December 9, 2019

Via Email to osd.dfars@mail.mil

Defense Acquisition Regulation System
Attn: Ms. Amy G. Williams
OUSD(A&S)DPC/DARS, Room 3B941
3060 Defense Pentagon
Washington, DC 20301–3060


Dear Ms. Williams,

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.

Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch, Douglas Mickle, and Nooree Lee, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Accounting, Cost & Pricing.”
I. INTRODUCTION

On September 26, 2019, the Department of Defense (“DoD”) published a proposed rule to amend the Defense Federal Acquisition Regulation Supplement (“DFARS”) to implement several sections of the National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2017, Pub. L. No. 114-328, 130 Stat. 2000. These particular sections address how contracting officers may require an offeror to submit relevant information to support market research for commercial-item price analysis and allow, for major weapon systems procured as commercial items, an offeror to submit information relating to the value of the commercial item to aid in price analysis.

The Section appreciates DoD’s effort to implement these important statutory provisions. Below, the Section offers suggestions to help DoD to clarify the proposed rule so as to reflect and reinforce the intent of Congress.

II. COMMENTS

A. FY17 NDAA § 871 Implementation: Emphasize Order of Priority Set Forth in the FAR

Under FAR 12.209, Determination of Price Reasonableness, contracting officers must establish price reasonableness in accordance with FAR 13.106-3, FAR 14.408-2, or FAR subpart 15.4, as applicable. When certified cost or pricing data are not required (e.g., commercial item acquisitions), contracting officers may obtain data other than certified cost or pricing data from the offeror to support their price analyses, but only after seeking data from other sources. To that end, FAR 15.402(a)(2)(ii)(A) specifies a hierarchy of “relying first on data available within the government; second, on data obtained from sources other than the offeror; and, if necessary, on data obtained from the offeror.”

Revisions proposed to DFARS 212.209(a) appear to preserve this order of priority by providing that contracting officers should require information from contractors “to the extent necessary to support market research” in connection with a price analysis:

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. **To the extent necessary to support such market research**, the contracting officer for the solicitation—

(1) In the case of major weapon systems items acquired under 10 U.S.C. 2379, shall use information submitted under 234.7002(d); and

(2) In the case of other items, may require the offeror to submit other relevant information as described in this section.

84 Fed. Reg. at 50814 (emphasis added). This proposed revised version of DFARS 212.209(a) would closely follow the text that FY17 NDAA § 871 provided for codifying at 10 U.S.C. § 2377(d).
To avoid confusion, the Section recommends adding a cross-reference to FAR 15.402 to reemphasize the order of preference and to clarify that requiring information from contractors should be necessary only after considering other data sources. In this regard, the Section recommends adding the following bolded phrase to the proposed DFARS 212.209(a)(2):

In the case of other items, may require the offeror to submit other relevant information as described in this section consistent with the order of preference set forth in FAR 15.402(a)(2).

The Section submits that this addition would be consistent with the text codified at 10 U.S.C. § 2377(d) as directed by FY17 NDAA § 871.

B. FY17 NDAA § 872 Implementation: Remove or Revise Proposed “Value Analysis” Provisions

The proposed rule contains a definition of “value analysis” that appears unnecessary based on the structure of the NDAA language being implemented. Under FY17 NDAA § 872, Congress amended 10 U.S.C. § 2379, which sets requirements for DoD when seeking to procure major weapon systems as commercial items.

Through the NDAA text, Congress revised 10 U.S.C. § 2379(d), which addresses information to be submitted for the contracting officer’s consideration in a price analysis. The revision inserted a new provision at § 2379(d)(2):

(2) An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (1)(A) and (1)(B).

Based on the language of this insertion, Congress intended for offerors to be able to submit information about the value of a commercial item for a contracting officer to consider in a price analysis.

This statutory provision amplifies and encourages DoD’s awareness and use of the long-standing FAR part 15 provision for considering value analysis in a price analysis:

Value analysis can give insight into the relative worth of a product and the Government may use it in conjunction with the price analysis techniques listed in paragraph (b)(2) of this section.

