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The Nash & Cibinic Report
Ralph C. Nash

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The new administration is issuing Executive Orders to reduce the "regulatory burden." The first on January 30, 2017, Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," requires agencies proposing a new regulation to identify two regulations to be "repealed." In addition, it requires that "the total incremental cost of all new regulations, including repealed regulations, to be finalized [in Fiscal Year 2017] shall be no greater than zero" and that in this year "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." The order states that it does not apply to "regulations issued with respect to a military, national security, or foreign affairs function of the United States" or "regulations related to agency organization, management, or personnel."

The second order, issued on February 24, 2017, Executive Order 13777, "Enforcing the Regulatory Reform Agenda," requires each agency to establish a "Regulatory Reform Officer" and a "Regulatory Reform Task Force" to evaluate all of the agency's regulations to determine which should be repealed, replaced, or modified. This order contains the following interesting provision relating to acquisition:

> Each entity staffed by officials of multiple agencies, such as the Chief Acquisition Officers Council, shall form a joint Regulatory Reform Task Force composed of at least one official. . . from each constituent agency's Regulatory Reform Task Force.

That leaves us with a question: Do these Executive Orders apply to procurement regulations? The Federal Acquisition Regulation does not seem to fall within the exceptions in the first order and procurement regulations have generally been treated as regulations that go through the Office of Information and Regulatory Affairs. If they are subject to the orders, what is a procurement regulation (singular)? If a paragraph is added to the FAR, can the two-for-one rule be met by taking out two paragraphs somewhere else? Maybe two sentences can compensate for one sentence. The possibilities seem fascinating. We also wonder how agencies will deal with regulations mandated by statute. In the case of the Defense FAR Supplement, that accounts for many of the new regulations.

We have argued for years that procurement regulations should not be treated like other regulations because they only deal with contracts between the Government and private parties. Perhaps these Executive Orders will inspire the FAR Council to seek relief from these requirements. *RCN*

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¶ 19. USING "OTHER TRANSACTIONS" TO OBTAIN PROTOTYPES: Broader Authority

Section 815 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, gave the Department of Defense permanent authority to obtain prototypes using an other transactions instrument by enacting a new provision, 10 USCA § 2371b. The Department has now issued new guidance on the use of this authority—*Other Transactions Guide for Prototype Projects* (Jan. 2017). Richard Dunn, the first General Counsel of the Defense Advanced Research Projects Agency, made some critical comments on this Guide in *Practitioner's Comment: DOD Guide for Other Transactions for Prototypes—Fundamentally Flawed,* 59 GC ¶ 19. We will discuss this guidance without directly addressing the Dunn critique.

The Statutory Authority

The DOD has had authority to obtain prototypes using an other transactions instrument since 1994 when Congress enacted § 845 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160. However, the authority was temporary with extensions every few years. As the years passed, the authority was broadened to some extent but it still remained quite restricted with the main problem being how to transition into a procurement contract if the agency needed production quantities. With the enactment of the permanent 10 USCA § 2371b DOD agencies have the broadest authority they have ever had. The statute states:

> (a) **Authority.**—(1) Subject to paragraph (2), the Director of the Defense Advanced Research Projects Agency, the Secretary of a military department, or any other official designated by the Secretary of Defense may, under the authority of section 2371 of this title, carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense, or to improvement of platforms, systems, components, or materials in use by the armed forces.
>
> (2) The authority of this section—
>
> (A) may be exercised for a prototype project that is expected to cost the Department of Defense in excess of $50,000,000 but not in excess of $250,000,000 (including all options) only upon a written determination by the senior procurement executive for the agency as designated for the purpose of section 1702(c) of title 41, or, for the Defense Advanced Research Projects Agency or the Missile Defense Agency, the director of the agency that—
>
> (i) the requirements of subsection (d) will be met; and

(ii) the use of the authority of this section is essential to promoting the success of the prototype project; and

(B) may be exercised for a prototype project that is expected to cost the Department of Defense in excess of $250,000,000 (including all options) only if--

(i) the Under Secretary of Defense for Acquisition, Technology, and Logistics determines in writing that—

(I) the requirements of subsection (d) will be met; and

(II) the use of the authority of this section is essential to meet critical national security objectives; and

(ii) the congressional defense committees are notified in writing at least 30 days before such authority is exercised.

(3) The authority of a senior procurement executive or director of the Defense Advanced Research Projects Agency or Missile Defense Agency under paragraph (2)(A), and the authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (2)(B), may not be delegated.

(b) **Exercise of Authority**.—

(1) Subsections (e)(1)(B) and (e)(2) of such section 2371 shall not apply to projects carried out under subsection (a).

(2) To the maximum extent practicable, competitive procedures shall be used when entering into agreements to carry out projects under subsection (a).

(c) **Comptroller General Access to Information**.—[Agreements over $5 million must include an Examination of Records clause]

(d) **Appropriate Use of Authority**.— (1) The Secretary of Defense shall ensure that no official of an agency enters into a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section unless one of the following conditions is met:

(A) There is at least one nontraditional defense contractor participating to a significant extent in the prototype project.

(B) All significant participants in the transaction other than the Federal Government are small businesses or nontraditional defense contractors.

(C) At least one third of the total cost of the prototype project is to be paid out of funds provided by parties to the transaction other than the Federal Government.

(D) The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract, or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract.

(2)(A) Except as provided in subparagraph (B), the amounts counted for the purposes of this subsection as being provided, or to be provided, by a party to a transaction with respect to a prototype project that is entered into under this section other than the Federal Government do not include costs that were incurred before the date on which the transaction becomes effective.

(B) Costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in a transaction (other than a contract, grant, or cooperative agreement) with respect to the project before the date on which the transaction becomes effective may be counted for purposes of this subsection as being provided, or to be provided, by the party to the transaction if and to the extent that the official responsible for entering into the transaction determines in writing that—

(i) the party incurred the costs in anticipation of entering into the transaction; and

(ii) it was appropriate for the party to incur the costs before the transaction became effective in order to ensure the successful implementation of the transaction.

(e) **Definitions.**—In this section:

(1) The term "nontraditional defense contractor" has the meaning given the term under section 2302(9) of this title.

(2) The term "small business" means a small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

(f) **Follow-on Production Contracts or Transactions.**—(1) A transaction entered into under this section for a prototype project may provide for the award of a follow-on production contract or transaction to the participants in the transaction.

