On May 4, 2018 the Defense Federal Regulation Supplement (DFARS) was revised via issuance of a **final rule** "to state that, in the interest of promoting voluntary contractor disclosures of defective pricing identified by the contractor after contract award, DoD contracting officers have discretion to request a limited-scope or full-scope audit, as appropriate for the circumstances."

According to the background section of the final rule, this regulatory revision came about because contractors requested it. Contractors requested it because DoD asked about opportunities to reduce or eliminate regulatory burdens "where costs [of compliance outweigh benefits [to the government." DoD asked contractors for input as part of "Better Buying Power 3.0," which we discussed **here** . We offered opinions regarding BBP 3.0 in **this article** . In our typically understated, diplomatic style, we concluded that "BBP 3.0 is much the same as its predecessors: More bureaucratic management and more bureaucratic processes. Processes designed and implemented by bureaucrats for bureaucrats in order to achieve bureaucratic ends."

But this article isn't about BBP 3.0. Nor is it about BBP 2.0 (which is where the notion of regulatory roll-backs started). Nope. This article is about the regulatory revision that allegedly spawned from BBP 3.0, a claimed regulatory roll-back intended to reduce a burden on contractors so that the associated reduced costs could be passed back to taxpayers.

Yeah, *that's a lie*.

We documented the true story on this blog site.

As we documented, after five years of intensive study, after five years of focusing on reducing regulatory burdens where the costs to contractors outweighed the benefits to the government, after admittedly spending $600,000 of taxpayer funds, the DoD issued **this report** entitled "Eliminating Requirements Imposed on Industry Where Costs Exceed Benefits." (Catchy title, right?) We **documented** how almost every single input received from contractors was dismissed by the study's authors. We documented how the authors promised to continue to study regulatory roll-back in "Phase II," and we opined that we would expect much of the same, in terms of results. I.e., nothing.

One of the few contractor recommendations that was accepted by the authors was to reduce

the number of certified cost or pricing (CoP) data submissions. We discussed that recommendation, in some detail, in **this article** . We quoted from the DoD report and we repeat that same quote here so that readers can see the exact language of the recommended regulatory roll-back:

We concur with contractors' recommendation in the first category: DoD should clarify policy guidance to reduce repeated submissions of CoP data. Multiple submissions are an unintended, and generally unsought, consequence of the FAR requirement that certified CoP data be 'current.' Frequent resubmissions appear to be the result of contractors' fears that out of date CoP data that becomes inaccurate will lead to defective pricing claims by DoD post-award. However, lack of clarity on what is considered 'current' motivates some contractors to provide excessively frequent CoP data updates during negotiations (weekly or monthly), which creates unnecessary work not only for contractors, but also for the Procuring Contracting Officer (PCO). *We recommend amending DFARS (and/or the FAR) to remove uncertainty about the appropriate frequency of providing certifiable CoP data to ensure it remains 'current' and/or to clarify pricing changes that warrant resubmission of CoP data.* … Reducing unnecessary resubmissions of certifiable CoP data would lower contractor proposal costs and reduce procurement administrative lead time. Making this change also weakens the argument for making additional changes to the TINA statute, such as increasing thresholds or relaxing waiver criteria.

(Emphasis added to show exactly what the authors were recommending.)

So then this happened.

As we documented in the article (link above), the report's recommendation was changed. The recommendation provided to the Director of Defense Pricing became ""Consider revising the FAR to eliminate the requirement that a defective pricing claim and associated audit must be initiated if a contractor voluntarily discloses defective pricing post-award …"

You see the disconnect, don't you?

Further (and as we documented), even though the recommendation was to revise FAR 15.407-1(c), the Director of Defense Pricing initiated a DFARS Case (215-D030) that would only

revise DFARS 215.407-1. Because the FAR was not being revised (as recommended), there would be no associated cost reductions with the regulatory revision.

So here we are today, more than two years after the DFARS Case was opened, with a final rule that does nothing. It reduces no regulatory burden and it reduces no contractor costs. What it does do is clarify the rights of the parties.

-

“Voluntary disclosure of defective pricing is not a voluntary refund as defined in 242.7100 and does not waive the Government entitlement to the recovery of any overpayment plus interest on the overpayments in accordance with FAR 15.407-1(b)(7).”

-

“Voluntary disclosure of defective pricing does not waive the Government's rights to pursue defective pricing claims on the affected contract or any other Government contract.”

Thus, if you determine that you may have defectively priced your cost proposal, in that you failed to disclose accurate, complete, and current certified cost or pricing information (as that term is defined at FAR 2.101), then you may make a voluntary disclosure to your contracting officer. Who will discuss the situation with DCAA. The contracting officer and DCAA will determine how best to proceed in evaluating the contractor disclosure. Regardless of the voluntary nature of the contractor’s disclosure, that disclosure may lead to further demands for repayment, as the solicitation provisions and contract clauses provide. In some extreme cases, the government (or *qui tam* relator) may pursue a lawsuit under the civil False Claims Act, based on the theory that any invoice submitted under a defectively priced contract is a false claim.

The only silver lining in this situation is that Congress recently raised the threshold at which contractors must certify their cost or pricing data from $750,000 to $2 million. DoD **recently issued** a Class Deviation to implement that statutory change ahead of formal rule-making. Consequently, the number of proposals subject to this rule—especially at smaller contractors—should

decrease significantly.

Otherwise, this story is the poster child for how the DoD “fourth estate” sabotages attempts to improve the defense acquisition environment. As we have documented here for our readership to consider.