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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



**EDITOR'S NOTE: CYBERSECURITY FOR CONTRACTORS**

Victoria Prussen Spears

**ACTIONS FORESHADOW UNIFORM CYBERSECURITY REGULATIONS FOR FEDERAL CONTRACTORS**

Mary Beth Bosco

**"OFFERED FOR SALE" HEADED FOR THE SCRAP HEAP? PROPOSED DFARS RULE MAY CHANGE REQUIREMENTS FOR COMMERCIAL ITEM DETERMINATIONS AND PRICE REASONABLENESS EVALUATIONS**

Nicole J. Owren-Wiest

**IMPORTANT DEVELOPMENTS ON OVERPAYMENT LIABILITY UNDER THE FALSE CLAIMS ACT**

Wade Pearson Miller, Kimyatta E. McClary, Dawnmarie R. Matlock, and Paula M. Stannard

**IN SPLIT VICTORY FOR CONTRACTORS AND WHISTLEBLOWERS, SUPREME COURT REJECTS EXPANSIVE STATUTE OF LIMITATIONS THEORY FOR FALSE CLAIMS ACT CASES AND CLARIFIES APPLICATION OF ACT'S "FIRST-TO-FILE" BAR**

Emily Crandall Harlan and Brian T. Kelly

**IN THE COURTS**

Steven A. Meyerowitz

**LEGISLATIVE AND REGULATORY DEVELOPMENTS**

Victoria Prussen Spears

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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VOLUME 1

NUMBER 7

October 2015

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**Editor's Note: Cybersecurity for Contractors**

Victoria Prussen Spears

213

**Actions Foreshadow Uniform Cybersecurity Regulations for Federal Contractors**

Mary Beth Bosco

216

**“Offered for Sale” Headed for the Scrap Heap? Proposed DFARS Rule May Change Requirements for Commercial Item Determinations and Price Reasonableness Evaluations**

Nicole J. Owren-Wiest

221

**Important Developments on Overpayment Liability under the False Claims Act**

Wade Pearson Miller, Kimyatta E. McClary, Dawnmarie R. Matlock, and Paula M. Stannard

225

**In Split Victory for Contractors and Whistleblowers, Supreme Court Rejects Expansive Statute of Limitations Theory for False Claims Act Cases and Clarifies Application of Act's “First-to-File” Bar**

Emily Crandall Harlan and Brian T. Kelly

228

**In the Courts**

Steven A. Meyerowitz

233

**Legislative and Regulatory Developments**

Victoria Prussen Spears

243

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# “Offered for Sale” Headed for the Scrap Heap? Proposed DFARS Rule May Change Requirements for Commercial Item Determinations and Price Reasonableness Evaluations

*By Nicole J. Owren-Wiest\**

*Recently, a proposed rule was issued that would amend the Defense Federal Acquisition Regulation Supplement to add new definitions, instructions, and solicitation provisions and contract clauses related to the requirements for the submission of certified cost or pricing data and the determination of price reasonableness when data other than certified cost or pricing data are required. The author of this article explains the proposed rule and its implications.*

A long-awaited proposed rule<sup>1</sup> was issued recently that would amend the Defense Federal Acquisition Regulation Supplement (“DFARS”) to add new definitions, instructions, and solicitation provisions and contract clauses related to the requirements for the submission of certified cost or pricing data and the determination of price reasonableness when data other than certified cost or pricing data are required. The proposed amendments are intended to implement Section 831(a) of the Fiscal Year 2013 National Defense Authorization Act, which required the Department of Defense (“DOD”) to issue guidance on the use of the authority to require the submission of other than certified cost or pricing data, including standards for determining whether certain information is sufficient to determine price reasonableness. Although the preamble states that the proposed rule seeks only to clarify existing requirements, as currently drafted, the rule could be interpreted as imposing new requirements for items to be accepted as “commercial” under FAR 2.101.

## **THE PROPOSED RULE**

Consistent with the increased scrutiny being given to commercial item determinations and pricing, major elements of the proposed rule include:

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<sup>1</sup> <http://www.gpo.gov/fdsys/pkg/FR-2015-08-03/pdf/2015-18938.pdf>.