(2) A follow-on production contract or transaction provided for in a transaction under paragraph (1) may be awarded to the participants in the transaction without the use of competitive procedures, notwithstanding the requirements of section 2304 of this title, if—

(A) competitive procedures were used for the selection of parties for participation in the transaction; and

(B) the participants in the transaction successfully completed the prototype project provided for in the transaction.

(3) Contracts and transactions entered into pursuant to this subsection may be awarded using the authority in subsection (a), under the authority of chapter 137 of this title, or under such procedures, terms, and conditions as the Secretary of Defense may establish by regulation.

The Nature Of A Prototype "Other Transaction"

The statute states that it deals with "a transaction (other than a contract, grant, or cooperative agreement)" but this is a misuse of the word "contract." Prototype OTs are contracts between the Government and a third party but they are not "procurement contracts." The Guide corrects the statute by stating:

> Section 2371b authorizes DoD to carry out prototype projects using a legal instrument other than a *procurement* contract, grant, or cooperative agreement under the authority of section 2371. Because awards for prototype projects are intended to provide DoD a direct benefit, these OTs are acquisition instruments. [Emphasis added.]

The fact that these OTs are "acquisition instruments" is clear from the statutory description of these projects as being "directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by the Department of Defense." Thus, prototype OTs can only be used after a determination that acquisition of the prototype will meet a military need. Richard Dunn comments that this definition is too narrow because it excludes a prototype OT that might be used to provide Government facilities to test a commercial prototype.

Incidentally, one result of this definition of a prototype OTs as a form of acquisition is that the Guide has been written in the office of the Director of Defense Procurement and Acquisition Policy. This is the source of Richard Dunn's criticism, which is based on his view that the Guide is unnecessarily restrictive.

Use Of Prototype Other Transactions

The other transaction device's purpose has been to allow the Government to attract commercial companies (called "nontraditional defense contractors") to provide their technology to serve military needs—on the theory that procurement contracts impose too many restrictions on the contractor. Thus, an OT is not subject to the Federal Acquisition Regulation, the Defense FAR Supplement, or the procurement statutes. But it may be subject to other parts of the U.S. Code. This means that a user of the authority has to figure out what clauses to put in an OT—and the Guide contains some assistance in making this determination.

In order to encourage nontraditional defense contractors (and/or small businesses) to participate in prototype OTs, the statute allows them to be fully funded if their participation is "significant." The statute contains no definition or explanation of the amount of work that must be proposed in order to meet the "significant" standard but the Guide contains the following statement:

> Examples of what might be considered a significant contribution include, but are not limited to, supplying new key technology or products, accomplishing a significant amount of the effort, or in some other way causing a material reduction in the cost or schedule or increase in the performance.

In contrast, if the prototype OT is awarded to a traditional defense contractor, one-third cost sharing is required unless this is waived by the senior procurement executive of the agency. The Guide appears to limit such cost sharing by stating at C1.5.2:

> Generally, the Government should not mandate cost-sharing requirements for defense unique items, so use of OT authority that invokes cost-sharing requirements should be limited to those situations where there are commercial or other benefits to the awardee.

The Guide contains no description of what these "other benefits" might be but it appears that a number of traditional defense contractors have agreed to cost sharing in order to subsequently obtain a contract to product the prototyped product.

The statute contains a new category of company that can be fully funded—a small business. However, neither the statute nor the Guide contain any information on how small businesses can be brought into the program. For example, there is no guidance on whether a Small Business Innovation Research Phase II award could be made as a prototype OT or could be followed by a prototype OT.

Competition

The statute encourages the use of "competitive procedures" in the award of a prototype OT and this is of great benefit to the recipient because the statute permits the award of a follow-on production contract if competitive procedures were used to award the prototype OT. There is a wide range of competitive procedures that are available to meet this requirement. For particular projects, the agency can publicize its need for work to meet a designated need and seek competitive proposals. In addition, an agency can select the original OT contractor by use of a broad agency announcement or the SBIR procedure—both of which meet the "competitive procedures" requirement (see 10 USCA § 2302(2)(B) & (E)). Thus, agencies have wide latitude in selecting a competitive procedure at the outset. C2.1.1.6.2 of the Guide provides the following guidance:

> Innovation is encouraged for identifying and competitively selecting sources. Agencies who intend to award only OTs off a solicitation are free to create their own process to solicit and assess potential solutions provided it is a fair process and the rationale for making the Government investment decision is documented. Just keep in mind that terms of art that are already well-known or understood in traditional contracting should be avoided (e.g., do not call it an RFP, even though "request for proposal" is a generic phrase). One example of a solicitation method is the Commercial Solutions Opening (CSO) technique. In general, a CSO uses a broad solicitation method, much the same as a Broad Agency Announcement (BAA), to identify particular Government problem areas and solicit solution ideas from industry. Problem areas can be broad or specific. Upon receiving solution ideas, the Government can select an offeror to demonstrate (or "pitch") its solution or submit a proposal based on the merit of the idea. Upon receiving a proposal that the team determines is a good investment for the Government to pursue, the acquisition team can negotiate and award an OT to the company for the prototype project. Other flexible solicitation methods include Research Announcements, Program Announcements, and Program Solicitations.

Type Of Contract

The Guide permits the use of fixed-price or cost-reimbursement contract with different terminology ("fixed amount" vs. "expenditure-based"):

> C2.1.3.1.7. *Nature of the Agreement.* There is no one type of OT agreement for prototype projects. This section should discuss the nature of the agreement (i.e. expenditure-based, fixed amount or a hybrid), the way that the price or estimated cost will be determined to be fair and reasonable, and the method for verifying compliance with the OT's terms and conditions. Agreements Officers are encouraged to consider whether the prototype project can be adequately defined to establish a fixed-amount agreement. The insight into the effort required and the associated risk of achieving the goals, performance objectives, and desired outcomes for the specific project should influence whether a fixed-price can be established for the agreement. A fixed-amount agreement should not be awarded unless the project risk permits realistic pricing and the use of a fixed-amount agreement permits an equitable and sensible allocation of project risk between the Government and the awardee for the effort contemplated.

