



## COMPLIANCE

### **Compliance Roundup – What Government Contractors Should Know *Compliance Updates to be aware of now and through 2018***

By Craig Stetson, Partner

Various federal agencies during the first half of 2018 have issued final and proposed rules or agency direction related to regulatory compliance requirements associated with U.S. federal government contracts. Specifically, the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA), and the Office of Federal Procurement Policy (OFPP) have all issued specific Agency rules pertaining to performance and compliance under government contracts.

Further discussion of recent and noteworthy government contract compliance requirements are summarized below.

### 1. Cost Accounting Standards Exemption for Acquisition of Commercial Items

Synopsis – The OFPP, Cost Accounting Standards Board, issued a final rule July 17, 2018, effective August 16, 2018, clarifying that all contracts for the acquisition of commercial items are exempt from coverage under the Cost Accounting Standards (CAS). The final rule seeks to harmonize and eliminate inconsistencies regarding the specific types of commercial item contracts referenced in Federal Acquisition Regulation (FAR) 12.207 and 48 CFR 9903.201-1(b)(6). Key provisions of this final rule include:

- Reference to include as commercial item time-and-material and labor-hour contracts in accordance with previous regulatory revisions;
- Reference to include as commercial item certain firm fixed-price incentive (performance or delivery) contracts in accordance with previous regulatory provisions;
- Acknowledgement, in response to public comments received regarding CAS applicability under hybrid and indefinite-delivery-indefinite-quantity type contracts, albeit outside the scope of this final rule-making process, by the CAS Board its intention to further review these contract types to determine if clarifying language is required for implementation into the CAS rules – (it's about time).

Takeaway – Contractors should identify now outstanding proposals in response to solicitations received regarding acquisition of commercial items under any contract type meeting the FAR 12.207 commercial item definition. Solicitations containing any CAS clauses should be identified and addressed with the issuer of the solicitation for removal. Existing contracts awarded prior to August 16, 2018 will retain their CAS-coverage status at the time of initial award. Contracts awarded on or after August 16, 2018 are exempt.

### 2. Cost Accounting Standards and Certified Cost or Pricing Data Thresholds

Synopsis – The DoD, GSA, and NASA separately issued agency class deviations on May 31, 2018, May 3, 2018, and July 1, 2018, respectively, directing agency contracting officers to use the \$2,000,000 threshold as mandated by Section 811 of the National Defense Authorization Act (NDAA) for fiscal year 2018, in all applicable contracts awarded on or after July 1, 2018. Key provisions of these agency class deviations include:

- Prime contracts awarded prior to July 1, 2018, remain at the prior threshold of \$750,000;
- Subcontracts awarded on or after July 1, 2018 under prime contracts awarded prior to July 1, 2018, remain at \$750,000 however, the prime contractor must request from the government a contract modification to incorporate the FAR clauses that deal with subcontractor certified cost or pricing data requirements (52.215-12 or 52.215-13);
- The \$2,000,000 threshold also applies for CAS-coverage purposes, as pursuant to the OFPP June 14, 2007, final rule. The thresholds for both CAS-coverage and submission of certified cost or pricing data are the same.

Takeaway – Contractors should assess now potential purchasing system implications and subcontractor flow-down requirements resulting from the revised \$2,000,000 threshold. When appropriate, prime contractors may seek contract modifications (contracts awarded prior to July 1, 2018) to incorporate the increased threshold applicable to future subcontract awards.

### 3. Definition of Adequate Price Competition

Synopsis – The DoD, GSA, and NASA issued a proposed rule June 12, 2018, to amend the FAR at 15.403-1(c)(1) to add a separate standard redefining adequate price competition. The proposed revised definition, arising from Section 822 of the NDAA for fiscal year 2017, would apply to the DoD, GSA, and Coast Guard. Public comments were due August 13, 2018. Key provisions of this proposed rule include:

- Elimination of the longstanding reasonable expectation standard;
- For adequacy purposes – i.e., was there adequate price competition and thus, an exemption to submission of certified cost or pricing data? – at least two responsive and viable bids must be received;
- If at least two responsive and viable bids are not received the competition is deemed not adequate and requires submission of certified cost or pricing data.

Takeaway – Contractors should be aware and ready to provide certified cost data related to price proposals that traditionally would be exempt in a public solicitation situation. That is, an additional layer of price and cost diligence may be prudent to avoid surprises when a specific contractor ends up as the sole offeror. Similar procedures may be necessary when analyzing subcontractor price proposals received to avoid potential downstream purchasing system deficiencies.

### 4. Voluntary Disclosure of Post-Award Defective Pricing

Synopsis – The DoD issued a final rule May 4, 2018, effective same date, to amend the Defense Federal Acquisition Regulation Supplement (DFARS) at 215.407-1(c)(i) to eliminate the requirement that all contractor voluntary defective pricing disclosures are subject to audit. Rather, in the interests of promoting contractor voluntary disclosure, contracting officers now have discretion to seek a Defense Contract Audit Agency (DCAA) audit. Key provisions of this final rule include:

- Requirement for contracting officers to discuss with the DCAA contractor voluntary defective pricing disclosures;
- DCAA discussions shall focus on the completeness and accuracy of the contractor voluntary disclosure as well as the potential impact on other contracts, task, or delivery orders, and outstanding price proposals;
- DCAA discussions may be used to determine the DCAA's involvement including, a limited-scope audit, a full-scope audit, or technical assistance.

Takeaway – Contractors should assess and coordinate with legal counsel the nature of potential voluntary defective pricing matters. Attention should be focused on the type of cost(s) subject to the possible defective pricing disclosure as well as the relevant fact pattern(s) associated with the initial pricing. Consideration of existing contractor – government relationships should be addressed to assess the likelihood of a favorable outcome.

## 5. Miscellany

Synopsis – The DoD issued two class deviations during the second quarter – both effective on the date issued – and the OFPP revised the executive compensation limits:

- Micro-purchase and Simplified Acquisition Thresholds (April 13, 2018):
  - Micro-purchase – generally \$5,000; exceptions apply to limited situations;
  - Simplified acquisition – generally \$250,000; exceptions apply to limited situations.
  
- Contract close-outs (May 4, 2018)
  - Accelerated close-out of selected completed contracts entered into at least 17 years prior to the current fiscal year and not otherwise subject to traditional reconciliation procedures.
  
- Executive compensation limits
  - Calendar year 2016 - \$500,000
  - Calendar year 2017 - \$512,000
  - Calendar year 2018 - \$525,000

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