

ALERT

Department of Defense Withdraws Controversial Proposed Rule on Commercial Items, But Expect Close Scrutiny to Continue

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The Department of Defense (DOD) has withdrawn a proposed rule that would have effectively narrowed the standards under which an item qualifies as “commercial” and that would have broadly expanded the type of information required to determine price reasonableness. As we previously reported, the proposed rule was intended to implement Section 831(a) of the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA), which required DOD to issue guidance regarding the submission of other than certified cost or pricing data for commercial item acquisitions. The proposed rule followed recent DOD Office of Inspector General reports on pricing in commercial item acquisitions, which raised concerns that Contracting Officers had not analyzed sufficient pricing information to determine that the prices of certain sole source commercial item products were fair and reasonable. The proposed rule generated significant negative comments, including from the American Bar Association’s Section of Public Contract Law. With little fanfare, DOD closed the DFARS case on the proposed rule and incorporated the FY13 NDAA issues into a new DFARS case that will address both Section 831(a) of the FY13 NDAA and the commercial item provisions in the Fiscal Year 2016 (FY16) NDAA.

The FY16 NDAA includes seven provisions relating to procurement of commercial items. Of particular significance to contractors, the NDAA provides:

- Section 851: This section directs DOD to publicly post commercial item determinations by DOD Contracting Officers and to establish a centralized office to provide assistance and

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expertise to Contracting Officers regarding commercial item determinations. To further encourage consistency across DOD components, this section also requires Contracting Officers to presume that a prior commercial item determination by any DOD component provides a valid determination for subsequent procurements of the same item. Failure to follow this presumption triggers a review by the head of the contracting activity, who must either determine that the prior determination was appropriate and still applicable, or issue a revised determination with a written explanation of the basis for the revision.

- Section 853: This section requires Contracting Officers to consider evidence of recent government purchase prices for the same or similar commercial items in establishing price reasonableness on a subsequent purchase. Contracting Officers retain discretion to determine that the previous government prices remain valid points of comparison when considering the totality of the circumstances.
- Section 855: This section directs the Under Secretary of Defense for Acquisition, Technology, and Logistics to issue guidance prohibiting the acquisition of non-commercial item information technology products or services, unless the agency head makes a written determination that no commercial items are suitable for the agency's needs.
- Section 856: This section limits a Contracting Officer's ability to convert an acquisition of commercial item products and services under FAR Part 12 to a non-commercial item procurement under FAR Part 15. In order to proceed with such a conversion, the Contracting Officer must make a written determination that the earlier commercial item procurement was in error or based on inadequate information, and that DOD will realize a cost savings compared to procuring the same quantity of products or services using commercial item acquisition procedures.

In addition to implementing the FY16 NDAA provisions and drafting a new proposed rule, DOD is continuing its focus on commercial item procurements, particularly commercial item pricing. To that end, DOD has established a commercial pricing cell within the Defense Contract Management Agency's Defense Contract Pricing Center of Excellence to provide assistance and expertise to agencies in procuring commercial items.

Although the proposed rule on commercial item pricing is no longer pending, contractors should expect continued DOD focus on commercial item acquisition policy reform and continued scrutiny of commercial item pricing decisions.