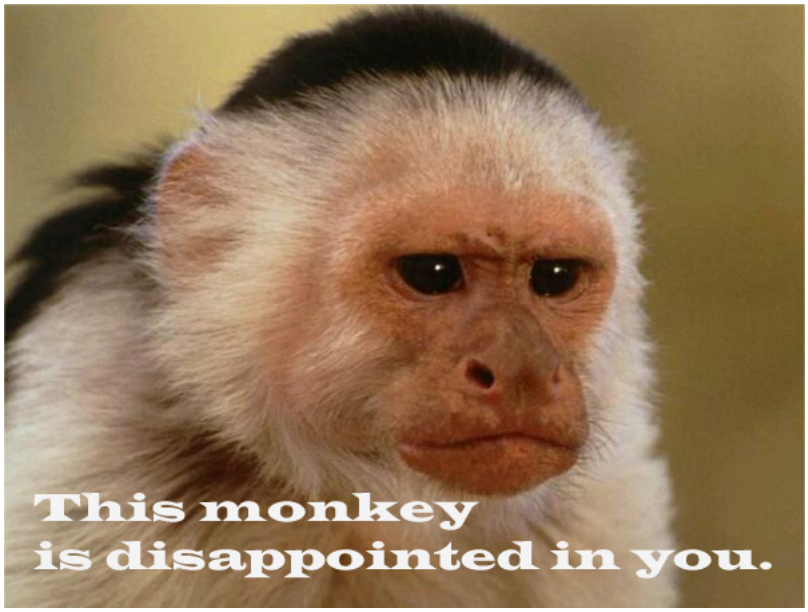

Well, it's here.

We first brought this matter to your attention as part of **an article** on how DOD was gearing up to mount a concerted attack on the profit of defense contractors. When the DAR Council issued a proposed rule on the topic, we did a **deep dive** into it—and we didn't like what we saw. As is our wont, we didn't pull any punches, writing, "we start off with the proposition that this rule is unnecessary, overly bureaucratic, and possibly un-American."

We didn't like what we saw to such an extent that we were moved to submit **our comments** to the DAR Council for consideration as they finalized the language.

And now the final DFARS rule is **here**, issued on March 28, 2013. Coincidentally, it is also effective on that same date.

And we continue to dislike what we see. You want to know what we dislike about the checklist, please go check out the links provided above.

So no, we are not going to repeat our "concerns" about the final rule here. It's final and our "concerns" are now moot. But we are going to devote some verbiage to complaining about the DAR Council's cavalier treatment of public comments on the proposed language—including our own. We think the DAR Council did not adhere to the standards established by the Defense Federal Acquisition Regulation Supplement (DFARS) itself.

DFARS 201.301(b) states—

When FEDERAL REGISTER publication is required for any policy, procedure, clause, or form, the department or agency requesting Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD (AT&L)) approval for use of the policy, procedure, clause, or form (see 201.304(1)) must include an analysis of the public comments in the request for approval.

That requirement is aligned with other statutory and regulatory requirements imposed on rule-makers of the Federal Acquisition Regulation (FAR) system. For example, FAR 1.301 states—

(b) Agency heads shall establish procedures to ensure that agency acquisition regulations are published for comment in the *Federal Register* in conformance with the procedures in Subpart 1.5 and as required by section 22 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 418b), and other applicable statutes, when they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in an additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization. …

(c) When adopting acquisition regulations, agencies shall ensure that they comply with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) as implemented in 5 CFR 1320 (see 1.106) and the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Normally, when a law requires publication of a proposed regulation, the Regulatory Flexibility Act applies and agencies must prepare written analyses, or certifications as provided in the law.

The foregoing references FAR 1.5. Looking at 1.501-2, we see the following—

(a) Views of agencies and nongovernmental parties or organizations will be considered in formulating acquisition policies and procedures.

