

ALERT

FAR Council Proposes to Implement Narrowed Definition of “Adequate Price Competition” for DOD, NASA, and the Coast Guard

June 14, 2018

WHAT: The FAR Council issued a proposed rule that would revise the definition of “adequate price competition” for DOD, NASA, and the Coast Guard. The proposed rule would revise FAR 15.403-1 to specify that for these three agencies, adequate price competition occurs “only if two or more responsible offerors, competing independently, submit responsive and viable offers.” Other agencies would continue to apply the existing, broader definition of adequate price competition.

WHEN: The FAR Council published the proposed rule on Tuesday (June 12, 2018) and requested comments from interested parties by August 13, 2018.

WHAT DOES IT MEAN FOR INDUSTRY: The proposed rule implements Section 822 of the Fiscal Year 2017 National Defense Authorization Act, which narrows an important criterion used by agencies to determine whether they must require contractors to submit certified cost or pricing data and whether the agencies have established “fair and reasonable” pricing submitted by contractors. Contractors likewise may find these criteria applied to their subcontracts through DOD contractor purchasing system reviews (CPSRs) or other agency reviews and audits. Although DOD already had narrower criteria for adequate price competition in the DFARS, the proposed FAR rule would further narrow the criteria. Contractors should prepare to update their business-capture and purchasing policies accordingly.

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Practice Areas

Cost Accounting and Cost Allowability
Government Contracts

An agency must request certified cost or pricing data from a contractor if three criteria are met: (1) the parties are undertaking a contract action identified in FAR 15.403-4(a)(1) (awarding a contract or subcontract, or modifying a sealed bid or negotiated contract); (2) the action exceeds the statutory threshold (currently \$750,000, jumping to \$2 million on June 30, 2018); and (3) none of the exceptions identified in FAR 15.403-1(b) apply. The proposed rule modifies the first exception in FAR 15.403-1(b), which prohibits agencies from requiring certified cost or pricing data when the price for the contract action is based on “adequate price competition,” which is defined at FAR 15.403-1(c)(1).

Also, FAR 15.404-1(b)(2) lists techniques for finding prices to be fair and reasonable, providing that “[n]ormally, adequate price competition establishes a fair and reasonable price (see FAR 15.403-1(c)(1)).”

Under the **current rule** at FAR 15.403-1(c)(1), an agency could find adequate price competition in three different scenarios:

(1) Actual Competition: Two or more responsible offerors submitted offers that satisfy the Government’s requirements in a best-value competition;

(2) Expected Competition: Only one offer was submitted, but that offer was submitted with the expectation that at least one other offeror was capable of submitting a meaningful offer; or

(3) Comparisons with Other Competitions: Price analysis clearly demonstrates that the offered price was reasonable based on a comparison with similar contracts that resulted from adequate price competition.

The **proposed rule** would limit the definition of adequate price competition to a scenario that, like the first scenario under the current rule, looks only at the number of offers actually submitted, rather than any parties’ expectations. Under the proposed rule, FAR 15.403-1(c)(1) would separately define adequate price competition for DOD, NASA, and the Coast Guard as occurring when “a price is based on adequate price competition only if two or more responsible offerors, competing independently, submit responsive and viable offers.”

This narrowed definition has already been applicable to a degree. Most notably, DFARS 215.403-1 and 215.371-3 specify that when agencies receive only one offer, higher-level review of price analysis and certified cost or pricing data may be required even if the offeror had the reasonable expectation of competing offers. But the FAR Council’s proposed rule narrows adequate price competition even further by eliminating the “expected competition” and “comparison with other competitions” bases for adequate price competition completely.

Contractors accordingly may find agencies directing them to provide certified cost or pricing data in competitive procurements. Even for proposals below the threshold for submission of certified cost or pricing data, agencies may request cost or pricing data to support their price analyses in more circumstances than they currently do.

Contractors also should prepare for these standards to be applied to their supply chains through CPSRs and other reviews. DCMA’s CPSR Guidebook defines adequate price competition using the current FAR definitions, without folding in the DFARS provisions discussed above. Thus, in particular, contractors that regularly receive only one proposal or quote in response to competitive solicitations should prepare for increased obligations in conducting price analyses and potentially in obtaining certified cost or pricing data.

The FAR Council calls this proposed rule a “top-level framework” for implementing Congress’s direction in the FY 2017 NDAA. Although comments may prompt some changes to the implementation, the statutory basis for this proposed rule indicates that contractors should begin assessing what, if any, changes to make to their proposal and purchasing practices to prepare for a final rule.