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Via Regulations.gov

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD (AT&L) DPAP/DARS
Room 3B941, 3060 Defense Pentagon
Washington, DC 20301-3060

(August 11, 2016)

Dear Mr. Gomersall:

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 Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein 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 policy of the ABA.

Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine B. Kassekert, and Heather K. Weiner, 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.

1 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Commercial Products and Services.”
I. INTRODUCTION

On August 11, 2016, the Department of Defense ("DoD") issued the Proposed Rule to amend the Department of Defense Federal Acquisition Regulation Supplement ("DFARS") to implement the requirements of two National Defense Authorization Acts ("NDAA")s: (a) Sections 851 through 853 and 855 through 857 of the Fiscal Year ("FY") 2016 NDAA (Pub. L. 114-92, enacted November 25, 2015); and (b) Section 831 of the FY 2013 NDAA (Pub. L. 112-239, enacted January 2, 2013). In addition, the Proposed Rule seeks to provide "guidance to contracting officers to promote consistency and uniformity in the acquisition process." The Proposed Rule replaces an earlier proposed rule arising from DFARS Case 2013-D034, which was later withdrawn.4

The Section applauds the Defense Acquisition Regulations ("DAR") Council for drafting the Proposed Rule after having reviewed and considered comments submitted in response to the prior proposed rule. The Section believes that the current Proposed Rule is a vast improvement over the 2015 proposed rule. We further appreciate the DAR Council’s addressing concerns raised in comments on this Proposed Rule.

The Section is nevertheless concerned that the Proposed Rule, like the prior effort, still places unnecessary burdens on commercial-item contractors and introduces confusion that may chill participation by some commercial-item contractors in the DoD marketplace. This chilling effect is contrary to current DoD policies that encourage more companies to participate in the DoD market.5 Adding burdens through the Proposed Rule runs contrary to that purpose.

The Section understands and appreciates that the Government has an obligation to purchase supplies and services from commercial-item contractors at fair and reasonable prices and that many of the Proposed Rule’s requirements arise from NDAA mandates. But the Section is concerned that some provisions in the Proposed Rule could create barriers to entry for some commercial contractors in doing business with DoD, thus hindering the Government’s ability to acquire vital, cutting-edge technologies from the commercial marketplace. Further aspects of the Proposed Rule contain language that is ambiguous or otherwise unclear. The Section offers recommendations below on these issues.

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5 For example, Section 809 of the FY15 NDAA authorized the establishment of an advisory panel on streamlining DoD acquisition regulations. The purpose of the advisory panel is to eliminate duplicative and unnecessary DFARS regulations so as to encourage participation in DoD programs and to allow DoD to maintain its defense technology advantage.
II. COMMENTS

A. The Section recommends changes related to terms included in the NDAA.

1. Definition of market research

The Proposed Rule adds to DFARS 212.001 a new definition of the term “market research,” which, under proposed DFARS 212.209(a), contracting officers will be required to use to “inform price reasonableness determinations.” The Section acknowledges that the proposed definition corresponds with and implements the definition contained in Section 855 of the FY 2016 NDAA (prescribing a “minimum” set of requirements). Still, the Section recommends amending the Proposed Rule’s definition to provide additional guidance to contracting officers, in light of the clear statutory preference for commercial items and the Proposed Rule’s mandate for contracting officers to consider information obtained during market research for purposes of evaluating the fairness and reasonableness of an offeror’s proposed price. The Section’s proposed revisions expand upon and are consistent with the statutory definition.

In particular, the Section believes that the definition would be significantly improved by incorporating guidance that relates more directly to pricing and an adequate evaluation of the fairness and reasonableness of an offeror’s proposed price. As drafted, the proposed definition, as well as the guidance in Federal Acquisition Regulation (“FAR”) 10.002 (cross-referenced), focuses predominantly on research on the availability of existing industry capabilities. A critical component of market research—particularly for determining fair and reasonable pricing—is reviewing and understanding pricing conditions and related considerations in the relevant industry and marketplace. Such research includes an understanding of commercial businesses’ operating models, profits, and expected margins.