FAR 15.404-1(b)(4).

Notably, FY17 NDAA § 872 neither calls on an offeror to provide a “value analysis” nor requires the contracting officer to perform a “value analysis” when considering the submitted information or analysis. Instead, Section 872 shows that the intent was to provide a way for an

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3 Congress shifted the existing § 2379(d)(2) to § 2379(d)(3).
offeror to submit information or analysis relating to the value of a commercial item that then may be considered in the contracting officer’s price analysis.

The Section is thus concerned with DoD’s proposed definition of “value analysis” at DFARS 234.7001, which applies to DFARS subpart 234’s provisions governing major systems acquisitions:

Value analysis means a systematic and objective evaluation of the function of a product and its related costs, whose purpose is to ensure optimum value.

84 Fed. Reg. at 50814.

The proposed rule then provides in DFARS 234.7002(d)(5) that:

An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

Value analysis is used to understand what features or characteristics of a given product or service, or offered terms and conditions warrant consideration as having legitimate value to the government. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (d)(1) and (d)(2) of this section . . . .

Id. (emphasis added).

Effectively, the proposed addition of the defined term “value analysis” in DFARS 234.7001 and the above emphasized sentence in DFARS 234.7002 are likely to lead contracting officers to conclude that they must obtain a value analysis from offerors, or create and document a value analysis in order to consider the information submitted.

Based on the plain language of FY17 NDAA § 872, however, these proposed terms are unnecessary and may slow consideration of the information or analysis relating to the value of a commercial item. This outcome appears to be contrary to congressional intent and, therefore, the Section recommends that the proposed definition of “value analysis” at DFARS 234.7001 be removed and the sentence regarding “value analysis” in the proposed DFARS 234.7002(d)(5) be restated as follows with the text marked in bold:

An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item as provided in FAR 15.404-1(b)(4). A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (d)(1) and (d)(2) of this section . . . .

Even if retained, DoD’s definition of “value analysis” proposed for DFARS 234.7001 is too narrow and may cause confusion. For example:

- Regarding “function,” value can be derived from a wide variety of factors such as time savings, efficiency, readiness, durability, portability, life-cycle support, the cost to the
Government of developing a non-commercial alternative, preservation of life, and other considerations.

- Regarding “systematic and objective evaluation,” the Section notes that the concept of “value” is inherently subjective relative to the needs and perspectives of contracting officers, program sponsors, end users, and other stakeholders. Also, an analysis of value cannot always be “systematic” because the value of any particular product or service is a unique question relative to its purpose, importance, buyers, and users under unique facts and circumstances.

- Regarding “related costs,” the term “cost” is unclear. In connection with commercial items, an item’s “costs” are not relevant. The value of an item takes into consideration the item’s price (i.e., the Government’s cost, not the contractor’s) relative to the Government’s cost to acquire alternatives, or the cost of not proceeding with the procurement.

- Regarding “optimum value,” the Section discourages DoD from using this undefined term within the definition of “value analysis.” Doing so will increase confusion rather than add clarity. Additionally, the Section is concerned that “optimum value” creates a higher bar for contracting officers beyond the established concepts of best value and fair and reasonable pricing.

- Regarding “ensure,” when used in the context of the undefined term “optimum value,” the term creates a sense of precision and certainty that is, in the Section’s view, incompatible with the inherent subjectivity of “value.”

As an alternative to the proposed definition of “value analysis,” the Section offers the following for DoD’s consideration for addition to DFARS 234.7001:

Value means the worth, merit, or importance of a product or service given its acquisition price (and life-cycle costs) relative to available alternatives. Value analysis is a reasoned inquiry undertaken by the contracting officer, with support from other members of the acquisition team, to discern the value of a product or service. See FAR 15.404-1(b)(4).

This revised definition would address the concerns stated above and comport with Congress’s intent as shown in the FY17 NDAA and with the provision in FAR 15.404-1(b)(4).

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.
Sincerely,
/s Linda Maramba
Chair, Section of Public Contract Law

cc:
Susan Warshaw Ebner
Jennifer L. Dauer
Annejanette Heckman Pickens
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