The NDAA giveth; the NDAA taketh away.

Recently, we have published a series of articles discussing how the FY2018 National Defense Authorization Act (NDAA) increased several important acquisition thresholds--notably, the threshold at which certified cost or pricing data must be obtained. The threshold applies both to government acquisitions and to contractor acquisitions. The "TINA threshold" was raised from $750,000 to $2 million, which we thought was a good thing.

But a recent proposed FAR rule, **FAR Case 2017-006** , reminded us that not all Congressional acquisition reforms work to the benefit of contractors. The proposed rule would (partially) implement Section 822 of the FY2017 NDAA by redefining "adequate price competition" for the General Services Administration (GSA), Department of Defense (DoD), and the National Aeronautics and Space Administration (NASA). Importantly, the change would not affect other agencies (e.g., Department of Energy or Environmental Protection Agency) because the NDAA was not directed at them. (We'll note, however, that we have seen the other agencies adopt NDAA-based acquisition reforms, and they could do so here, as well.)

The proposed rule, if finalized as drafted, would limit the circumstances in which "adequate price competition" would exist. This matters because, if there is adequate price competition, then certified cost or pricing data need not be obtained. Indeed, if there is adequate price competition, then the contracting officer (or prime contractor buyer) is *prohibited* from obtaining certified cost or pricing data. Thus, some of the workload reductions given by raising the threshold to $2 million would be taken away by the proposed rule.

Currently, there are three circumstances in which adequate price competition can be found to exist. Without quoting FAR 15.403-1(c) in its entirety, they are:

1.

At least two offers are received for evaluation

2.

There was a reasonable expectation that at least two offers would be received, even though only one offer was actually received

3.

"Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition."

Most people know the first set of circumstances, but fewer people know the other two sets of circumstances. Regardless, the proposed rule would (for affected agencies) establish that adequate price competition exists "only if two or more responsible offerors, competing independently, submit responsive and viable offers." *Period.*

If you were one of the many who only followed the first definition of adequate price competition, then you probably won't be impacted very much by the proposed rule. But if you were one of the few who used all three definitions—because they offered ways to reduce workload and shorten proposal lead times—then you will definitely be impacted. We suspect you won't be very happy with the proposed rule.

We do not care for the proposed rule. If you are one of the contractors that don't like either then you may, if you wish, follow the link in the first sentence and find out how to submit a comment. However, we don't expect it will matter very much, because the proposed rule is basically just implementing the language in the NDAA.

We were interested to note that the FAR Councils have chosen to implement only a part of Section 822 of the FY2017 NDAA. The part that is *not* included in the proposed rule concerns prime contractor determinations of adequate price competition.

The NDAA language that was omitted from the proposed rule is—

DETERMINATION BY PRIME CONTRACTOR.—A prime contractor required to submit certified cost or pricing data under subsection (a) with respect to a prime contract shall be responsible for determining whether a subcontract under such contract qualifies for an exception under paragraph (1)(A) from such requirement.

We are not certain, but we believe the language above would clarify that the prime contractor's determination that its subcontractor(s) do not need to submit certified cost or pricing data to it (because adequate price competition was achieved) could not be overruled by a contracting officer's finding to the contrary. However, that is conjecture and should not be relied upon. Further, note that the prime contractor would be "responsible" for determining whether or not adequate price competition existed. If an audit or review subsequently found that the prime contractor had made a mistake, then that prime contractor might well be the subject of defective pricing allegations. Further—as we've seen before—if DCAA asserts that the subcontractor's price was unreasonable, then the auditors may question up to 100 percent of subcontractor costs as being unallowable. So the language is definitely not a "get out of jail free" card.

When the TINA (and other acquisition) thresholds were raised by the NDAA, we told contractors to update their procedures. Given the language in the proposed rule—which is almost certain to be finalized as drafted, or very close to it—we suggest that contractors should prepare to update their procedures once again.