

## Proposed Rule on Proposal Adequacy

Written by Nick Sanders  
Monday, 12 December 2011 00:00

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You have to give us some credit on this one. Sure, our lead time was measured in hours and not days or weeks, but at least we *were* [in front](#) of the curve . Our readers did get some measure of “heads-up”. And it would have been more, too, but the SoCal windstorm took out the power at our webmaster’s lair, and so publication was delayed for a couple of days until the electricity was restored. But we were on this like a drug-sniffing K-9 canine prowling an opium den.

(The foregoing is a long-winded and clearly defensive introduction to the very recently published proposed DFARS rule on proposal adequacy, found [right here](#) .)

As we mentioned in our previous article (link found in the long-winded and clearly defensive introductory paragraph, above), we start off with the proposition that this rule is unnecessary, overly bureaucratic, and possibly un-American. DCAA already has such a checklist and has been using it to avoid auditing contractor proposals for some time. Moreover (and as we noted in our previous article), though the DCAA proposal adequacy checklist expressly applies only to contractor proposals for which certified cost or pricing data are being submitted, DCAA has told its auditors that the checklist is may be good “guidance” to help an auditor “reach an opinion on the adequacy of the [contractor’s] proposal.” And so we’ve seen proposal after proposal rejected for audit as being inadequate, even though TINA, the requirements of FAR Table 15-2, and the proposal adequacy checklist itself are clearly and expressly Not Applicable.

But try as we might, we can’t get away from the fact that it is the Contracting Officer’s responsibility to determine whether the contractor’s proposal is adequate to negotiate a fair and reasonable price—*before* requesting the “field pricing assistance” of DCAA auditors. (See FAR 15.404-2.) So while DCAA may need a checklist to determine whether a proposal is adequate for audit, we have to reluctantly agree that it may be reasonable for DOD to issue to its Contracting Officers a checklist to assist them in determining whether a proposal is adequate for negotiation.

(You’d think that any warranted CO would be able to make that determination on his or her own, and that any CO who couldn’t make the right call in that particular area might be relatively unfit to have received the warrant in the first place, but perhaps we digress.)

So let’s now turn to the substance of the proposed DFARS rule and see if it is focused on assisting Contracting Officers in determining whether a contractor proposal is adequate for negotiating a fair and reasonable price.

The substance of the proposed rule is to create a solicitation clause (252.215-70XX) that imposes a “proposal adequacy checklist” for contractors to submit, along with their proposals, when solicitations “require the submission of certified cost or pricing data, if the contracting officer chooses to use the provision.” We note that the proposed DFARS language states, “When the solicitation requires the submission of certified cost and pricing data, the contracting officer should include 252.215–70XX, Proposal Adequacy Checklist, in the solicitation.” So inclusion of the provision clearly is not mandatory; nonetheless, you should expect to see it

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frequently, since Contracting Officers who opt not to include it may have to justify their decision.

Though the Regulatory Flexibility Act analysis that accompanies the proposed rule states that only 905 contract actions per year will qualify for the new proposal adequacy checklist, we are more than a little skeptical of that number. If the entire defense industrial base were only submitting 905 TINA-compliant proposals each year, then DCAA could kick back and read the newspaper. Instead, DCAA reports that it is so bogged-down in auditing “forward priced proposals” that it needs to [limit its audits](#) only to those that exceed certain dollar thresholds. In fact, in its [most recent](#) Semi-Annual report to Congress, the DOD Inspector General reported that DCAA had issued 1,143 audit reports on contractor forward pricing proposals. (See Appendix D.) And that was over a 6-month period (not a full year), and after the dollar thresholds noted above had already been implemented! So while not all of those proposals would be subject to TINA, we believe the majority of them would be. So quite clearly, we think that the proposed proposal adequacy will be applied to far more than the 905 instances DOD has stated would be the case.

The proposal adequacy checklist itself is not very novel. If you look at the DCAA’s proposal adequacy checklist you’ll find the source of the majority of the 47 proposed points of proposal adequacy. Other items include stuff pulled from FAR 2.101 (e.g., definition of commercial item) or from other FAR Parts. It’s quite a bit redundant with the requirements of FAR Table 15-2 in that (by our count) 30 of the 47 points of adequacy simply reiterate requirements from that Table. It would be much simpler, and provide Contracting Officers with exactly the same information, if those 30 points were collapsed into one single point that said, “Contractor certifies that it complies with all applicable requirements of FAR Table 15-2.”

Contractors subject to TINA, and wishing to successfully negotiate a contract award with DOD, should already be prepared to comply with the requirements of FAR Table 15-2. We don’t see this proposed checklist as adding very much (if any) value to such contractors. So why does DOD think it’s even necessary?

Well, according to the comments accompanying the proposed rule—

*This rule will implement one of DoD’s Better Buying Power initiatives. The objective of the rule is to ensure that offerors submit thorough, accurate, and complete proposals. By completing the checklist, offerors will be able to self validate the adequacy of their proposals.*

So there you are. DOD is implementing this proposed rule to help its contractors check, on their own, that their proposals are “adequate”. We should all say “thanks” to the DAR Council and just go about our business.

*Hold it!* Not so fast.

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We told you about DOD's "better buying power" initiative in a series of blog posts, including (for example) [this article](#). As we told you, DOD has been pursuing two distinct lines of attack: (1) the drive to reduce waste, bureaucracy, and inefficiency within the Pentagon (AKA the "efficiency" attack), and (2) the drive to reduce the costs of goods and services by focusing on reducing contract prices (AKA the "affordability" attack). We reviewed (once again), the

### [September 2010 Memo](#)

and its 23 "principal actions". The funny thing was that we couldn't find anything in that Memo about the adequacy of contractors' proposals. Sure, you could say this effort falls under the general rubric of "reduce non-productive processes and bureaucracy"—and maybe it does. But we didn't see anything under that heading that caused us to think this proposed rule was contemplated by the Better Buying Power initiative.

To the contrary—under the heading "reduce non-productive processes and bureaucracy" we found this objective:

Reduce non-value-added overhead imposed on industry. Industry has its own internal unproductive processes which add to project costs, but these are in some part a reflection of the requirements which the government imposes. A great number of the inputs I received from industry were directed at what was viewed as excessive overhead expenses based solely on non-value-added mandates and reporting requirements which may have been relevant at some point in time, but have little relevance in the world in which we now find ourselves.

*In order to identify and reduce these costly requirements, I am directing the Director of Industrial Policy, with support from DPAP, to more fully survey our industrial base to identify, prioritize, and recommend a path forward to unwind duplicative and overly rigorous requirements that add to costs, but do not add to quality of product or timeliness of delivery. As we remove these requirements, I will expect a decline in the overhead charged to the Department by our industrial base that reflects these reduced costs.*

(Italics in original.)

So, rather than impose an additional solicitation provision and checklist on contractors, the Better Buying Power initiative actually directed the exact opposite take place.

Contractors already know—or should know—how to submit adequate proposals. If they can't submit adequate proposals, then they shouldn't expect to win any work from DOD. Instead of this ill-begotten piece of bureaucratic misadventure, what is needed is a checklist for DOD Contracting Officers to use in determining whether a proposal meets the Section L pricing instructions of the solicitation, whether it is adequate as submitted to commence negotiations leading to a fair and reasonable price, and/or whether field pricing assistance (including DCAA audit) is necessary.

Contractors don't need this kind of assistance from the DAR Council. Instead, DOD needs to

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be assisting its Contracting Officers in being more efficient. That will be the theme of the comments that Apogee Consulting, Inc. intends to submit to the DAR Council.

What will you be saying?