As the Defense Business Board observed in its FY 2014 report to the Secretary of Defense, Innovation: Attracting and Retaining the Best of the Private Sector, one barrier to innovation through the expanded use of commercial capabilities fits this theme: DoD’s “fundamental lack of understanding that a fair and attractive profit is an essential incentive for innovation. Reduced profit, or profit levels that are constantly under attack, erodes the willingness of industry to invest, and has significant implications on industry’s ability to attract capital and retain talent.” The Defense Business Board found that DoD contributes to this barrier by not having “sufficient understanding of the business operating models and drivers of innovation,” including profit.

The Defense Business Board underscored the importance of understanding commercial

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7 Id. at 25.
8 Id. at 26 (Profit is often “misunderstood by the government, seen as something to be minimized.”); see also id. at 27 (finding that “the DoD workforce, for the most part, lacks an adequate or even basic understanding of industry business and operating models, investment criteria, and the importance of profit as a driver of innovation”); id. at 33 (discussing misperceptions regarding profit and its role in innovation).
business models, what profit represents, and how profit is considered in the commercial market to attracting and retaining industry within its Defense Industrial Base. Of note, the Board observed that commercial models are typically “value-based,” meaning how a product or service is valued, instead of cost-based. The Board also reported commercial pricing turns in large part on the expected return on investment.

To address these findings and ensure that a contracting officer’s price reasonableness determination accounts for commercial operating models and related considerations, the Section recommends revising the market research definition as follows, with proposed revisions in red text:

**Market research** means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of DoD in whole or in part, including an identification of the relevant industry and market for those capabilities or technologies, the prices at which those capabilities or technologies have been offered for sale or sold, the offerors’ operating and net profit margins (if publicly reported), and the operating and net profit margins of companies in the relevant industry. Market research shall also include a review and identification of how the desired capabilities or technologies are generally offered for sale in the relevant marketplace (such as firm-fixed price, time-and-materials, labor hour, etc.), and other contract terms that may affect differences in pricing, such as warranties, buyer financing, volume (or other) discounts, as well as the customary practices in the industry regarding customizing, modifying or tailoring of items or services to meet a customer’s needs and budget. The review may include any of the techniques for conducting market research provided in section 10.002(b)(2) of the FAR and shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities and the prices at which those capabilities or technologies have been offered for sale or sold, the offerors’ operating and net profit margins (if publicly reported), and the operating and net profit margins of companies in the relevant industry.

2. **Prior commercial item determinations**

The Section acknowledges that the proposed provision at DFARS 212.102(a)(111) implements and is consistent with 10 U.S.C. § 2306a(b)(4), as amended by FY 2016 NDAA Section 851, allowing contracting officers to presume that a prior commercial item determination made by a DoD entity shall serve as a determination in future procurements. Although these statutory provisions created a presumption that an offered item qualifies as a commercial item based on a prior commercial item determination made by a “military department, a Defense Agency, or another component of the [DoD],” the Section recommends revising the proposed

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9 *Id.* at 33-40.
10 *Id.* at 39.
11 *Id.*
provision to expand the presumption to prior commercial item determinations made by any federal department or agency, including civilian agencies, departments, and components.

This proposed revision, which is not prohibited by Section 851, would be consistent with the Proposed Rule’s stated purpose of promoting consistency and uniformity in the acquisition process. For example, by law, items listed on Federal Supply Service ("FSS") schedules have been determined to qualify as commercial items.12 (Further discussion is in Section II.D.2 below.) No legal or practical reason justifies disregarding these prior commercial item determinations just because they were made by a civilian agency. To do so through the Proposed Rule could create inconsistency and confusion within the acquisition community. So, instead, by relying on prior commercial item determinations regardless of agency, contracting officers and contractors will benefit from consistency and reduced administrative burdens. See also Section II.C, below.

B. The Section recommends revising proposed DFARS 252.215-70XX(b)(1)(ii).

1. Conflating pricing with the commercial-item exception

Proposed DFARS 252.215-70XX(b)(1)(ii) mirrors the existing language of FAR 52.215-20(a)(1)(ii) regarding the exception from certified cost or pricing data for commercial items. In the FAR, that language identifies information offerors must submit to the Government when seeking a commercial item exception from providing certified cost or pricing data:

Commercial item exception. For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition.