Terms And Conditions

Although procurement contracts under the FAR must contain numerous contract clauses, it appears that the sticking point for nontraditional defense contractors are the accounting provisions and the intellectual property provisions. As to the accounting requirements, the Guide states that the OT should use the current accounting system of the contractor. It also calls for different treatment of traditional defense contractors and nontraditional defense contractors as follows:

> C2.13.2.3. When the business unit receiving the award is not performing any work subject to the Cost Principles (48 CFR Part 31) and/or the Cost Accounting Standards (CAS) (48 CFR Part 99) at the time of award, the Agreements Officer should structure the agreement to avoid incorporating the Cost Principles and/or CAS requirements, since such an incorporation may require the awardee to revise its existing accounting system.

> C2.13.2.4. When the business unit receiving the award is performing other work that is subject to the Cost Principles and/or CAS requirements, then the awardee will normally have an existing cost accounting system that complies with those requirements. In those cases, the Agreements Officer should consider including those requirements in the agreement unless the awardee can demonstrate that the costs of compliance outweigh the benefits (e.g., the awardee is no longer accepting any new CAS and/or FAR covered work, the agreement does not provide for reimbursement based on amounts/costs generated from the awardee's financial or cost records, the work will be performed under a separate accounting system from that used for the CAS/FAR covered work).

With regard to intellectual property provisions, the Guide has a large amount of coverage. In dealing with patent rights, the Guide gives agencies considerable leeway but suggests that the normal Patent Rights, Authorization and Consent, Reporting of Inventions, and Patent Indemnity clauses be used (at least as a starting point for negotiation). One interesting suggestion is the possibility that the OT allow trade secret protection in lieu of obtaining a patent as follows:

> C2.3.2.2.5. *Option for Trade Secret Protection.* The Agreements Officer may consider allowing subject inventions to remain trade secrets as long as the Government's interest in the continued use of the technology is protected. In making this evaluation, the Agreements Officer should consider whether allowing the

> technology to remain a trade secret creates an unacceptable risk of a third party patenting the same technology, the Government's right to utilize this technology with third parties, and whether there are available means to mitigate these risks outside of requiring patent protection.

The guidance on rights in technical data and computer software also appears to be based on the use of the standard DFARS clauses with some flexibility:

> C2.3.3.2.2. *Allocation of Rights.* The agreement should explicitly address the extent of the Government's rights obtained as a result of the Government's investment in the OT to use, modify, reproduce, perform, display, release, and disclose the relevant technical data and computer software. Consistent with the objectives of the project and contemplated follow-on activities: the Government can negotiate to receive rights in technical data and computer software that are developed under the agreement, regardless of whether it is delivered; and could even elect to negotiate to receive rights in all delivered technical data and computer software, regardless of whether it was developed under the agreement. The final negotiated clause should be determined on a case-by-case basis and should consider the instant and future needs of both parties, the technology at issue, and any commercialization strategies.

> C2.3.3.2.3. *Delivery Requirements.* While not necessarily required to secure the Government's rights in the technical data and computer software (e.g., the clauses may grant the Government rights to technical data or computer software that is generated or developed under the project even if not delivered), if delivery of technical data, computer software, or computer software documentation is necessary, the Agreements Officer should consider the delivery medium, and for computer software, whether that includes both executable and source code.

This is a difficult area because nontraditional defense contractors with valuable technology are unlikely to give the Government broad rights to such technology.

Summary

The Guide allows agencies to exercise a considerable amount of discretion in negotiating prototype OTs and it would be expected that the result would be more diverse agreements with nontraditional defense contractors. There is not much literature in the field but a 2016 Government Accountability Office report, *Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities*, GAO-16-209 (Jan. 7, 2016), surveying the entire Government indicated that eleven agencies have "other transactions" authority but only two use it for prototypes—the Departments of Defense and Homeland Security. The report contains a discussion of only one DOD prototype project as follows:

> In 2011, DOD entered into a 2-year other transaction agreement with a nontraditional contractor for the development of a new military sensor system. According to the agreement documentation, this military sensor system was intended to demonstrate DOD's ability to quickly react to emerging critical needs through rapid prototyping and deployment of sensing capabilities. By using an other transaction agreement, DOD planned to use commercial technology, development techniques, and approaches to accelerate the sensor system development process. The agreement noted that commercial products change quickly, with major technology changes occurring in less than 2 years. In contrast, according to the agreement, under the typical DOD process, military sensor systems take 3 to 8 years to complete, and may not match evolving

> mission needs by the time the system is complete. According to an official, DOD obligated $8 million to this agreement.

There is also a 2000 study of the RAND Corporation, *Assessing the Use of 'Other Transactions' Authority for Prototype Projects*, which surveyed 21 prototype OTs awarded from 1994 through 1998. That study concluded:

> Important new industrial resources are now participating in DoD prototype projects because of the freedoms inherent in the OT process. However, evidence of that cannot be found by counting "new" company names on a list of projects; we found few firms with no prior DoD contracting experience now working on DoD projects, with most of those at the subcontractor level. The important new industrial capability is drawn from segments of major firms that had been focusing exclusively on commercial projects but are now willing to apply their skills and products to military prototypes.
>
> The benefits of OT are broader than just the addition of new industrial resources. The flexibility of the OT process has been used to: (a) achieve better use of industry resources through innovative business arrangements and project designs; (b) improve management of risks and uncertainties through freedom to modify the program as it evolves; and (c) achieve better value through cost sharing and reduction of transaction costs. Overall, more effort is being devoted to product and less to process.
>
> Some risks to the government are incurred, but we believe the immediate rewards substantially outweigh the risks. Risks arise mainly through relaxing DoD demands for access to the firm's financial records, and ownership of intellectual property (patents and data). However, such relaxation of DoD rights applies to only a few of the OT prototype projects, mainly those involving products with strong commercial market potential and where the firm contributes a significant portion of the development resources. Even in those few projects, we believe the risks to DoD are limited. Verification of cost records becomes relatively unimportant when a firm is contributing a large share of project costs. Less-than-complete government ownership of intellectual property might lead to increased costs in future phases of the project, but those risks are limited. This is in part because the possible future costs should be discounted to some degree as they are in the future, and in part because they typically apply in areas where the technology is moving fast and where the value of specific kinds of knowledge can rapidly decay. *Furthermore, if the flexibility in negotiating intellectual property and financial audit clauses is removed from the OT authority, most if not all of the new industrial resources would again become unavailable to DoD.* [Emphasis in original.]

