On June 26, 2012, the Defense Federal Acquisition Supplement (DFARS) **was revised** "to address acquisitions using competitive procedures in which only one offer is received." Readers of this blog should not be surprised. After all, we **told you** it was coming more than a year ago.

At that time, we took DOD officials to task for prohibiting DOD Contracting Officers from using the flexibilities provided by the FAR to determine whether or not they had achieved "adequate competition" in their acquisitions. To be specific, the FAR provided three means by which adequate competition could be achieved (see 15.403-1(c)(1)(i) through 15.403-1(c)(1)(iii). DOD told its Contracting Officers that only one of the three methods was acceptable.

We refer you back to our 2010 article (link above) for details on the DOD policy guidance, and our issues with it. For purposes of this article, suffice to say that DOD's policy reduced the ability of Contracting Officers to determine that their acquisitions had achieved adequate price competition, and thus forced them into using "cost analysis" (instead of "price analysis") in order to determine that the bidders' prices were "fair and reasonable." We opined that this reduction in authorized regulatory was a mistake.

Using understated language typical of our academic, disinterested, approach to analysis, we wrote—

There is nothing about this memo—from the bureaucratic maneuvering to avoid the transparency of the public rule-making process, to the willful blindness to existing regulatory flexibility within a regulatory schema not known for flexibility—that we think has any merit.

We'll note for the record that, more than a year ago, we linked the DOD policy position to recent DCAA findings that certain subcontract awards were problematic because only one offer was received. (You can find details in our original article.) We just spent **a week** discussing the reasonableness of subcontractor pricing when challenged by DCAA. It is clear to us (as we told our readers) that DCAA and DOD's recently created Pricing Directorate are driving this issue. And so now we have a final DFARS rule, making the policy position formal regulatory guidance for DOD Contracting Officers. (You'll note that the formalization of the policy position addresses one of our complaints, quoted above.)

According to the promulgating comments, the final rule clarifies that the policy revision is aimed to emphasize the need for increased competition and, in the case where only one offer is received, provide direction to DOD Contracting Officers regarding next steps. Before we delve into the details, let's clarify that the issue that the DAR Council was trying to address was this: Competition was expected (thus the use of competitive procedures), but only one offer was received. Regardless of what the FAR says, the receipt of only one offer indicates a problem: (1) acquisition and market planning were poorly done, (2) the solicitation was poorly drafted, or (3) the incumbent was so strongly positioned that no other bidder could effectively compete. So that's the issue; let us now delve into the details of the new rule.

(One more caveat: As always, we are going to discuss the points that we find interesting. We are not going to recite the entirety of the rule. You should click on the link we provided and read the rule for yourself.)

Many parts of the DFARS were revised. In particular, a new Subsection (215.371 "Only One Offer") was created. 215.371-1 (Policy) states—

It is DoD policy, if only one offer is received in response to a competitive solicitation—

(a) To take the required actions to promote competition (see 215.371–2); and

(b) To ensure that the price is fair and reasonable (see 215.371–3) and to comply with the statutory requirement for certified cost or pricing data (see FAR 15.403–4).

The policy statement illustrates the shift between the initial draft and the final rule, which seemed to be driven by some excellent comments from the public. The DAR Council stated—

The policy statement is completely rewritten to shift the emphasis away from whether the circumstances described at FAR 15.403–1(c)(1)(ii) constitute adequate price competition, to an emphasis on the objectives of the rule, i.e., to increase competition and, if only one offer is received nevertheless, to make sure that the price is fair and reasonable and that the statutory requirements for obtaining certified cost or pricing data are met.

Indeed, the revised rule expressly states that if only one offer was received, despite the "reasonable expectation" that more than one would be received, then that situation may constitute adequate price competition—*but only if an official at one level above the contracting officer approves the contracting officer's determination that the offered price is reasonable*. Otherwise—

Obtain from the offeror cost or pricing data necessary to determine a fair and reasonable price and comply with the requirement for certified cost or pricing data at FAR 15.403–4, in accordance with FAR provision 52.215–20. For acquisitions that exceed the cost or pricing data threshold, if no exception at FAR 15.403–1(c) applies, the cost or pricing data shall be certified; and [the contracting officer will proceed with negotiations on the basis of the certified cost or pricing data].

The revised DFARS subsection under "adequate price competition" now reads (in part)—

Adequate price competition normally exists when—

(*i*) Prices are solicited across a full range of step quantities, normally including a 0–100 percent split, from at least two offerors that are individually capable of producing the full quantity; and

(*ii*) The reasonableness of all prices awarded is clearly established on the basis of price analysis (see FAR 15.404–1(b)).

In addition to the foregoing, much verbiage was written discussing whether or not this policy revision applies to acquisitions of commercial items, or to DOD acquisitions from the GSA Federal Supply Schedules. The answer? Yes, it does.

So there you have it. The DAR Council is doing what it is doing, and neither your kvetching nor our kvetching will not stop the policy change. We'll let the DAR Council have the final word on the matter.

The purpose of this rule is not just to save money but to ensure the integrity of the process. More competition benefits all parties, including small businesses. Although it is possible to demonstrate that increased competition strengthens the industrial base and has a beneficial impact on pricing, the benefits are not readily quantifiable. DoD is tracking improvement in the percentage of effective competition (more than one offer). DoD has always had a fiduciary responsibility to determine that prices are fair and reasonable. The most basic pricing policy at FAR 15.402 is that the contracting officer shall purchase supplies and services from responsible sources at fair and reasonable prices. Unless certified cost or pricing data is required by law (see FAR 15.403–4), the contracting officer is required to obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price. This rule provides a mechanism to accomplish that goal when a competitive solicitation does not result in more than one offer. As revised, the final rule does not impose unnecessary burdens.