public

# Role of the Administrator of OFPP

- The role of OFPP has evolved over the last 4 decades
  - Initially the Administrator was a figure head who attended FAR Council meetings
  - Today the Administrator plays a key role in developing and driving policy through the FAR Council
  - Administrator votes if there is a disagreement between the FAR Signatories
  - No rule can be published without the concurrence of the Administrator

# FAR System Structure



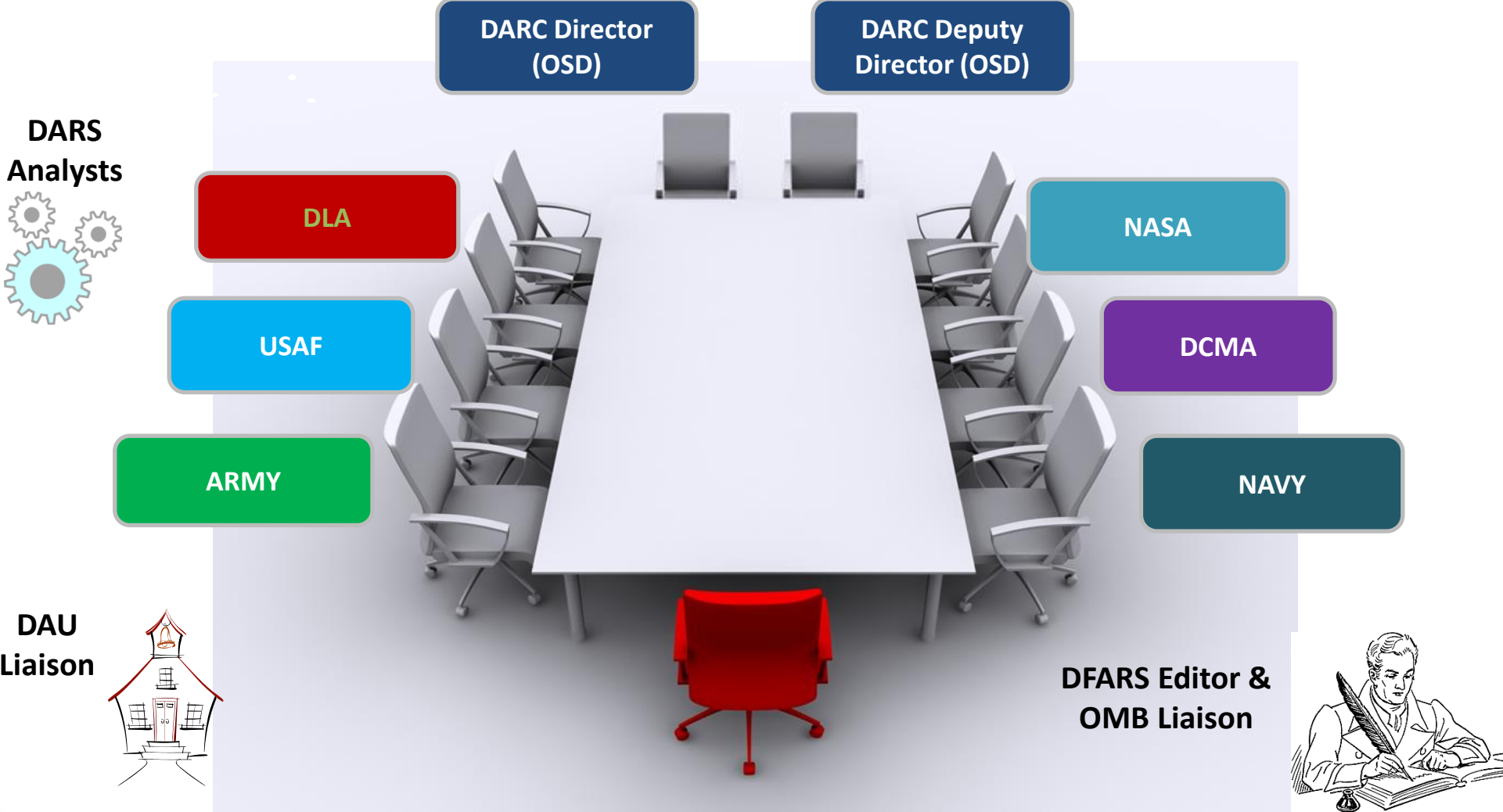
# Defense Acquisition Regulation Council

- DARC Members:
  - DAR Council Director, OUSD(AT&L) DPAP/DARS
  - DAR Council Deputy Director, OUSD(AT&L) DPAP/DARS
  - Military Departments (Army, Navy, Air Force)
  - Defense Agencies (DCMA, DLA)
  - NASA
  - Nonvoting Legal Members of Each Member