This doesn't provide much information to make an assessment, but we can tentatively conclude that making the prototype OT authority permanent is a good thing. It gives the military services an added degree of flexibility and has apparently been used to harness some commercial technology to work on military problems. *RCN*

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¶ 20. CONTRACT FORMATION WITHOUT CONVERSATION: How Do You Do That? Why Would You Want To?

In *Our Competitive Negotiation Process: It's Expensive!*, 30 NCRNL ¶ 49, and *Overruling Egregious Contracting Officer Conduct: The Court Finds a Way*, 31 NCRNL ¶ 7, Ralph discussed protests filed by Level 3 Communications LLC against an acquisition conducted by the Defense Information Systems Agency (DISA) for telecommunications work in the Middle East. The company first protested to the Government Accountability Office, which denied its protest. *Level 3 Communications LLC*, Comp. Gen. Dec. B-412854, 2016 CPD ¶ 171, 2016 WL 3568223. The company then protested to the U.S. Court of Federal Claims on expanded grounds. *Level 3 Communications, LLC v. U.S.*, 129 Fed. Cl. 487 (2016). The court:

(1) granted Level 3's motion for judgment on the administrative record,

(2) issued an injunction to stop contract performance,

(3) awarded proposal preparation costs,

(4) advised the Government to show cause why it did not violate Rule 11(b) of the Rules of the U.S. Court of Federal Claims by making misleading statements to the court,

(5) ordered the agency to provide its acquisition files to the Inspector General of the Department of Defense for further investigation, and

(6) announced its intention to forward the public record in the case to the Senate Armed Services Committee.

BOOM!

The Level 3 Protest Decisions

DISA's solicitation stated that the agency intended to make an award without discussions. The solicitation also stated that the agency would make award on the basis of the lowest price, technically acceptable proposal as follows:

> After the receipt of quotes, the government will first evaluate the lowest price quote. If the lowest price quote is determined to be technically acceptable and otherwise properly awardable, no further evaluations will be conducted, and award will be made. If, however, the lowest price quote is determined to be technically unacceptable and/or otherwise not properly awardable, the next lowest price quote will be evaluated until a quote is deemed technically acceptable and otherwise properly awardable.

We described such a procedure in *Streamlining Source Selection: A Labor-Saving Approach to Lowest Price Technically Acceptable Source Selection*, 23 N&CR ¶ 26.

Level 3, the incumbent contractor, proposed the lowest price, but submitted a technical quote that did not provide a map in the required format. As a result, the quote was ambiguous with respect to whether the company would comply with a requirement. The missing map information would have resolved the ambiguity and proven that Level 3 would comply. But instead of seeking "clarification" in accordance with FAR 15.306(a) or conducting discussions in accordance with FAR 15.306(d), the Contracting Officer awarded the contract without discussions to the second-low quoter, Verizon, whose price was $38.5 million higher than the Level 3's. Level 3 complained about the evaluation of its proposal to the GAO. The GAO found Level 3's protest to be unfounded and denied it the on familiar ground that "[i]t is a vendor's responsibility to submit a well-written quotation, with adequately detailed information which clearly demonstrates compliance with solicitation requirements." See *Competing for Government Work: Perfection Demanded*, 29 NCRNL ¶ 42, and a *Postscript* at 29 NCRNL ¶ 47.

Level 3 then took its protest to the Court of Federal Claims. Thank goodness for Judge Braden:

> During the hearing on the parties' Cross–Motions For Judgment On The Administrative Record, the court asked why the Government did not seek any "clarification," about the concerns raised between the map and Level 3's written representations and past performance, in light of the $38.6 million difference between Level 3's and Verizon's offers:
>
> THE COURT: The Government awarded a contract to Verizon, which was $30 million more than the people who had been doing the job—
>
> [THE GOVERNMENT]: That's correct.
>
> THE COURT:—based on the map. And no one bothered to think about picking up the phone and saying hmm, hmm—as my grandson [Roark] would say—I wonder if there's a problem with the map? Or was something else going on?

Unfortunately, the court did not report the agency's response, if there was one. But what could they have said that would have made any sense at all? The court held that DISA's decisions not to seek clarification and not to conduct discussions to resolve the ambiguity were "arbitrary, capricious, and an abuse of discretion." We agree—a $38.5 million abuse.

Why didn't DISA ask for the missing map? We can only speculate about the agency's reasons, and here goes: The RFQ stated that the agency would identify the quoter with the lowest price and evaluate its technical quote for acceptability. If it was acceptable, then source selection would be done and the agency would award without discussions. If not, then the agency would evaluate the technical quote of the next low offeror, and so forth, until the lowest-price technically acceptable quote was discovered and award could be made. We think the agency feared (1) that if they sought "clarification" from Level 3 by asking for the missing map they would have engaged in "discussion," not "clarification," and (2) that if they conducted discussions with Level 3 in order to get the map they would have failed to conduct the

source selection in accordance with the procedure described in the RFQ. We think the agency feared that, either way, they would lose a protest. They had run up against the dread rules of "clarification" and "discussion."

The Rules Of "Clarification" And "Discussion"

The FAR Part 15 source selection process model has taken shape over the course of more than 40 years of legislation, regulation, litigation, and agency practice. Grounded in the Armed Services Procurement Act of 1947, Pub. L. No. 80-413, as amended, and the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, as amended, the process was tinkered into existence by federal agencies, the GAO and the courts. It was documented in the Armed Services Procurement Regulation, the Federal Procurement Regulation, the Federal Acquisition Regulation, other agency regulations, agency regulation supplements, and countless agency policy issuances, handbooks, manuals, guides, and briefings. Congress enacted elements of it into the Truth in Negotiations Act of 1962, Pub. L. No. 87-653, as amended, and the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Division B, Title VII, as amended. The process is not specified or described in FAR Part 15 in clear, step-by-step fashion; at best, a reader can only glimpse its outline. However, detailed descriptions can be found in various published sources, official and unofficial. See Cibinic et al., FORMATION OF GOVERNMENT CONTRACTS, 4th ed., Chapter 6, "Basic Negotiation Procedures"; and Feldman, GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING, Part III.

In the case of the *Level 3* protests, the problem arose from the rules about "exchanges" of information between the Government and offerors after receipt of proposals. Those rules—which include statutes, regulations, protest case law, and various agency guidance—are exceedingly complex. We think their complexity makes COs wary of seeking clarification or conducting discussions, and we think that is a bad thing. When process complexity has reached a point at which it leads to bad things, it's time for radical redesign. Tweaking just won't do. It will only make things worse.

