

## DFARS Case 2020–D008 (11/23/22)

### Requiring Data Other than Certified Cost or Pricing Data

Thank you for allowing us the opportunity to provide comments on the proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2020 that provides additional requirements relating to the submission of data other than certified cost or pricing data.

While we believe the Congressional intent was to improve the pricing of Government contracts, the fact is that Section 803 of the NDAA for 2020 states “Contracting officers shall not determine the price of a contract or **subcontract** to be fair and reasonable based solely on historical prices paid by the Government.” (*Emphasis added*) The current proposed rule does not address how subcontract pricing by prime or higher-tier contractors is going to be addressed and limits changes to DFAR 215 and 242, which are requirements for contracting officer not contractors.

Both the Defense Contract Audit Agency (DCAA) and Defense Contract Management Agency (DCMA) have in many cases placed requirements on contractors that are not contractually required (i.e., addressed in DFARS 252 contract clauses). Due to the language in the NDAA stating subcontracts, we believe there is a significant risk that DCAA auditors, DCMA contractor purchasing system reviewers, and administrative contracting officers are going to flow down contracting officer requirements to contractors without adequate contractual language.

Therefore, we request the following comments be addressed:

#### **Clarify that the prohibition does not restrict the contracting officer from relying on prior cost or price analysis.**

Clarification is needed that the contracting officer can rely on recently completed cost or price analysis from the buying command files (e.g., within 18 months) and not simply discount this effort now that it supports a historical price paid by the Government. This will significantly limit the risk of wasteful rework on the part of both the contracting officer and the contractor.

#### **Does the requirement flow down to contractors?**

If the drafters of the proposed rule do not believe the requirement flows down to contractors and is limited to contracting officer cost or price analysis of subcontracts impacting their pricing of Government contracts, it should be so stated in PGI 215.403-3(4).

If the requirement is intended to be flowed down the proposed rule will have to be expanded to include a new DFARS 252 contract clause, addressing:



**DFARS 215.403-3(a)(4) Determination by the Head of the Contracting Activity**

Does a contractor need to develop a package for the contracting officer to submit for head of the contracting activity determination for subcontract pricing, or can a determination be made by an official of the contractor?

**DFARS 215.404-1(b)(ii) Pricing based solely on historical prices paid by the Government**

In most cases, a contractor is not going to know the prices historically paid by the Government on a subcontract or a purchase by another program. Will contracting officers be required to provide this information to contractors?

Will there be a requirement that contractors are prohibited from making a price reasonableness determination based solely on historical prices paid by the contractor?

**DFARS 242.1502 Notation in Contractor Performance Assessment Reporting System (CPARS)**

Contractors do not have the ability to update CPARS. Will a similar requirement be placed on contractors? If so, it should be addressed in the regulations. We recommend the requirement be limited to only contractors meeting the requirement to undergo a contractor purchasing system review (CPSR) (i.e., those contractors maintaining a vendor rating system per DFARS 252.244-7001(c)(20) and (21)).

Thank you again for the opportunity to provide comments on this important rule.