Although this language exists in the FAR, the Section finds mirroring the language in the DFARS, as proposed, to be problematic.

Doing so conflates two distinct events: the commercial item determination and the price reasonableness determination. Both are equally important to the Government’s procurement of commercial items, but only the commercial item determination is necessary for an exception to submitting certified cost or pricing data.13 Pricing information is not solely determinative of whether a product or service is a “commercial item,” yet that is the only information the language above requires. With this Proposed Rule, DoD has the opportunity to make substantial improvements to FAR 52.215-20 with supplemental guidance, which not only implements the requirements of the FY 2013 and FY 2016 NDAAs, but also clarifies several important requirements and distinctions that are critical to DoD’s future success in commercial-item

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12 See CGI Fed. Inc. v. United States, 779 F.3d 1346, 1353 (Fed. Cir. 2015) (establishing that items or services listed and ordered through the FSS program are commercial items acquired under FAR Part 12); see also General Services Acquisition Regulation § 538.271 (noting Multiple Award Schedule “awards will be for commercial items as defined in FAR 2.101”).
13 See FAR 15.403-1(b).
acquisition, such as the distinction between commercial item determinations and price reasonableness determinations.

The Section urges revisions because Congress has mandated a different process. As reflected in the FY 2013 and FY 2016 NDAAs, Congress provides for a commercial item determination to be made, and only then for price reasonableness to be assessed:

- Section 831(b)(2) of the FY 2013 NDAA requires training of the acquisition workforce “in evaluating reasonableness of price in procurements of commercial items.”

- Further, Section 831(c) includes a requirement that, in the acquisition of commercial items, “requests for uncertified cost information for the purposes of evaluating reasonableness of price are sufficiently documented.”

- Section 851(c) of the FY 2016 NDAA states that the contracting officer for the procurement of a commercial item is not precluded from requiring the contractor to supply information sufficient to determine the reasonableness of price.

- Section 852(d) of the FY 2016 NDAA discusses the same or similar cost or pricing data as FAR 52.215-20(a)(1)(ii), but makes it clear that this information may be obtained only as needed to determine the reasonableness of price.

- Section 855 of the FY 2016 NDAA further clarifies the distinction between commercial-item determinations and price reasonableness determinations. Subsection (a)(1) addresses market research regarding commercial items. Subsection (a)(2) addresses market research regarding price reasonableness of commercial items.

In light of this distinction made and maintained by Congress, the Section recommends that DoD modify proposed DFARS 252.215-70xx(b)(1) to separate (1) a commercial-item determination (and thus an exception from certified cost or pricing data) from (2) a price reasonableness determination of a commercial item.

For commercial item determinations, the Section urges the DAR Council to focus on the Government’s market research and information obtained from contractors about current and historical markets, customers, sales volumes, sales trends, service offerings, product/service development pipelines, and other non-price factors sufficient to determine if a product or service meets the commercial item definition in FAR 2.101.

Regarding price reasonableness determinations, we urge the DAR Council to ensure that the Proposed Rule reflects the intent of Section 831(c) of the FY 13 NDAA. DoD could do so by revising proposed DFARS 252.215-70XX(b)(1)(ii) to state that cost or pricing data will be uncertified when required by this clause section to support the Government’s price reasonableness determination (of an item already determined to be a commercial item).
2. Proposed 252.215-70XX(b)(2) audit clause

Proposed DFARS 252.215-70XX (b)(2) grants the Government the right to examine a contractor’s books and records relative to commercial item determinations and price reasonableness determinations. This proposed language mirrors FAR 52.215-20(a)(2) in part, omitting this sentence:

For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror’s determination of the prices to be offered in the catalog or marketplace.

The Section does not believe that Congress intended for either section 831 of the FY 2013 NDAA or sections 851 and 853 of the FY 2016 NDAA to expand the Government’s access to cost or profit information when commercial items are priced based on catalog or market prices, or set by law or regulation. Accordingly, the Section recommends that proposed DFARS 252.215-70XX(b)(2) mirror the entire language of FAR 52.215-20(a)(2). As an alternative, if DoD intends to broaden its access rights, the Section requests that DoD do so directly and provide an opportunity for interested parties to comment.

