

Government Contracts Blog

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Reining in Use of "Of A Type" Commercial Service Contracting

The FAR Councils issued an interim rule, effective October 14, 2009, revising the circumstances under which services not offered and sold commercially can still qualify as commercial services. This is important for a couple of reasons, but probably most importantly, because commerciality can eliminate the requirement for the submission of cost or pricing data and can limit the amount of Government contracting requirements to which a company is subjected. The new interim rule now permits a Contracting Officer determination of commerciality even where services are not offered and sold competitively in substantial quantities in the commercial marketplace.

Under the interim regulation, commercial services not offered and sold competitively in the commercial marketplace can be considered commercial items if the Contracting Officer makes a written determination that the offeror submitted enough information to evaluate the reasonableness of the price of the services using price analysis. To supplement the price analysis, the Contracting Officer may obtain from the offeror the prices paid, by the Government or commercial customers, for similar commercial items under "comparable terms and conditions." *See* 74 Fed. Reg. 52852. If the Contracting Officer still cannot make a determination on the reasonableness of the price, the Contracting Officer can request other relevant information such as labor costs, material costs, and overhead rates. *See* 74 Fed. Reg. 52852. In other words, if the services are "of a type offered and sold competitively," then they can qualify as "commercial services."

This interim rule implements section 868 of the Duncan Hunter National Defense Authorization Act for 2009 ("Section 868") and scales back the widened "of a type" Truth in Negotiations Act ("TINA") exemption for commercial services enacted in 2003 by Services Acquisition Reform Act ("SARA"). Congress enacted Section 868 (entitled "Minimizing Abuse of Commercial Services Item Authority") largely in response to a series of DoD Inspector General reports critical of the use of commercial item exceptions and comments by the Federal Acquisition Advisory Panel, established by SARA. Hence, expect to see diminished use of "of a type" commercial service contracts. When this contract authority is used, be prepared to provide cost or pricing data.

Comments on this interim rule must be submitted by December 14, 2009.

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