## Responsibilities:

- Promulgate the FAR (in conjunction with CAAC)
- Promulgate the DFARS and DFARS PGI
- Publish DFARS Federal Register notices, solicit public comments
  - Advance notices of proposed rulemaking
  - Proposed and interim rules soliciting public comments
  - Public meetings
  - Final and Interim DFARS rules

# Your DAR Council



DAR Team Members From DoD Agencies



# Civilian Agency Acquisition Council

- CAAC Members:
  - Chair: GSA
  - Representatives from the Civilian Agencies
- Responsibilities:
  - Promulgate the FAR (in conjunction with DAR Council)
  - Publish FAR Federal Register notices, solicit public comments
    - Proposed and interim rules
    - Advance notices of proposed rulemaking
  - Publish FAR Federal Register notices, solicit public comments
    - Advance notices of proposed rulemaking
    - Proposed and interim rules soliciting public comments
    - Public meetings
    - Final and Interim FAR rules

# Standing FAR Teams

- The standing FAR teams are responsible for all but the very routine cases in their assigned FAR parts.

Cases in FAR parts not listed in the next chart will be assigned to either a standing FAR team or an ad hoc team, depending on the nature of the case.

The teams are comprised of “core” members and “rotational” members.

- Core members, or their designated representative, attend all team meetings.
- Rotational members are team members for specific cases that impact their assigned areas of responsibility. Supplemental advisors (OFPP, Defense Contract Audit Agency (DCAA), IAE systems personnel, FAI, DAU, etc.) also support the teams. Supplemental advisors are not voting members.
- Supplemental advisors may present a formal minority position.

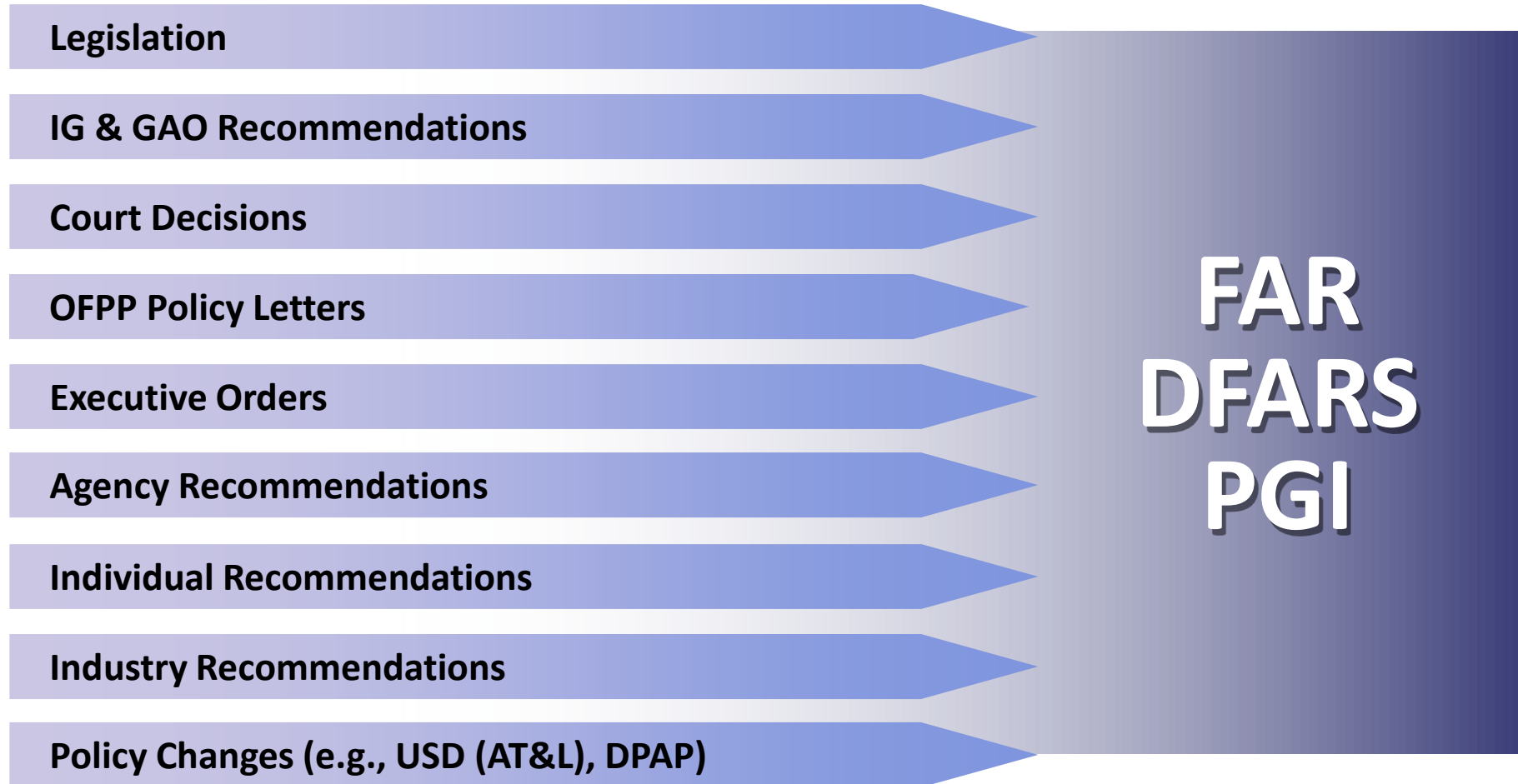
The CAAC Chair, DARC Director, and NASA Policy Representative (FAR Principals) establish the composition of the standing FAR team’s membership.