### New Definitions

The proposed rule includes new definitions in DFARS 202.1 and 215.401 for the following terms:

- *Market-based pricing*: “[P]ricing that results when nongovernmental buyers drive the price in a commercial marketplace.” The proposed definition states that there is a “strong likelihood the pricing is market based” when nongovernmental buyers account for 50 percent or more of sales by volume of a particular item. Market-based pricing would become the preferred method to evaluate price reasonableness in the absence of competition.
- *Uncertified cost data*: “[T]he subset of ‘data other than certified cost or pricing data’ . . . that relates to cost.”
- *Nongovernment sales*: “[S]ales of the supplies or services to nongovernmental entities for purposes other than governmental purposes.”
- *Relevant sales data* and *Sufficient nongovernment sales to establish reasonableness of price*: The “subset of an offeror’s sales data that, as considered by a prudent person, could reasonably be expected to influence the contracting officer’s determination of price reasonableness, taking into consideration the age, volume, and nature of the transactions;” the data are “sufficient” when they reflect “market-based pricing” and are made available to the contracting officer to review and contain enough information to make adjustments to account for differing circumstances. The proposed rule establishes standards and an order of precedence for the types of “relevant sales data” that should be considered.

### New Solicitation Provisions and Contract Clauses

The proposed rule includes new solicitation provisions and contract clauses for making commercial item determinations and evaluating price reasonableness. The rule would add new *basic* and *alternate* clauses in lieu of the clause at FAR 52.215-20 when “it is reasonably certain” that certified (or uncertified) cost or pricing data may be required to be submitted.

- The “basic” clause would be required when the submission of certified cost or pricing data may not be required at the time of submission, or when certified cost or pricing data are required to be submitted in the format prescribed by FAR Table 15-2. Under the “basic” clause, contractors seeking to invoke an exception from the requirement to submit certified cost or pricing data would be required to submit a written request to the contracting officer and certain minimum

information as specified in the clause to determine (a) *whether an exception to the requirement should be granted*, and (b) *the data necessary to determine price reasonableness*. For example, if an offeror invokes the commercial item exemption, the clause specifies certain data the offeror would be required to provide depending on whether the proposed price is based on a catalog price, “market-based pricing,” or is included on an active federal supply schedule contract. When based on “market-based pricing,” the offeror would be required to provide a description of the market, the method used to develop the price, and “all relevant sales data” which are required to be made available to the contracting officer within 10 days of a written request.

- The “alternate” clause, with similar provisions, would be required in order to support a format for the submission of certified cost or pricing data other than the FAR Table 15-2 format.
- Under either clause, the contracting officer may require additional supporting information “to determine whether an exception should be granted, and whether the price is fair and reasonable.” Unless required to be certified, the data may be provided “in the form in which it is regularly maintained by the offeror or prospective subcontractor in its business operations.”
- As currently drafted, the proposed clauses’ requirement for actual sales data appears to eliminate the “offered for sale” prong of the FAR 2.101 commercial item definition, and the new definitions could be interpreted to impose a 50 percent sales standard for items to qualify as “commercial,” contrary to the FAR 2.101 definition.

### **Broad Subcontract Data Requirements**

The proposed rule includes broad subcontract data requirements. The new clauses would also require offerors to “obtain from subcontractors *whatever information is necessary* to support a determination of price reasonableness,” including “*cost data to support a commerciality determination*, cost realism analysis, should-cost review, or any other type of analysis addressed by FAR part 15 and DFARS part 215.” Prospective subcontractors at all tiers above the simplified acquisition threshold would be required to adhere to this requirement.

### **Spare Parts or Support Equipment**

The proposed rule would require extra scrutiny when the line items for prices for spare parts or support equipment exceed the lowest price the Government has paid within the most recent 12-month period by 25 percent or more, when a comparison of the item description and proposed price indicates a potential

for overpricing, or when they are significant high-dollar-value items.

**CONCLUSION**

Comments on the proposed rule were due October 2, 2015. Although the final rule may reflect some changes, contractors should expect heightened scrutiny in this area and take proactive steps to support their commercial item assertions and demonstrate price reasonableness.