

ALERT

DOD Revamps Commercial Item Determinations

February 5, 2018

WHAT: The Department of Defense (DOD) issued a final rule amending Defense Federal Acquisition Regulation Supplement (DFARS) clauses related to the procurement of commercial items. The rule implements Section 831(a) of the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA), several commercial item provisions in the FY16 NDAA, and Section 848 of the FY18 NDAA. At the same time, the DOD issued its revised Guidebook for Acquiring Commercial Items, which provides practical tips for DOD contracting personnel making commercial item determinations and evaluating commercial item pricing.

WHEN: The final rule and DOD Guidebook for Acquiring Commercial Items were published on January 31, 2018. The rule is effective immediately.

WHAT DOES IT MEAN FOR INDUSTRY: This long-awaited rule makes major changes to the way DOD procures commercial items. Most important for commercial item contractors, the final rule requires contractors to submit data showing that the price is reasonable at the same time they seek a commercial item exception to the requirement to provide certified cost or pricing data—potentially conflating what should be separate decisions on commerciality and pricing. For contractors that price their commercial items based on catalog prices, the rule requires contractors to provide an explanation if the catalog pricing is not consistent with “all relevant sales data.”

Even with these areas of concern, several of the final rule’s changes to commercial item procurements will benefit commercial item contractors. Specifically, the final rule implements the previous statutory change directing DOD contracting officers generally to rely

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on a prior commercial item determination made by a DOD component in subsequent commercial item determinations. In addition, when procuring information technology products or services, the products or services must be commercial items unless the head of the contracting activity determines, based on market research, that no commercial items are suitable to meet the agency's needs. The final rule also allows goods and services provided by nontraditional defense contractors to be treated as commercial items to allow those firms to take advantage of the lower administrative burdens associated with commercial item contracts.

Finally, the final rule did not address many commercial item provisions that were included in the FY17 and FY18 NDAA's, so we expect to see more changes to DOD commercial item procurements to implement those provisions. We will provide a more detailed analysis of the final rule and its implications in later communications.