C. The Section recommends deleting provisions that may lead to significant confusion and other undesirable outcomes in the DoD procurement community.

1. Proposed DFARS 252.215-70XX(b)(ii)(B)(2)

Proposed DFARS 252.215-70XX(b)(ii)(B)(2) would require an offeror’s proposal to include one of two statements when the offeror’s proposed pricing is based on the offeror’s catalog prices:

(i) The catalog pricing provided with this proposal is consistent with all relevant sales data (including any related discounts, refunds, rebates, offsets or other adjustments). Relevant sales data shall be made available upon request of the Contracting Officer; or

(ii) The catalog pricing provided with this proposal is not consistent with all relevant sales data, due to the following: [Insert a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments)].

81 Fed. Reg. at 53108. These comments will refer to this clause provision as the “Catalog Pricing Provision.”

The Section recommends deleting the Catalog Pricing Provision. It is not based on any provision in the FY 2013 NDAA or the FY 2016 NDAA, and is unclear about what it means for “catalog pricing” to be “consistent” or “not consistent” with “all relevant sales data.” In fact, as
drafted, the Catalog Pricing Provision raises a number of important, yet unanswered, questions:

- Does the term “catalog pricing” refer to the prices shown in the catalog in question, or to the offeror’s proposed pricing for the particular proposal?

- If the term “catalog pricing” refers to the prices shown in the catalog in question, must those prices be used in the pricing of all sales in order for that pricing to be “consistent” with “all relevant sales data”?

- Does the determination of consistency take into account whether “catalog pricing” is higher or lower than the pricing reflected in “all relevant sales data”?

- How does the use of the term “all relevant sales data” in the Catalog Pricing Provision (which implies that such data is in the contractor’s possession and will only be made available upon request) relate to the definition of the term “relevant sales data” in the proposed DFARS 252.215-70XX(a) (which states that such data includes only information “provided” by an offeror)? The answer to this question affects whether an offeror must analyze all of the “relevant sales data” it possesses or only the information it actually provides to the Government.

Without answers to these questions, offerors proposing pricing based on a catalog will be unable to determine which of the two prescribed statements they can make. On the other side of the procurement, contracting officers will not know what offerors mean by these statements. This is a prescription for confusion and misunderstandings, which will undermine the reliability of any price reasonableness determinations based on the statements.

Further, if an offeror must analyze “all relevant sales data” in the offeror’s possession to determine which statement to select, the Catalog Pricing Provision would impose a significant due diligence burden on offerors, potentially deterring contractors from selling products and services to DoD. This is inconsistent with the purpose of basing proposed pricing on a catalog—reducing the need for extensive data analysis.

The Section therefore recommends that the Catalog Pricing Provision be deleted from the Proposed Rule.

2. Proposed DFARS 215.402(B)

Proposed DFARS 215.402(B) provides: “The contracting officer shall not limit the Government’s ability to obtain any data that may be necessary to support a determination of fair and reasonable pricing by agreeing to contract terms that preclude obtaining necessary supporting information.” This language does not appear to be based on the statutory authority cited, section 831 of the FY 2013 NDAA. In addition, the language is vague and ambiguous. The terms “any data” and “necessary supporting information” are unclear and would create confusion regarding the scope of the information that the Government could request. The Section recommends deleting the provision in full.
D. The Section recommends additional changes to enhance clarity.

I. Nontraditional defense contractors

The Proposed Rule implements Section 857 of the FY16 NDAA by providing that a product or service provided by a “nontraditional defense contractor” may be treated as a commercial item, regardless of whether the item meets the statutory definition of a “commercial item.” The Proposed Rule also includes the expanded definition of “nontraditional defense contractor” set forth in 10 U.S.C. § 2302(9). The term means an entity that is not currently performing and has not performed any contract or subcontract for DoD subject to full coverage under the Cost Accounting Standards (“CAS”) for at least one year before the solicitation of sources by DoD. The Section recommends changes to two of these provisions to clarify the rule and align it more closely with the statutory language.

a. Clarifying the intent of the authority

Proposed DFARS 212.102(a)(iv) states as follows (emphasis added):

(iv) Nontraditional defense contractors. Supplies and services provided by nontraditional defense contractors may be treated as commercial items (10 U.S.C. 2380A). This permissive authority is intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD. It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not constitute a requirement for a commercial item determination and does not mean the item is commercial.

