

ALERT

Contractors Take Note: Proposed DFARS Rule to Implement Other Than Cost or Pricing Data Requirements Covers More Than Just That

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WHAT: The U.S. Department of Defense (DoD) has issued a proposed Defense Federal Acquisition Regulation Supplement (DFARS) rule to implement Section 803 of the Fiscal Year 2020 National Defense Authorization Act (FY2020 NDAA) relating to information used to determine fair and reasonable pricing and submission of information other than certified cost or pricing data. 86 Fed. Reg. 48368 (Aug. 30, 2021). This short proposed rule packs in some important pricing guidance for commercial items and a caution to offerors that do not provide other than certified cost or pricing data when requested.

WHEN: The proposed rule was published August 30, 2021; comments are due October 29, 2021.

WHAT DOES IT MEAN FOR INDUSTRY: Section 803 of the FY2020 NDAA prohibits contracting officers from relying solely on historical prices paid by the Government to determine that contract or subcontract prices are fair and reasonable. It also provides that if an offeror fails to make a good faith effort to comply with a reasonable request for other than cost or pricing data, the offeror may be declared ineligible for award if the contracting officer is unable to determine by any other means that prices are fair and reasonable, unless the head of the contracting activity (HCA) determines that an award to that offeror is in the best interests of the Government. Although the Federal Acquisition Regulation (FAR) already includes this latter requirement in FAR 15.403-3(a)(4), the proposed DFARS rule has different criteria that the HCA must consider. The proposed rule also makes clear that if market research is insufficient to determine price reasonableness, the contracting officer should consider

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information from an offeror or recent purchase prices paid by the Government or commercial customers for the same or similar commercial items under comparable terms and conditions so long as prior prices remain a valid comparison reference. The contracting officer cannot base a reasonableness decision solely on historical prices paid by the Government and, when evaluating pricing data, should consider materially different terms, conditions, quantities, and market and economic factors. Finally, the proposed rule amends DFARS 242.1502 to provide that, unless exempted by the HCA, a Contractor Performance Assessment Reporting System (CPARS) report must include a notation for contractors that have denied multiple requests for submission of other than certified cost or pricing data over the preceding three-year period, but nevertheless received an award.

Although still a proposed rule, contractors should be attuned to the incoming requirements for determining fair and reasonable pricing, as well as instances where a contracting officer does not follow them. And, if a contracting officer requests other than certified cost or pricing data, contractors should be prepared to weigh the increasing risks of not providing such data.