The first rules about "written or oral discussions" in the context of competitive negotiations were added to the Armed Services Procurement Regulation § 3.805, "Selection of offerors for negotiation and award," in 1958, 23 Fed. Reg. 9209, 9211 (Nov. 29, 1958), and stated:

> The normal procedure in negotiated procurements, after receipt of initial proposals, is to conduct such written or oral discussions as may be required to obtain agreements most advantageous to the Government. Negotiations shall be conducted as follows:
>
> (1) Where a responsible offeror submits a responsive proposal which, in the contracting officer's opinion, is clearly and substantially more advantageous to the Government than any other proposal, negotiations may be conducted with that offeror only; or
>
> (2) Where several responsible offerors submit offers which are grouped so that a moderate change in either the price or the technical proposal would make any one of the group the most advantageous offer to the Government, further negotiations should be conducted with all offerors in that group.
>
> Whenever negotiations are conducted with more than one offeror, no indication shall be made to any offeror of a price which must be met to obtain further consideration, since such practice constitutes an auction technique which must be avoided. No information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to any- one whose official ditties do not require such knowledge.

> Whenever negotiations are being conducted with several offerors, while such negotiations may be conducted successively, all offerors participating in such negotiations shall be offered an equitable opportunity to submit such pricing, technical, or other revisions in their proposals as may result from the negotiations. All offerors shall be informed that after the submission of final revisions, no information will be furnished to any offeror until award has been made.

But by 1961, written or oral discussion was no longer just the "normal procedure"; it was mandatory. ASPR § 3.805-1 stated:

> (a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:
>
> (1) Procurements not in excess of $2,500;
>
> (2) Procurements in which prices or rates are fixed by law or regulations:
>
> (3) Procurements in which time of delivery will not permit such discussions;
>
> (4) Procurements of the set-aside portion of partial set-asides or by small business restricted advertising;
>
> (5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. Provided, however, that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

In 1962, that rule was enshrined in statute by passage of the Truth in Negotiations Act, Pub. L. No. 87-653, which provided in part as follows:

> In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: Provided, however, That the requirements of this section with respect to written

> or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussions.

The rules became the subject of protests. The earliest protests complained that agencies were improperly making awards without discussions. But in the early 1970s the focus shifted to what kinds of communications constituted discussions. See, e.g., *To Murray Schaffer*, Comp. Gen. Dec. B-173703, 50 Comp. Gen. 479 (1972), 1972 CPD ¶ 17, 1972 WL 5877:

> We have reviewed several of our more recent decisions bearing on the question of what constitutes discussions and conclude that resolution of the question has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror. Consequently, an offeror's late confirmation as to the receipt of an amendment and its price constituted discussions (50 Comp. Gen. 202 (1970)), as does a requested "clarification," which result in a reduction of offer price (48 Comp. Gen. 663 (1969)) and the submission of revisions in response to an amendment to a solicitation (50 Comp. Gen. 246 (1970)). On the other hand, an explanation by an offeror of the basis for its price reductions without any opportunity to change its proposal was held not to constitute discussions (B-170989, B-170990, November 17, 1971). We believe, therefore, that a determination that certain actions constitute discussions must be made with reference to the opportunity for revision afforded to offerors by those actions. If the opportunity is present, the actions constitute discussions.

By the publication of the first edition of the FAR in the *Federal Register* on September 19, 1983, effective on April 1, 1984, and after hundreds of protest decisions, the coverage of discussions in FAR 15.610, "Written or oral discussion," included a list of dos and don'ts:

> (c) The contracting officer shall—
>
> (1) Control all discussions;
>
> (2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;
>
> (3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;
>
> (4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24); and

(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

(d) The contracting officer and other Government personnel involved shall not engage in—

(1) Technical leveling (i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal);

(2) Technical transfusion (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or

(3) Auction techniques, such as—

(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and

(iii) Otherwise furnishing information about other offerors' prices.

The clarification and discussion rules that we have today, now in FAR 15.306, were drafted in 1996–1997 during the FAR Part 15 Rewrite, 62 Fed. Reg. 51223 (Sept. 30, 1997). See *The FAR Part 15 Rewrite: A Final Scorecard*, 11 N&CR ¶ 63.

In the course of that process of development, the focus of concern shifted from price to "technical proposals." At first, technical proposals were rather informal, and the early editions of the ASPR made scant mention of them. (Most early references to technical proposals related to two-step formal advertising.) But as Government procurement of military research and development became more important, technical proposals became more formal, and preparation and evaluation of them became major undertakings. (For a description of the source selection process by the end of the 1950s, see Peck and Scherer, THE WEAPONS ACQUISITION PROCESS: AN ECONOMIC ANALYSIS 324-85 (Harvard 1962), and *TFX Contract Investigation: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Government Operations*, 88th Cong. 1st Sess., pt. 1 (1963)). By the late 1950s, competitions for such contracts were intense, and technical (and management) proposals voluminously addressed complex matters of system design and program management, contained priceless proprietary information, and cost millions of dollars to prepare. Source selection boards for important contracts included hundreds of persons, and it seemed essential to have strict rules about

what Government personnel could and could not discuss with offerors during source selection. Protests decisions not only made distinctions between clarifications and discussions, they identified a number of species of fatal error in the conduct of discussions—discussions that were not meaningful, misleading discussions, unequal discussions, improper discussions, inadequate discussions, and unfair discussions.

Clarifications or discussions have been an issue in more than 2,400 GAO protest decisions, and we have addressed the issues and problems associated with the rules of clarification and discussion in at least 30 articles in this publication. FAR 15.306(d) and its predecessor FAR 15.610 have figured in the holdings of 32 protest decisions of the Court of Federal Claims. The procedural distinction between clarification and discussions that is now expressly recognized in FAR 15.306 has been a source of considerable confusion and was, we suspect, one of the reasons why DISA did not seek clarification from Level 3. We have written extensively about this problem. See *Clarifications vs. Discussions: The Obscure Distinction*, 14 N&CR ¶ 29, which was followed by eight Postscripts, 15 N&CR ¶ 41, 16 N&CR ¶ 13, 17 N&CR ¶ 20, 18 N&CR ¶ 2, 21 N&CR ¶ 45, 23 N&CR ¶ 46, 26 N&CR ¶ 11, and 27 NCRNL ¶ 48.