The Section is concerned that the DAR Council may have defined the intent of the statute too narrowly and that, as a result, contracting officers may decline to use the authority in ways that are appropriate and consistent with DoD’s best interests. The Section therefore recommends a broader statement of intent that would warn against unduly narrow readings of the statutory authority.

As a threshold matter, the Section notes that the “intent” of the provision was not explained by Congress in the Joint Explanatory Statement accompanying the FY 2016 NDAA.

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14 See Proposed DFARS 212.102(a)(iv); Proposed DFARS 252.215-70XX(b)(ii)(E).
15 Section 815 of the FY 2016 NDAA expanded the definition of “nontraditional defense contractor” set forth in 10 U.S.C. § 2302(9). Under the previous definition, a nontraditional defense contractor was an entity that, for at least one year before the issuance of a solicitation, had not performed a contract or subcontract that (1) was subject to full CAS coverage, or (2) was valued above $500,000 and had required the submission of certified cost or pricing data. The second prong of this definition was deleted in the FY 2016 NDAA.
16 See Proposed DFARS 212.001.
Rather, the Explanatory Statement said only that the Senate bill contained the provision on non-traditional defense contractors; the House bill contained no similar provision; and the House receded to the Senate’s language. Thus, there does not appear to be an official statement of congressional intent concerning the statute.

The Section further notes that, in previous regulatory actions concerning nontraditional defense contractors, the DAR Council has more broadly described the ways in which such contractors can support DoD’s objectives. For example, when DoD established a pilot program for acquiring military-purpose non-developmental items through “nontraditional defense contractors,” the purposes of the program were stated to include (i) enabling DoD to acquire items that otherwise might not have been available, and (ii) assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs. The Section believes that DoD has similar broad and appropriate reasons to acquire commercial items from nontraditional defense contractors, and the plain language of the FY 2016 NDAA would support such acquisitions.

Therefore, the Section recommends modest changes to the description of the authority’s intent, as well as two drafting changes to clarify the provision, as set forth below in red text and strikethrough text:

(iv) Nontraditional defense contractors. Supplies and services provided by nontraditional defense contractors may be treated as commercial items (10 U.S.C. 2380A). This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for cutting-edge qualified firms to do business with DoD. It is not intended to recategorize current noncommercial items; however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not constitute a requirement for a commercial item determination and does not mean the item is commercial. When treated as commercial items the commercial item exemption in FAR 15.403-1(b)(3) shall apply.

b. Clarifying applicability to subcontractors

The Section also recommends that the DAR Council consider clarifying the Proposed Rule’s application to subcontractors. DFARS 244.402(a) requires a prime contractor to

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18 See 76 Fed. Reg. 38048 (June 29, 2011) (interim rule); 77 Fed. Reg. 2653, 2654 (Jan. 19, 2012) (final rule); 81 Fed. Reg. 42557 (June 30, 2016) (modifying rule). In addition, the program was designed to (i) channel investment and innovation from nontraditional contractors into areas that are useful to DoD, and (ii) obtain items developed at nontraditional contractor’s private expense to meet validated military requirements.
determine whether a particular subcontract item meets the definition of a commercial item. Prime contractors are expected to exercise reasonable business judgment in making such determinations. *Id.*

The Proposed Rule does not expressly state whether items provided by a subcontractor that meets the definition of a “nontraditional defense contractor” may be treated as commercial items. The plain language of proposed DFARS 212.102(a)(iv), however, suggests that is the case: “Supplies and services provided by nontraditional defense contractors may be treated as commercial items.” In addition, if a DoD agency elected to treat the supply or service of a nontraditional defense contractor as a commercial item, it would be illogical to apply a different standard to that contractor’s suppliers.\(^\text{19}\)

Accordingly, we recommend that the DAR Council consider amending DFARS 244.402, to harmonize it with proposed DFARS 212.102(a)(iv), as set forth below in red text:

244.402 Policy requirements.

(a) Contractors shall determine whether a particular subcontract item meets the definition of a commercial item or is provided by a nontraditional government contractor in accordance with DFARS 212.102(a)(iv). This requirement does not affect the contracting officer’s responsibilities or determinations made under FAR 15.403-1(c)(3). Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10.