(b) The opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the *Federal Register*. Each of these notices shall include— (1) The text of the revision or, if it is impracticable to publish the full text, a summary of the proposal;

(2) The address and telephone number of the individual from whom copies of the revision, in full text, can be requested and to whom comments thereon should be addressed; and (3) When 1.501-3 (b) is applicable, a statement that the revision is effective on a temporary basis pending completion of the public comment period.

(c) A minimum of 30 days and, normally, at least 60 days will be given for the receipt of comments.

Accordingly, both statute and regulation require that the public be given an opportunity to provide comments regarding proposed regulations. And the DFARS requires that those comments must be analyzed; the required analysis is to be provided to the USD (A,T&L) in the approval package. The clear inference is that the required analysis should be substantive and provide the USD (A,T&L) with meaningful input. The clear presumption is that the USD (A,T&L) should review the analysis prior to approving the final language of the proposed rule.

And it was in the foregoing that we believe the DAR Council blew it.

Allow us to provide evidence in support of our assertion, if you would. Consider the following comments and the responses from the DAR Council.

Comment: Two respondents stated that this new rule would result in increased costs that will ultimately be passed on to the Government and may be financially prohibitive to seeking other business.

Response: This provision results from a long history of incomplete proposals resulting in rework and lost time, and it aims to achieve cost savings by improving initial proposal submissions from contractors.

Comment: Several respondents believed that this checklist imposes additional reporting requirements on the contractor and note that many of the checklist items are not currently required for submission of certified cost or pricing data. One respondent noted that while this checklist adds the new requirements it appears to add no value to the contracting process.

Response: This rule does not impose additional requirements over what is already required under the conditions where certified cost or pricing data are required and these requirements are already covered by OMB Control Number 9000-0013 . This provision is applicable to solicitations with an estimated value greater than the TINA threshold and that require certified cost or pricing data. This provision intends to increase uniformity across DoD, minimize local variations, and thereby decrease proposal preparation costs.

Comment: Several respondents suggested that the checklist is unnecessary and duplicative. One respondent noted that it is the offeror's responsibility to comply with the requirements of the solicitation and an offeror that is unable to submit a compliant proposal is likely to be noncompliant after award. The same respondent noted that this checklist is somewhat duplicative of the DCAA forward pricing adequacy checklist. Another noted that most of the checklist items already appear in FAR 15.408 at table 15-2 and suggested that the rule should require contractors confirm that their proposal complies with all applicable requirements of 15-2. Another respondent noted that this rule is: (1) Not compliant with Executive Order 12866 as there is no defined problem that this rule aims to solve; (2) the rule is inconsistent, incompatible and duplicative of what is already in Table 15-2; and (3) that this checklist only adds a layer of regulatory requirements. Show citation box

Response: This provision is a single, uniform tool that is applicable across DoD to address the inconsistent interpretations of Table 15-2. The intent of this provision is to increase uniformity across DoD, minimize local variations, and thereby decrease proposal preparation costs. The checklist created by this rule is a DFARS provision; any checklist that DCAA currently uses is outside the scope of this rule.

Comment: Several respondents stated that the proposed rule does not support the BBP Initiative and noted that the rule does not align with any of the 23 principal actions. The respondents believed that the proposed rule is contrary to the BBP Initiative to reduce nonproductive processes and bureaucracy.

Response: While this initiative predates BBP, it is consistent with the BBP's cost reduction initiatives.

Comment: Two respondents stated it would be wastefully time consuming and burdensome for offerors to disclose which pages of the proposal contain a judgmental factor applied and the mathematical or other methods used in the estimate. The respondents suggested a large percentage of the pages comprising the proposal would contain such information.

Response: Having contractors identify this information prevents miscommunication and misunderstanding, and it will save time in the proposal evaluation process.

We could continue with the recitation of comments and responses, but the litany would simply become repetitive. Clearly, the DAR Council was bound and determined to require contractors to fill out the proposal adequacy checklist and no amount of public input was going to dissuade them.

We are disappointed in the DAR Council's cavalier treatment of the public comments (including our comments!) and we continue to believe that the new DFARS requirement adds little value while adding significantly to the costs of preparing proposals to the Defense Department.