

ALERT

Bicameral Bill Proposes Revising the Definitions of Commercial Product and Adequate Price Competition, Other Strategies Targeted at Perceived Price Gouging by DOD Contractors

June 17, 2022

WHAT: Sen. Elizabeth Warren (D-MA) and Rep. John Garamendi (D-CA) introduced the “Stop Price Gouging the Military Act” as S. 4374 and H.R. 8007, respectively, to prevent perceived price gouging by U.S. Department of Defense (DOD) contractors. According to a statement by Sen. Warren, the bill aims to close existing loopholes that make it difficult for DOD to obtain information that would allow it to prevent price gouging. Some of the bill’s changes would apply to all federal government procurements, not just those by DOD agencies.

First, the bill aims to “strengthen[] Truth in Negotiations Act provisions” (now the Truthful Cost or Pricing Data Act) by requiring offerors to provide certified cost or pricing data in all DOD procurements for cost-reimbursement contracts, even in competitions when an agency anticipates receiving multiple offers. In addition, the bill narrows the exception from providing certified cost or pricing data in procurements of commercial products and commercial services—by DOD and civilian agencies—to apply only when the agency receives two or more responsive and responsible offers. This would be a significant change from the current regime, which excepts all procurements of commercial products and commercial services from the Truth in Negotiations Act requirement to provide certified cost or pricing data, and many commercial contractors lack the accounting and compliance systems that would be required to

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produce certified cost or pricing data.

Second, the bill would revise the definition of “commercial product” to remove from the definition items that are “of a type” of those sold to commercial customers. (The bill’s subtitle refers to the “commercial item” definition, but the proposed statutory changes relate to the current definition of “commercial product,” which was part of the “commercial item” definition until Congress created separate definitions of “commercial product” and “commercial service” in 2018.) As a result, an item would no longer qualify as a “commercial product” unless it has actually been sold to commercial customers. Notably, DOD issued a proposed rule in 2015 that removed the “of a type” criteria, but received significant industry pushback and ultimately withdrew the proposed rule.

Third, the bill would require DOD to create a “Progress Payment Incentive Pilot Program.” This program would allow for accelerated progress payments for contractors that meet certain criteria, such as being responsive to DOD requests for cost information and meeting program schedules and small business subcontracting goals. Accelerated progress payments could not exceed 50% for large contractors that receive more than \$10 million in annual revenue from DOD; others could receive accelerated progress payments up to 95%.

WHEN: The bill was introduced in both the House and Senate on June 9, 2022.

WHAT DOES IT MEAN FOR INDUSTRY: If enacted, the bill could have significant impacts on all types of contractors, but most notably those competing for cost-reimbursement contracts and contracts for commercial products.

Wiley will continue to monitor the bill and will provide additional updates if the bill progresses.