Unfortunately, after passage of the Competition in Contracting Act of 1984, agencies that had been conducting mundane acquisitions of janitorial services, grounds maintenance, and the like by sealed bidding began to contract by negotiation and solicit "technical proposals." Thus, the issues reflected in the complex protest case law arose in acquisitions to which the rules about clarification and discussion need not have been applied—acquisitions of housekeeping services, simplified acquisitions, orders under GSA's Federal Supply Schedule, and orders against multiple award task order contracts. See *Simplified Acquisition: Avoiding the GAO's Clarifications/Discussions Mess*, 26 N&CR 21; *PricewaterhouseCoopers Public Sector*, LLP, Comp. Gen. Dec. B-413316.2, 2017 CPD ¶ 12, 2016 WL 7826642; and *Engility Corp.*, Comp. Gen. Dec. B-413120.4, 2017 CPD ¶ 67, 2017 WL 930351. A CO must be familiar not only with the regulations, but also with a considerable body of protest decisions in order to be comfortable engaging in any one-on-one communication with an offeror during source selection, and most CO's are not familiar with the case law. So it is no wonder that most COs prefer to award a contract without seeking clarification and without discussions whenever possible. Indeed, award without discussions is the Government's default procedure. See FAR 52.215-1(f)(4). To many COs, communicating with offerors during source selection can seem like walking a narrow plank across a pit of vipers.

Contractor Selection And Contract Formation Under FAR Part 15

Under the rules in Part 15, negotiation must precede contractor selection, presumably on the theory that the Government will get better terms if offerors know that it is also negotiating with their competition. Once the Government has selected its contractor, engagement in further discussion (reopening) before award is generally discouraged. This approach reflects the historical origin of the FAR Part 15 process in competitive bidding, which I discussed in *Essay-Writing Contests: How Did We Get Here?*, 30 NCRNL ¶ 47. It requires the Government to perfect its specification and other terms and stipulate them in a "model contract" before it solicits proposals. The model contract is presented to prospective offerors in the Government's solicitation. As a rule, the terms of the model contract are non-negotiable, and an offeror that proposes different terms risks being declared "unacceptable" and eliminated from further consideration, without advance notice and opportunity to reconsider. An agency may not select an offeror whose proposal does not conform to the material terms of the solicitation. Thus, agencies may not seek clarification of an ambiguity if doing so would permit an offeror to make an unacceptable proposal acceptable. *NuWay, Inc.*, Comp. Gen. Dec. B-296435.5, 2005 CPD ¶ 195, 2005 WL 3148359.

Once proposals are received, the rules about exchanging information and negotiating are designed to ensure fairness in the selection phase of the process. There are strict rules and formal procedures for amending solicitations (FAR 15.206) and for notifying prospective offerors of changes in requirements, including changes prompted by one or more alternate proposals (FAR 15.206(d)); rules about establishing a competitive range (FAR 15.306(c)); rules that distinguish "clarification" (FAR 15.306(a)), "communication" (FAR 15.306(b)), and "discussion" (FAR 15.306(d)); rules about what may and may not be said during "discussions" (FAR 15.306(d)), and rules about allowing offerors to "revise" their proposals (FAR 15.307). All of those rules have been interpreted and supplemented in protest case law. Violation

of the rules can have a serious effect on the process outcome and agency operations. Thus, while "clarification," "communication," and "discussion" are permitted in theory, complex rules, misinformation, confusion, tradition, and fear effectively constrain communications.

The Wages Of Fear

Part 15 merges contractor selection and contract formation in single process. The consequence is that the parties to a Government contract are often virtual strangers to one another at the outset of performance. They have had little if any chance to get acquainted, talk, bargain, and seal the deal based on an open and frank exchange of views before binding themselves. In a world of complex contracts, this is, well, nuts.

> Communication, like goal and cost determination, is an integral process of any exchange. Anyone planning an exchange must always communicate in some fashion with the other party to accomplish the exchange. This process is not simply additive or sequential to determining goals and ascertaining the costs of attaining them; it is interwoven with those processes and affects them as they affect it. Even the party acting entirely alone, who plans his goals and ascertains their costs, has to take into account the effect that his desires will have on the other potential party; he is thereby engaging in what might be called anticipatory communication. And, of course, far more active mutuality of planning often occurs in which much actual communication shapes both parties' goals and costs. Finally, the parties must communicate in some way to determine that they have achieved a degree of harmony on the allocation of those goals and costs. (Note: The pervasiveness and scope of the need for communication expands in proportion to any increase in the complexity of the exchange relation and in the extent to which the exchange is projected into the future.)

* * *

> Inadequate or inaccurate communication is familiar to us all. Who has not experienced situations where one party plans a transaction or relation differently from the other, each party thinking erroneously that the other understands "the plan"?

Macneil, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS, CASES AND MATERIALS 20-21 & 22 (2d ed. 1978, The Foundation Press, Inc.).

It does no good to say that the FAR does not prohibit communication during source selection, that it encourages bargaining, and that COs err in choosing not to seek clarification and conduct discussions. It does no good because when the rules of a prospective course of action are confusing, and when confusion gives rise to a real risk, people will tend to avoid that course of action if there is what seems to be a viable, less risky option: Award now. Talk later. Policymakers can engage in "myth-busting," try to teach the existing rules to its thousands of COs, and urge them to communicate, or they can simplify the rules and adapt them to the needs of modern contracting. Assuming that they have the will to take action, which would be easier for them to do in the long run?

A Better Way

A more sensible approach to competitive contracting by negotiation would be to separate the acts of contractor selection and contract formation, shift from selection based on competitive proposals to selection based on qualifications, and permit one-on-one negotiations with the selection leading to assent to acceptable terms and a fair and reasonable price. By separating the steps, neither will take priority over the other. Each step will be executed on its own terms and in the

way that is best. That is why we have been advocating a two-phase approach, with selection based on qualifications, not proposals. See *Changing the Rules of Source Selection: A Modest Proposal*, 30 NCRNL ¶ 42. *VJE*

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31 Nash & Cibinic Rep. NL ¶ 21

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¶ 21. AN OBVIOUS CLAIM: Why Are We Litigating?

