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Department of Defense Proposed Rule on Evaluating Commercial Prices Raises More Questions Than It Answers

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Government Contracts

On August 3, 2015, the Department of Defense ("DoD") published a proposed rule to amend the Defense Federal Acquisition Regulation Supplement ("DFARS") to provide guidance for evaluating the reasonableness of prices using data other than certified cost or pricing data. 80 Fed. Reg. 45,918 (Aug. 3, 2015). It attempts to clarify the data an agency can use to establish reasonable prices in situations when full and open competition is absent. The proposed rule implements Section 813 of the National Defense Authorization Act of 2013.

When contracting by negotiation, the proposed rule makes market-based pricing the preferred method of establishing a fair and reasonable price in situations without adequate competition. 80 Fed. Reg. at 45,920. It defines "market-based pricing," as "pricing that results when nongovernmental buyers drive the price in a commercial marketplace. When nongovernmental buyers in a commercial marketplace account for a preponderance (50 percent or more) of sales by volume of a particular item, there is a strong likelihood the pricing is market based." 80 Fed. Reg. at 45,920. The agency shall obtain commercial marketplace sales data to ensure that the price is consistent with market-based pricing. Relevant Sales Data, as defined by the proposed rule, includes sales data that "could reasonably be expected to influence the contracting officer's determination of price reasonableness, taking into consideration the age, volume, and nature of the transactions." In addition, the proposed rule requires that contractors "obtain from subcontractors whatever information is necessary to support a determination of price reasonableness." *See* 80 Fed. Reg. at 45,922 (to be codified at DFARS 252.215-70XX(d)(5)(i)).

This guidance is helpful to determine the reasonableness of prices for commercial goods with non-governmental sales, but it introduces more confusion into the determination of reasonableness for commercial goods that have been "offered for sale" but not sold. *See* FAR 2.101 (including items "offered for sale" in the definition of "commercial item"). The proposed rule does not clearly specify how to determine the reasonableness of items without 50% or more nongovernmental buyers.

Further, the open-ended definition of "Relevant Sales Data" provides little protection from agency demands for more and more such data to confirm the reasonableness of the prices. It leaves contractors potentially subject to the whims of the contracting officer to determine what type and quantity of information is necessary. This burden is then extended to subcontractors by requiring that contractors also obtain this information from subcontractors. As a result, this proposed rule will create a process that is both burdensome and unfamiliar—a sure recipe for compliance concerns and government scrutiny. And it opens up the possibility that providing data in support of a "commercial item" procurement will be as burdensome, and potentially as fraught with peril, as providing certified cost or pricing data in a procurement covered by the Truth in Negotiations Act.

Comments on the proposed rule should be submitted by October 2, 2015.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Government Contracts practice group:

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