- The work of drafting FAR cases and addressing public comments is done by experts in the various agencies.

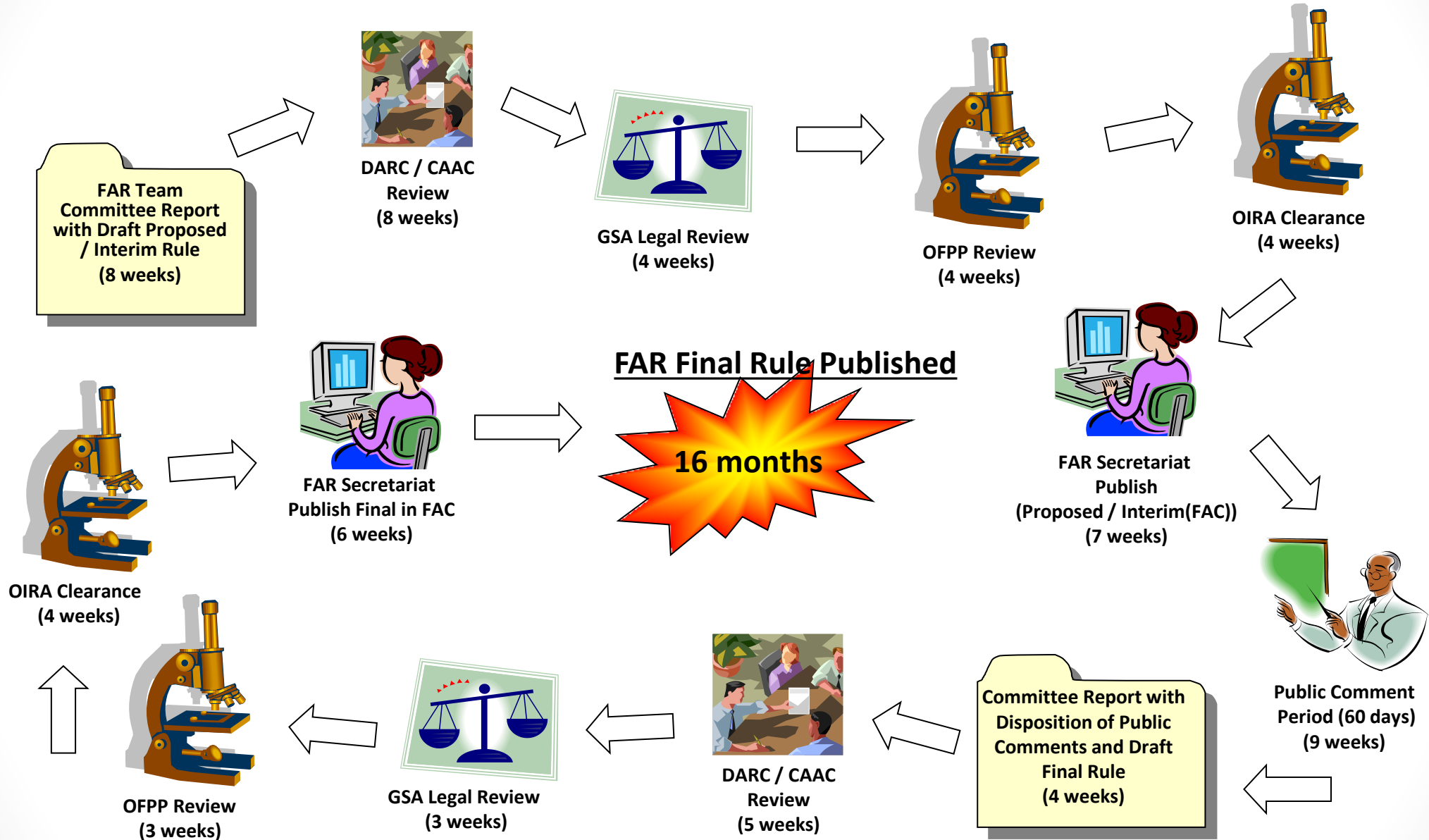
# FAR Teams

- **Environmental & Labor Law**
- **Ethics & International Law**
- **Finance**
- **Implementation**
- **Planning & Methods**
- **Small Business**
- **Strategy**
- **Technology**
- **Ad Hoc**