Occasionally we see a decision that makes us wonder why the litigation occurred. That happened recently in *Missouri Department of Social Services*, ASBCA 59191, 16-1 BCA ¶ 36,563, 2016 WL 7026002, 59 GC ¶ 8. There, the agency had partially terminated a requirements contract for convenience and the contractor had requested an adjustment to the contract's unit prices to account for the higher costs of performance of the unterminated part of the work. The contractor's request contained a detailed explanation of the computation it had made to spread the fixed cost of performance over the lesser quantity of work. This seems to be about as straightforward a request for equitable adjustment as one can imagine.

The Contracting Officer did not contest the validity of the request but refused to negotiate a settlement. In response to the ensuing certified claim under the Contract Disputes Act, the CO issued a decision denying the claim, stating:

> The remainder of the proposal addresses adjustments to contractual costs after the date of the termination notice. These issues should properly be addressed in a request for equitable adjustment separate and independent of the termination settlement proposal in accordance with [Federal Acquisition Regulation] Part 49.208.
>
> * * *
>
> This determination does not preclude filing a request for equitable adjustment for the continued portion of the contract. Any request for equitable adjustment shall be in the format prescribed in FAR 49.208(a) which may be found in FAR Part 15.408 Table 15-2.

The problem was that Federal Acquisition Regulation 49.208 does not require that the equitable adjustment for a partial termination be filed as a separate claim. Thus, when the case was argued before the Armed Services Board of Contract Appeals, the CO "conceded" this and the Government abandoned this reason for rejecting the claim. Instead, the Government lawyers argued that "just because the government's requirements did not meet its estimated requirements does not mean that appellant is entitled to an equitable adjustment, and that there are no allegations that the government acted in bad faith or prepared a negligent estimate." The board rejected this totally specious argument stating politely that it "misses the point." The board therefore ruled that the contractor was entitled to an equitable adjustment and remanded for the parties to negotiate the amount.

This is very discouraging. Seeing a CO reject a valid claim on some strange interpretation of the FAR followed by a Government lawyer using a clearly inapplicable legal proposition to string the case out portrays the Government contracting process in the worst light. COs and Government lawyers are being paid to negotiate fair equitable adjustments not to create litigation. It's certainly true that sometimes a contractor does not submit a well-thought-out

request for an equitable adjustment and the CO has to ask for more support or deny the request. But when the contractor does the job right, it's time to negotiate the equitable adjustment and move on. *RCN*

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31 Nash & Cibinic Rep. NL ¶ 22

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¶ 22. GOVERNMENT DRAFTING MISTAKES: The Contractor Bears The Risk

In teaching contract interpretation, I have frequently told students that a contractor cannot win by arguing that a conflict between the drawings and the specifications is a drafting error for which the Government should be held liable. While this seems counterintuitive, it is, in fact, the normal legal rule. A recent decision, *A.T.I. TACOSE S.C.a R.L*, ASBCA 59157, 2017 WL 244548, (Jan. 4, 2017), illustrates the point.

In this case, one of the specifications required a fire alarm speaker in each sleeping room of a barracks but a drawing showed the speaker in the common room between four sleeping rooms. When the Government ordered the contractor, TACOSE, to follow the specification, the contractor filed a claim for the extra costs of the four speakers per suite. The board denied this claim, reasoning:

> TACOSE. . . argues that the discrepancy between the drawings and specifications was a "specification defect" for which the government is responsible. A defective specification (or defective drawing) is a breach of the government's implied warranty that satisfactory contract performance will result from adherence thereto. *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1289 (Fed. Cir. 2000). To recover on this basis, TACOSE must show that there was a defect, that it reasonably relied on the defect, and that the defect was latent. *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1339 (Fed. Cir. 2004); *Robins Maint., Inc. v. United States*, 265 F.3d 1254, 1257 (Fed. Cir. 2001).
>
> TACOSE cannot carry this burden, among other reasons because there was no defect. The contract contemplated the possibility of inconsistencies between drawings and specifications and dictated how to resolve them. Straightforward application of the order-of-precedence clauses resolved any conflict between [Unified Facilities Criteria] 3-600-1 ON and drawing F A-101.

The Federal Acquisition Regulation and Defense FAR Supplement contract clauses referred to in this decision state:

> SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION [FAR 52.236-21]
>
> (a) . . . .Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.

CONTRACT DRAWINGS AND SPECIFICATIONS [DFARS 252.236-7001]

> (d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

This contract also contained a third agency clause stating: "In case of differences between project specifications and the accompanying drawings, the specifications shall govern."

The board rubbed salt in the contractor's wounds by also noting that it would lose its claim because it had not shown that it relied on its interpretation in computing its proposed price and it had not sought clarification of the patent defect in the drawing and the specifications.

It can be seen that the Government has carefully protected itself from its own drafting errors. The contract clauses place the burden on the contractor to identify drafting errors and to calculate their proposed costs accordingly. The reliance and patent defect rules also work against contractors. In all, the rule is clear—the contractor generally pays the penalty if it does not find the Government's drafting errors. *RCN*

31 Nash & Cibinic Rep. NL ¶ 23

Nash & Cibinic Report April 2017
The Nash & Cibinic Report
Costs & Pricing
Ralph C. Nash

¶ 23. DETERMINING REASONABLENESS OF COMMERCIAL ITEM PRICES: Congressional Help

In its continuing effort to micromanage the Department of Defense, Congress has added a new series of provisions dealing with commercial items in § § 871 through 880 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328. The most interesting of these provisions deal with the troublesome problem of determining the reasonableness of commercial item prices when there are no competing items and no commercial sales. Other provisions repeat the congressional view that the Government should maximize the procurement of commercial items.

Pricing

Section 871 of the statute, "Market Research for Determination of Price Reasonableness in Acquisition of Commercial Items," contains a strange new provision adding a paragraph to 10 USCA § 2377 dealing with market research:

> (d) MARKET RESEARCH FOR PRICE ANALYSIS.—The Secretary of Defense shall ensure that procurement officials in the Department of Defense conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the procurement official for the solicitation—
>
> (1) in the case of items acquired under section § 2379 of this title, shall use information submitted under subsection (d) of that section; and
>
> (2) in the case of other items, may require the offeror to submit relevant information.

We find this strange because the information suggested in the provision is information submitted by offerors *in their proposals*. Thus, the statute seems to consider obtaining information in response to a Request for Proposals as market research. We always thought market research was something that an agency did before it wrote an RFP but apparently Congress has a different view.

