

# DOD Updates Regulations and Guidance for Commercial Item Procurements

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## *Government Contracts Issue Update*

Complying with congressional direction to increase the acquisition of commercial items, the Department of Defense (DOD) recently 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), commercial items provisions in the FY16 NDAA, and Section 848 of the FY18 NDAA. At the same time, DOD issued its revised Guidebook for Acquiring Commercial Items, which provides practical tips for contracting personnel making commercial item determinations and evaluating commercial item pricing. The final rule and related Guidebook instructions contain many provisions that are important and relevant to the industry. This article highlights five key take-aways.

### **Commercial Item Determinations and Price Reasonableness**

The final rule revises DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. The revised clause provides a commercial item exception, but in so doing it intertwines the commercial item determination with an agency's price reasonableness determination. The clause now requires contractors seeking an exception from the requirement to provide certified cost or pricing data to also provide information demonstrating price reasonableness. A contractor will thus need to submit data pertaining to price reasonableness at the same time it seeks a commercial item determination. This requirement muddies what should technically be separate commerciality and price

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reasonableness determinations, and may lead to further confusion among the acquisition community about the analysis that should go into each issue. It also imposes a burden on offerors to submit pricing data at the front-end of a procurement in which they might not otherwise participate if the contracting officer does not grant the commercial item exception. In response to public comments, the drafters acknowledged those concerns, but nevertheless included the requirement in the interest of not delaying acquisitions with a two-step commerciality/price reasonableness process.

### **Additional Requirements When Prices are Based on Catalog Pricing**

The proposed version of the rule would have required offerors to include a certification when proposed pricing was based on an offeror's catalog prices. The "catalog pricing provision" would have required them to certify whether the catalog pricing supporting the proposal was consistent or inconsistent with "all relevant sales data." During the comment period, industry identified two concerns with the catalog pricing provision: (1) it was unclear how offerors would determine whether catalog pricing was consistent with all relevant sales data; and (2) the provision imposed a new certification not required by statute.

In response to these concerns, the final rule removed the certification requirement, but left the remainder of the provision essentially unchanged, leading to much of the same ambiguity initially identified by industry. Specifically, when offerors are relying on a commercial item exception from the requirement for certified cost or pricing data and the items are "priced based on a catalog," offerors will be required to submit a copy of the catalog that shows the pricing. The final rule also imposes an additional requirement: "if the catalog pricing . . . is not consistent with all relevant sales data," offerors must provide a description of the differences and inconsistencies between the relevant sales data and the catalog price. Although offerors no longer have to certify whether the catalog pricing is consistent with "all relevant sales data," they will still be required to make that same judgment and describe any differences. According to the drafters, this requirement applies even if the proposed price is **lower** than the catalog price. This disclosure requirement imposes an additional burden on contractors that is not necessary to determine whether the price is reasonable—particularly a price that is below the published catalog price.

### **Reliance on Prior Commercial Item Determinations**

The final rule allows DOD contracting officers to rely on a prior commercial item determination by a **DOD component** when making commercial item determinations for subsequent procurements of the same item. This presumption should allow for a more streamlined approach to commercial item determinations and speed up the process.

The rule could have gone further to allow DOD contracting officers to rely on prior commercial item determinations across the Government. Industry had encouraged expanding the reliance on prior commercial item determinations to include commercial item determinations by non-DOD agencies, particularly General Services Administration (GSA) determinations for items on the Federal Supply Schedules (which by definition, must be commercial items). The drafters determined that the FY16 NDAA did not mandate that DOD contracting officers rely on commercial item determinations made by civilian agencies, and they declined to exercise their own discretion to make that change.

### **Increased Acquisition of Commercial IT Products or Services**

The final rule includes a specific policy for the acquisition of information technology (IT) products or services. Under the new rule, a contracting officer must procure commercial IT products or services unless the head of the contracting activity determines that no commercial items are suitable to meet the agency's needs based on market research. This new policy should result in a major uptick in the acquisition of commercial IT products and services.

### **Advantages for Nontraditional Defense Contractors but Not Subcontractors**

The final rule allows DOD contracting officers to treat as commercial items any goods and services provided by nontraditional defense contractors. A "nontraditional defense contractor" is one that is neither currently performing nor has previously performed any DOD contract or subcontract for at least one year preceding DOD's solicitation of sources. In responding to public comment, DOD clarified that the provisions relating to nontraditional defense contractors do not extend to subcontractors that otherwise meet the definition of a nontraditional defense contractor. According to the drafters, the FY16 NDAA did not authorize expanding the definition of a nontraditional defense contractor to include a subcontractor.

### **Conclusion**

Notably missing from the final rule are changes to address the commercial item provisions in the FY17 and FY18 NDAAs. The FY17 NDAA includes several provisions directed at DOD's commercial item contracting. Of note, it includes a preference for procuring certain **services** (facilities-related, knowledge-based, construction, medical and transportation services) as commercial items—similar to the preference for commercial item IT products and services. These types of services cannot be procured as non-commercial items unless either the Undersecretary for Acquisition, Technology and Logistics or the contracting officer (depending on the value of the contract) makes a written determination, after conducting market research, that no commercial services are available to meet the agency's needs. Additionally, the FY17 NDAA provides for two pilot programs allowing DOD to acquire "innovative" commercial items, technologies, and services through streamlined acquisition procedures.

For its part, the FY18 NDAA takes the reliance on prior commercial item determinations one step further and provides that DOD's acquisition of an item through commercial item procedures constitutes a prior determination that is binding on future DOD acquisitions. Thus, a contracting officer can presume an item is commercial if DOD previously purchased it under a commercial item contract, even if the prior acquisition did not include a specific determination of commerciality. The FY18 NDAA also requires DOD to contract with multiple commercial online marketplaces for the procurement of certain commercial-off-the-shelf products. These marketplaces must provide procurement oversight controls, including the ability to screen suppliers and products to ensure compliance with existing laws.

Because the final rule does not address these provisions, we expect further DOD rulemaking involving commercial item procurements in the future. Ideally, those changes will consider the spirit of the congressional mandate to increase DOD's use of commercial item procurements.