# Sources of FAR/DFARS/PGI Changes



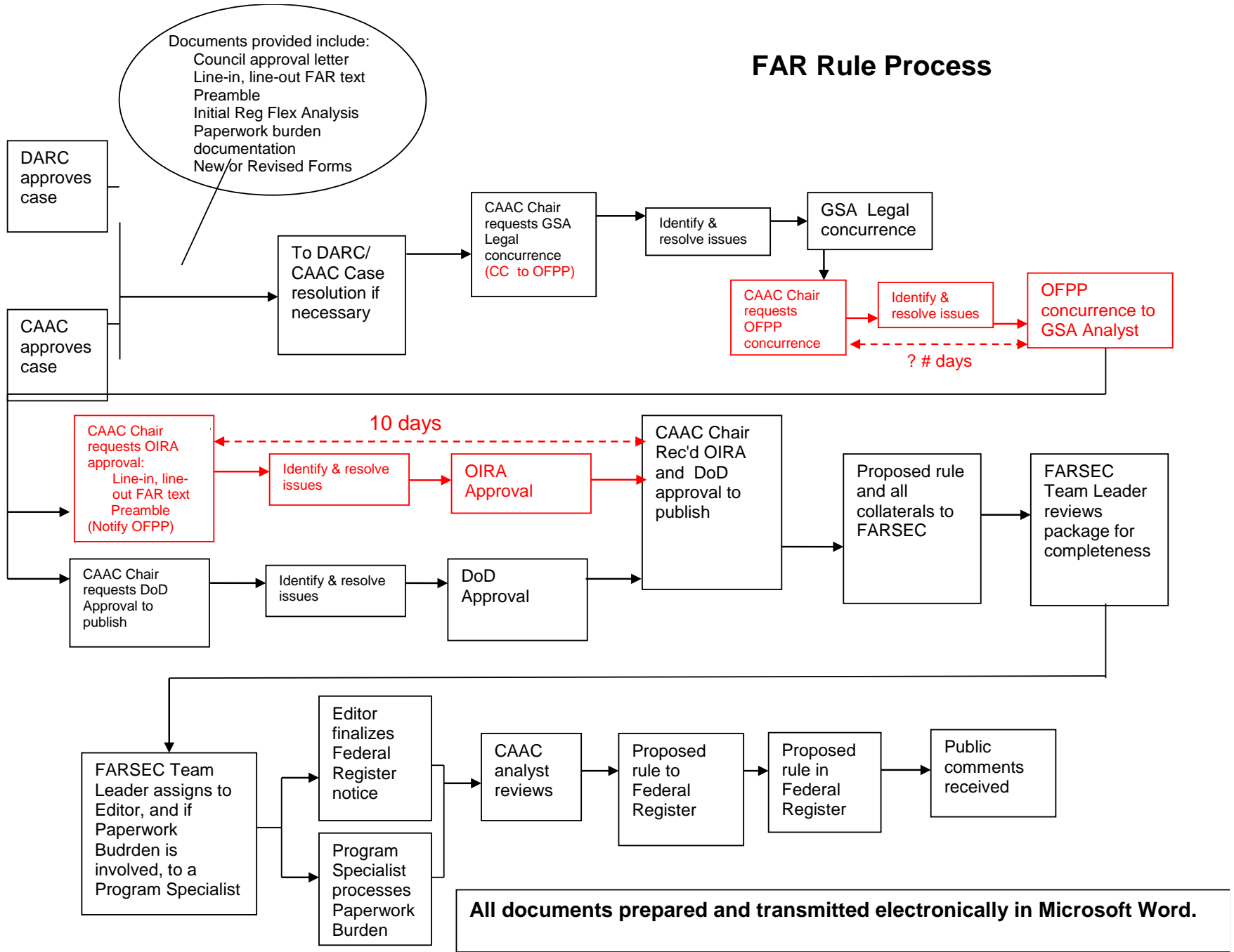
# FAR Case Standard Timeline



# DFARS Case Standard Timeline



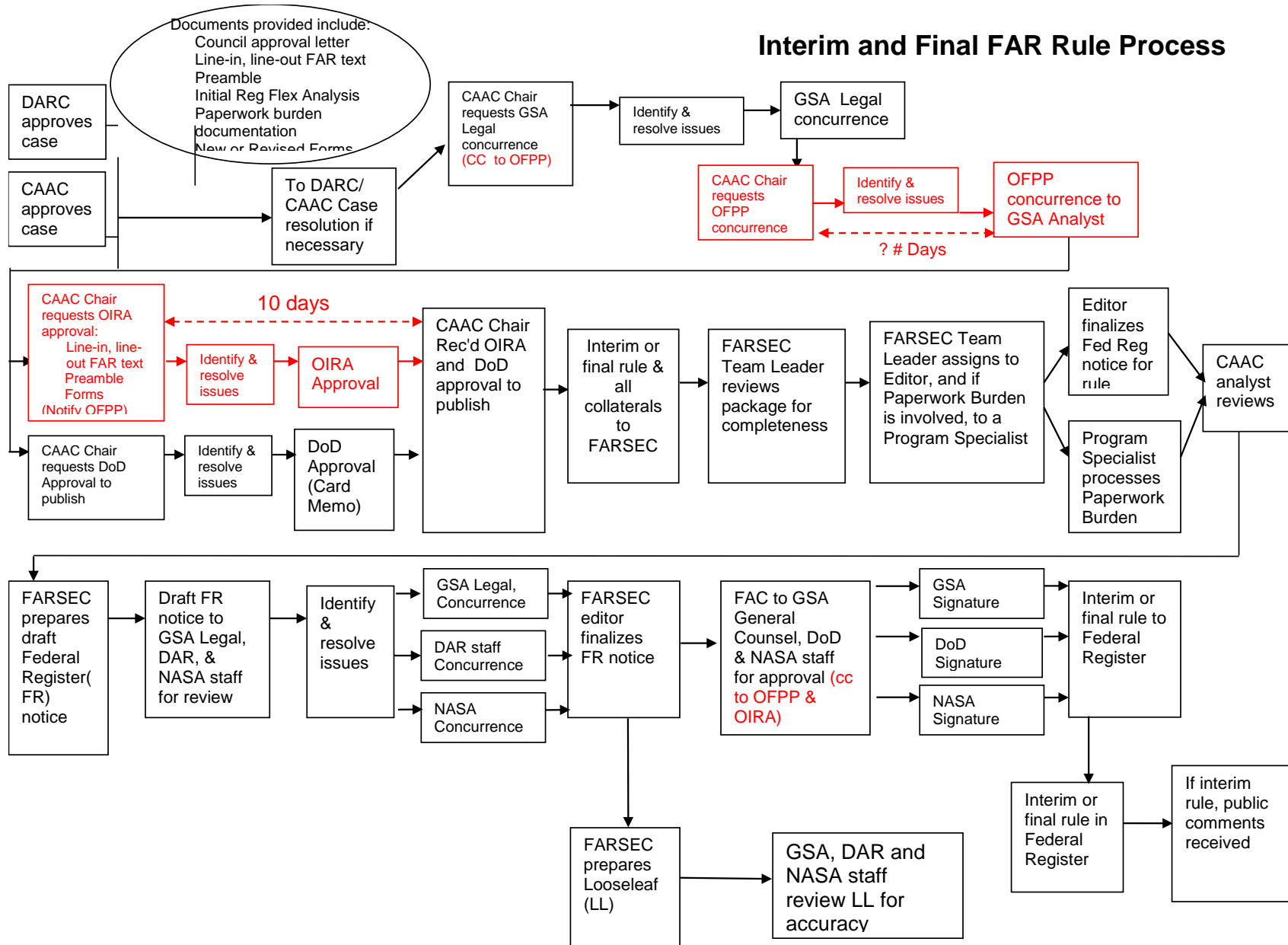
# FAR Rule Process



**All documents prepared and transmitted electronically in Microsoft Word.**



# Interim and Final FAR Rule Process





# Getting Involved in the Rulemaking Process

- Review DFARS and FAR proposed and interim rules
  - Publication Notices:  
<http://www.acq.osd.mil/dpap/dars>

## Submit input

- Agency comment (through command channels)
- Internet (follow local and agency procedures)

## View public comments on proposed & interim rules

- DFARS rules: [www.regulations.gov](http://www.regulations.gov)
  - FAR rules: [www.regulations.gov](http://www.regulations.gov)
- View status of open cases
    - <http://www.acq.osd.mil/dpap/dars>