That takes us to § 872 of the NDAA, "Value Analysis for the Determination of Price Reasonableness." It adds a new subparagraph (2) to 10 USCA § 2379(d) (referred to above). This entire paragraph, telling Contracting Officers how to price commercial items, states:

> (d) Information submitted.

(1) To the extent necessary to determine the reasonableness of the price for items acquired under this section, the contracting officer shall require the offeror to submit—

(A) prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers;

(B) if the contracting officer determines that the offeror does not have access to and cannot provide sufficient information described in subparagraph (A) to determine the reasonableness of price, information on—

(i) prices for the same or similar items sold under different terms and conditions;

(ii) prices for similar levels of work or effort on related products or services;

(iii) prices for alternative solutions or approaches; and

(iv) other relevant information that can serve as the basis for a price assessment; and

(C) if the contracting officer determines that the information submitted pursuant to subparagraphs (A) and (B) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

(2) *An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (1)(A) and (1)(B).*

(3) An offeror may not be required to submit information described in paragraph (1)(C) with regard to a commercially available off-the-shelf item and may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraphs (1)(A) and (1)(B) is not sufficient to determine the reasonableness of price. [New provision italicized.]

The provision on value information was suggested by the House of Representatives but House Report 114-537 (on the House version of the bill) contains no information on the origin or purpose of the provision. That leads us to speculate on how a prospective contractor will provide and how the CO will assess this value information. In the commercial world, a company selling a product has a pretty good idea of the price that will attract buyers and from this number can come up with a rough estimate of the value of each component and part in the product. If it buys the component or part from a vendor, it can also get its own manufacturing people to give an estimate of the amount it would cost the company to make the component or part. The result is quite good value information. But how does this apply to a component or part being sold to the Government?

History tells us that the Department of Defense will pay almost any price to obtain a technologically superior weapon system. Furthermore, it has lost almost all of its manufacturing facilities, with the result that it has very little in-house capability to establish a reasonable price. As a result, these commercial measures are generally not available. This leaves only the cost of replicating the commercial item as a measure of value. In the case of a product, that would be the cost of design and initial manufacture, while in the case of software, it would be the cost of writing new code. Arguably any price below that cost would yield value to the Government. However, this calculation of value would lead to prices that include a high profit—and this is just what has plagued the Department over the past few years.

It is this dilemma that caught our attention when we saw this new statutory provision. It will be interesting to see how industry and the Government folks respond to it.

Other Provisions

The other commercial item provisions in the 2017 NDAA reinforce the congressional push toward more procurement of commercial items as follows:

• *Section 873, "Clarification of Requirements Relating to Commercial Item Determinations"*—This section slightly revises 10 USCA § 2380 calling for a "centralized capability with necessary expertise and resources to provide assistance to the military departments and Defense Agencies in making commercial item determinations, conducting market research, and performing analysis of price reasonableness for the purposes of procurements by the Department of Defense."

• *Section 874, "Inapplicability of Certain Laws and Regulations to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items"*—This section revises 10 USCA § 2375 providing restrictions on clauses in commercial item contracts and subcontracts. This establishes new rules that apply to the lists of inapplicable clauses in Defense Federal Acquisition Regulation Supplement 212.503 and 212.504.

• *Section 875, "Use of Commercial or Non-Government Standards in Lieu of Military Specifications and Standards"*—This section calls for the use of commercial specifications and standards in lieu of military specifications and standards whenever possible and allows contractors to propose such use.

• *Section 876, "Preference for Commercial Services"*—This section requires prompt issuance of a regulation requiring a waiver by the service acquisition executive to forgo using a commercial item contract "in excess of $10,000,000 for facilities-related services, knowledge-based services (except engineering services), construction services, medical services, or transportation services." For smaller contracts, the CO can issue the waiver.

• *Section 877, "Treatment of Commingled Items Purchased by Contractors as Commercial Items"*—This section adds 10 USCA § 2380B requiring items valued "at less than $10,000 that are purchased by a contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract" to be treated as commercial items.

• *Section 878, "Treatment of Services Provided by Nontraditional Contractors as Commercial Items"*—This section amends 10 USCA § 2380A to require services provided by nontraditional defense contractors to be treated as commercial items as long as such services "use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing."

• *Section 879, "Defense Pilot Program for Authority To Acquire Innovative Commercial Items, Technologies, and Services Using General Solicitation Competitive Procedures"*—This section establishes a pilot program allowing the acquisition of "innovative commercial items, technologies, and services" using broad agency announcement procedures. Contracts must be firm-fixed-price or fixed-price incentive and must be commercial item contracts.

• *Section 880, "Pilot Programs for Authority To Acquire Innovative Commercial Items Using General Solicitation Competitive Procedures"*—This section establishes a pilot program allowing the Department of Homeland Security and the General Services Administration to acquire "innovative commercial items" using broad agency announcement procedures. These contracts may not exceed $ 10 million but there is no requirement that they be firm-fixed-price or fixed-price incentive nor that they must be commercial item contracts.

For a more complete description of these provisions, see Schaengold, Prusock, and Muenzfeld, *Feature Comment: The Significant Impact of the FY 2017 National Defense Authorization Act on Federal Procurement—Part II*, 59 GC ¶ 26. They all seem to have the goal of inducing the Government to use the commercial item procedures more frequently.

The Tug Of War

These commercial item provisions are a continuation of the tug of war between the DOD and Congress over the breadth of the commercial item rule. The DOD has tried unsuccessfully to persuade Congress to narrow the definition of a commercial item to exclude sole-source items that have not been sold commercially where it is difficult to determine a fair and reasonable price. Congress has pushed back believing that the problem is the lack of competence in the DOD to figure out a reasonable price when there is no market data for the commercial item. Since Congress has the last word, we now have this statute telling the DOD to create a workforce that is competent to determine the value of such items. That's a tough job—particularly when the services tend to be understaffed and many of the commercial items are at the component and replenishment parts level.

The one thing that everyone seems to agree on is that there is a good bit of commercial technology that can enhance DOD weapon systems. If that technology can be obtained at a price lower than the cost of developing a comparable product, it seems appropriate to go for it even if the commercial company makes a high profit. If that is congressional view, it makes sense. Let's just remember not to crucify the CO that pays a price with a 30 or 40% profit when this occurs. *RCN*

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