On August 13, 2016, a proposed DFARS rule (DFARS Case No. 2016-D006) **was published** in the Federal Register. This is not DoD's first attempt at such rule-making. For instance, readers may wish to review **our comments** on the prior attempt, which took place almost literally one year ago. We said at the time that the proposed rule was "… simply the return of the pre-FASA application of rigid mathematical formulae to determine commerciality."

We weren't the only ones to express concerns with the 2015 proposed rule-making. In a **follow-up** article, we noted critical comments from the Council of Defense and Space Industry Associations (CODSIA), as well as a critical letter written by Senator John McCain (R-AZ) and sent to SECDEF Ash Carter. In response, Frank Kendal (USD, AT&L) publicly walked back from the rule-making, and seemed to indicate that changes would be made in response to comments received.

So here we are, one year later, and we have an opportunity to gauge those promised changes. To that end, let's review the comments received by the DAR Council and how they were dispositioned.

Comment: A number of respondents expressed concern that proposed rule 2013-D034 would exclude readily available data to determine commerciality.

Response: In accordance with section 831 of the NDAA for FY 2013, this rule will ensure that in cases in which uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations. Further, in accordance with section 855 of the NDAA for FY 2016, this rule directs that market research shall be used, where appropriate, to inform price reasonableness determinations. Additionally, DoD is establishing a cadre of experts to provide expert advice to the acquisition workforce in assisting with commercial item and price reasonableness determinations.

We were interested to see that DoD has a "cadre of experts" who will provide "expert advice" to contracting officers faced with making a commercial item determination and in determining whether the price offered is fair and reasonable. We can't help wondering how those experts

were selected and what their qualifications may be. Does each individual have at least 10 years in making commercial item determinations under the current FAR 2.101 definition of "commercial item"? If not, what combination of experience and training confers their subject matter expertise? We think the rule-makers should have addressed that point.

Comment: A number of respondents took exception to the definition of "market-based pricing" in proposed rule 2013-D034.

Response: The definition of market-based pricing in proposed DFARS rule 2013-D034 has not been retained in this proposed rule.

Comment: A number of respondents took exception to the treatment of modified commercial items and catalog items in proposed rule 2013-D034.

Response: This rule focuses on obtaining appropriate data for determinations of price reasonableness, and provides for the consideration of the same or similar items under comparable and differing terms and conditions, and catalog prices, when regularly maintained and supported by relevant sales data, to serve as the basis for price reasonableness determinations.

Those are good things. Maybe the DAR Council listened to the comments received.

Comment: A number of respondents did not agree with the requirement for sales data to support a commerciality determination in proposed rule 2013-D034.

Response: This proposed rule does not address additional requirements for offerors to provide sales data to support a commerciality determination. This rule expands the use of FAR part 12 procedures. In accordance with section 853 of the NDAA for FY 2016, contracting officers may presume that a prior commercial item determination made by a military department, a Defense agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements. Further, in accordance with section 857 of the NDAA for FY 2016, supplies and services provided by nontraditional defense contractors may be treated as

commercial items.

More good things.

For those interested, the proposed rule seeks to add a definition of "nontraditional defense contractor" to DFARS 212.001 (Definitions). If implemented as drafted, a nontraditional defense contractor would be –

… an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards … for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction

That's a *very interesting* definition.

We noted that the proposed definition is different from the one used in implementing the pilot program for acquisition of "military-purpose nondevelopmental items" as described at DFARS 212.71. In that language, a nontraditional defense contractor is defined as a contractor that has not had –

--Any contract or subcontract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 1502) and the regulations implementing such section; or

--Any other contract in excess of the certified cost or pricing data threshold under which the contractor is required to submit certified cost or pricing data.

See the difference? Obviously, the definition being proposed in the new rule is more expansive than the definition found in the old (2011) rule that implemented the pilot program for acquisition of military-purpose nondevelopmental items. We discussed that pilot program in **this article**

. The DFARS language as currently drafted does not explicitly say that the definition found in 212.71 describes a “nontraditional defense contractor,” but if you review the **interim DFARS rule** that became the final DFARS rule (without changes to the interim rule) that became DFARS 212.71, it is quite clear what is being defined.

Will that be a source of confusion? Who knows? It depends on whether the cadre of DoD subject matter experts will connect the dots the way we have.

Finally, let’s point out that the new definition of nontraditional defense contractor, the one that says that any entity that is not fully CAS-covered, nor has been for at least one year, is *extremely* expansive. Since any small business is, by CAS regulation, exempt from CAS coverage, that means that *every single small business in America is now suddenly a nontraditional defense contractor and is capable of supplying commercial items to the DoD*. Is that what the rule-makers intended?

And it’s not just small businesses. *Any contractor* that is other than fully CAS-covered can be a nontraditional defense contractor under the proposed definition. That seems … counter-intuitive. We suspect the rule drafters simply forgot the second half of the 212.71 definition. But in case we are wrong about that, if implemented as drafted then many upon many contractors just become nontraditional defense contractors, even if their only customer has been the Department of Defense.

Have fun with that.