We recently submitted a paper to the NCMA Macfarlan Writing Program, in which we compared the acquisition reform efforts of the Obama Administration to those of the Clinton Administration. The bottom-line is that we characterized the Clinton-era reform efforts as being focused on decentralization and individual discretion while breaking down market-entry barriers, while we characterized the Obama efforts as being focused on centralization and enhanced oversight. But of course that was an oversimplification.

We were reminded that the reality of the situation is more complex than any medium-length paper can describe, when a **final DFARS rule** was published in the Federal Register, creating opportunities for DOD acquisition officials to award contracts to "nontraditional defense contractors" via streamlined procedures for acquisitions of "military-purpose nondevelopmental items."

As the final rule states—

Under this pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of--

--Enabling DoD to acquire items that otherwise might not have been available to DoD;

--Assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and

--Protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired.

This pilot program is designed to test whether the streamlined procedures, similar to those available for commercial items, can serve as an effective incentive for nontraditional defense contractors to (1) channel investment and innovation into areas that are useful to DoD and (2) provide items developed exclusively at private expense to meet validated military requirements.

Sounds pretty Clinton-like, doesn't it?

How does the pilot program work? Well, the final rule doesn't tell you that. It basically just says the interim rule is being adopted as a final rule without changes. For the intricacies of the pilot program's inner workings, you need to go to that **interim DFARS rule** , published in the Federal Register on June 29, 2011.

From the interim rule, you can see that a new DFARS Subpart (212.71) has been added to the DFARS Section on Commercial Item Acquisition (Part 212). Essentially, contracting officers may treat qualifying contract actions awarded to qualifying companies as acquisitions of commercial items. But as they say, "the devil is in the details."

Let's get dirty into the details, shall we?

The first thing you need to know is how to determine whether a company is a nontraditional defense contractor. According to the rule, a nontraditional defense contractor …

… means an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any of the following for the Department of Defense--

(1) 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. section 1502) and the regulations implementing such section; or

(2) 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.

You might also want to understand what procurement actions are subject to the opportunity to use streamlined procedures. The streamlined procedures are available for "military-purpose nondevelopmental items".

What are those items? The rule states—

Military-purpose nondevelopmental item means a nondevelopmental item that meets a validated military requirement, as determined in writing by the responsible program manager,

and has been developed exclusively at private expense. An item shall not be considered to be developed at private expense if development of the item was paid for in whole or in part through--

(1) Independent research and development costs or bid and proposal costs, per the definition in FAR 31.205-18, that have been reimbursed directly or indirectly by a Federal agency or have been submitted to a Federal agency for reimbursement; or (2) Foreign government funding.

In order to avail themselves of the streamlined procedures, contracting officers must award contracts that meet the following requirements. The rule states—

Each contract entered into under the pilot program shall--

1. Be awarded using competitive procedures;
2. Be a firm-fixed-price contract, or a fixed-price contract with an economic price adjustment clause;
3. Be in an amount not in excess of $50 million;
4. Provide--
1. For the delivery of an initial lot of production quantities of completed items not later than nine months after the date of the award of such contract; and
2. That failure to make delivery as provided for under paragraph (d)(1) may result in termination for cause; and
3. Be--
1. Exempt from the requirement to submit certified cost or pricing data;
2. Exempt from the cost accounting standards under section 26 of the Office of Procurement Policy Act (41 U.S.C. 1502); and
3. Subject to the requirement to provide data other than certified cost or pricing data for the purpose of price reasonableness determinations.

One final point. As the rule-makers noted in the final rule, this opportunity is only authorized by statute with respect to awards of prime contracts by the DOD. They expressly stated that it is

not to be flowed-down by prime contractors to subcontractors—i.e., it cannot be used by prime contractors or higher-tier subcontractors At least, that's the opinion of the DAR Council. We're not so sure that Congress would agree with that interpretation of the statute.

But if you happen to qualify as a "nontraditional defense contractor" and would like to sell "military-purpose nondevelopmental items" to the Defense Department, then this pilot program might well be your ticket.

On the other hand, if you are truly a "nontraditional defense contractor" then we don't expect you'd be reading this blog, now would you?