

## New Provisions in Defense Authorization Act Relating to the Production on Demand of Cost and Pricing Data by Commercial Suppliers

On December 20, 2019, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2020 (NDAA), which authorizes appropriations and sets forth policies for Department of Defense (DOD) programs and activities. In Title VIII of the bill, on “Acquisition Policy, Acquisition Management, and Related Matters,” provisions address policies associated with the DOD’s procurement of commercial products and services, specifically requirements associated with how the DOD must establish the fairness and reasonableness of offered prices, including the need for commercial suppliers to provide the DOD with cost and pricing data. This alert discusses what changes in law (if any) regarding this requirement result from the newly signed NDAA.

Beginning in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA) and the subsequent Federal Acquisition Reform Act (FARA), as well as recent amendments to those laws, to facilitate the federal government’s reliance on the commercial marketplace and emulate commercial-style buying practices, especially in situations where competition was not feasible.<sup>1</sup> Before these laws were enacted, there were no procedures or clear mandate for the government’s acquisition of commercial items in the open market. FASA modified the government’s approach to buying commercial items by making price analysis, not cost analysis, the norm.

With this in mind, FASA and FARA were enacted to reduce the number of otherwise onerous government-unique requirements applicable to procurements of commercial items, and thereby encourage commercial contractors to enter into government contracts.<sup>2</sup> Specifically, laws were designed to reduce the information burden on commercial contractors that are neither equipped nor interested in supporting government cost analysis.

Indeed, the commercial-item exception was specifically designed to promote the government’s acquisition of commercial goods and services by seeking to establish more commercial-like procedures, which freed businesses from unnecessary government data and audit requirements, simplify the sale of commercial items and promote the government’s use of commercial sources.<sup>3</sup>

Currently, under the FAR, contracting officers are required to buy products and services at “fair and reasonable” prices. Generally, however, the fairness and reasonableness of prices that the DOD pays for commercial products or services are determined by the commercial marketplace. But, where a contracting officer is unable to determine whether proposed prices are fair and reasonable, under current law, they are allowed to compare submitted prices with historical prices from previous purchases, current price lists, catalogs or advertisements, an independent government estimate, or prices identified through market research for the same or similar items, as well as analysis to identify any pricing inconsistencies. Contractor officers are allowed to request uncertified cost data, generally, as a last resort.

To address concerns raised by some critics that the current processes do not do enough to establish price reasonableness, the defense authorizing committees included in the NDAA Section 803, which amends the US Code Title 10, Section 2306a(d)(1), to provide that “[c]ontracting officers shall not determine the price of a contract or subcontract to be fair and reasonable based solely an historical prices paid by the Government.” This change complements a prior sentence in the same paragraph that allows the contracting officer to require “appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.”

<sup>1</sup> S. Rep. 103-258, 1994 U.S.C.C.A.N. 2561 at 2566 (May 11, 1994). See also id. at 2580 (“[t]he new exception shall be used where competition is not practicable...”) (emphasis added).

<sup>2</sup> The legislative history underlying FASA and FARA provides explicit statements supporting this purpose:

“Title VIII includes provisions that would reduce impediments to the purchase of commercial items *by exempting such purchases from a series of statutes that are unique to government purchases*, and that have no counterpart in the commercial sector.” (emphasis added). S. Rep. 103-258, 1994 U.S.C.C.A.N. 2561 at 2566 (May 11, 1994).

“The bill... would amend the Truth in Negotiations Act for DOD and civilian agencies to create a new commercial item exception.... *This approach would relieve commercial contractors from what they consider their number one disincentive to participating in government procurements – the burden of collecting cost data for the government.*” (emphasis added). S. Rep. 103-258, 1994 U.S.C.C.A.N. 2561 at 2566 (May 11, 1994).

<sup>3</sup> H.R. 1670, The Federal Acquisition Reform Act of 1995, Joint Hearing Before the Committee on Government Reform and Oversight and the Committee on National Security House of Representatives at 2 (May 25, 1995).

Section 803 further amends Section 2306a(d) by inserting a new paragraph (2) that renders an offeror ineligible, unless the offer is later determined to be in the best interest of the US government, for the contract award if the offeror “fails to make a good faith effort to comply with a reasonable request to submit data” in accordance with the statute. This new paragraph incorporates into the cost and pricing statute a memorandum by the Director, Defense Pricing and Contracting (DPC), on March 22, 2019, titled, “Process and Reporting Requirements Pertaining to Contractor Denials of Contracting Officer Requests for Data Other than Certified Cost or Pricing Data.” That memorandum states, in part, that if a contractor “fails to comply with a contracting officer’s request for data other than certified cost or pricing data to support a price reasonableness determination,” the contractor becomes ineligible for the award, unless there is a determination such an award would be in the best interest of the US government.

It is important to note what these new provisions do **not** do – they do not impose a requirement that does not currently exist in the FAR or DFARS that compel commercial suppliers to provide uncertified data when requested, or otherwise alter the hierarchy of price analysis that contracting officers are supposed to use when determining whether a price is fair and reasonable. Under the new provisions, the contours of the current law on commercial pricing remain the same. It simply effectuates policy changes that had already been made by DPC, which has resulted in no appreciable changes as to how contracting officers should make price-reasonableness determinations. Therefore, the practical effect of the changes made under the NDAA appears very limited.

However, the amended statute leaves undefined key terms, including, what constitutes “a good faith effort” or “a reasonable request.” It will likely take several years for the DOD to define these terms in the DFARS. Until these terms are further defined, the standards of reasonableness and good faith will be determined on a case-by-case basis. Nonetheless, under these changes, the best practice has been, and continues to be, for suppliers to (1) develop robust commerciality packages upfront in support of their sales to the DOD, and (2) insist that documentation of any dispute about the commerciality of products or services offered to the DOD be made carefully and, indeed, resolved up front as fully as possible with the contracting officer, with that documentation included in the contract file.

## Contacts

### **Pablo E. Carrillo**

Of Counsel, Washington  
T +1 202 457 6415  
E [pablo.carrillo@squirepb.com](mailto:pablo.carrillo@squirepb.com)

### **Jack Deschauer**

Partner, Washington  
T +1 202 457 6338  
E [jack.deschauer@squirepb.com](mailto:jack.deschauer@squirepb.com)

### **Karen Harbaugh**

Partner, Washington  
T +1 202 457 6485  
E [karen.harbaugh@squirepb.com](mailto:karen.harbaugh@squirepb.com)