2. *CI determinations based on FSS Contract*

As noted elsewhere in these Comments, under the Proposed Rule, DoD would require that offerors submit price reasonableness information as a condition to qualifying for the commercial item exception in certain circumstances. Specifically, the Proposed Rule states, “[f]or a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition[.]” 81 Fed. Reg. at 53107 (proposed DFARS 252.215-70XX(b)). The Proposed Rule further notes that “[f]or items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item” is required. *See* 81 Fed. Reg. at 53,107 (proposed DFARS 252.215-70XX(b)(ii)(D)).

Items listed on FSS schedules have been determined to qualify as commercial items. *See CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1353 (Fed. Cir. 2015) (establishing that items or

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\(^{19}\) This reading is also consistent with section 873 of the FY 2016 NDAA. Section 873 created an exception from the requirement for cost or pricing data on awards made to small businesses and “nontraditional defense contractors,” valued at less than $7.5 million, pursuant to either the Small Business Innovation Research Program or certain broad agency announcements. *See* 81 Fed. Reg. 59594 (Aug. 30, 2016) (proposed rule implementing section 873 of the FY 2016 NDAA). Notably, the exception applies expressly to “contracts, subcontracts, or modifications of contracts or subcontracts.” *Id.* (emphasis added). Thus, the exception would apply not just to a prime contractor that is a “nontraditional defense contractor,” but to a subcontractor who meets that definition as well.
services listed and ordered through the FSS program are commercial items acquired under FAR Part 12); see also 48 C.F.R. § 538.271 (noting Multiple Award Schedule “awards will be for commercial items as defined in FAR 2.101”). Consequently, we recommend deleting the requirement that an offeror must provide proof of a commercial item exception when an item is sold via an active FSS Multiple Award Schedule (MAS) contract because it is redundant and unsupported by statute.

The Proposed Rule’s requirement—that an offeror provide additional proof that an FSS schedule item is commercial beyond its listing on an active FSS MAS contract—disregards the prior work of the General Services Administration (GSA) Federal Acquisition Service (FAS) contracting officers.

Additionally, the provisions of the NDAA DoD intends to implement through the Proposed Rule do not require proof that a commercial item exception has been granted for a schedule item. The supplementary information of the Proposed Rule states “DoD is proposing to amend the DFARS to implement the requirements of section 851 through 853 and 855 through 857 of the [FY16 NDAA], as well as the requirements of section 831 of the NDAA for FY 2013.” 81 Fed. Reg. at 53101. The text of these provisions does not justify looking beyond the FSS for additional proof that a commercial item exception applies.

DoD, in the Proposed Rule, may be disregarding the prior commercial-item determinations of GSA FAS contracting officers because of Section 851 of the FY16 NDAA. Specifically, Section 851 provides that a contracting officer “may presume that a prior commercial-item determination made by a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such item.” The Proposed Rule, in the opinion of the Section, misconstrues Section 851 of the FY 2016 NDAA. The mere fact that Congress limited the presumption to prior commercial item determinations of DoD does not mean that DoD is foreclosed from reasonably relying upon the commercial item determinations of other federal agencies.

Finally, the FY 2013 NDAA provision on which DoD relies for the Proposed Rule, Section 831, simply provides that DoD should issue standards to determine “whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price[.]” Standing alone, this language does not require that DoD disregard the work of other federal agencies to impose additional, redundant proof requirements to satisfy the commercial item exception. Doing so runs directly contrary to the spirit of the commercial item reforms themselves, which were intended to streamline federal procurement.
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,

James A. Hughes
Chair, Section of Public Contract Law

cc:
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