

# Special Regulatory/Contractual Update

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- On November 24, 2010, the DoD Director of Defense Procurement and Acquisition Policy issued a memorandum entitled, “Improving Competition in Defense Procurements.” This memo changes the “playing field” with a new, albeit DoD only, definition of “adequate price competition” used in Truth In Negotiation Act (TINA) determinations. Currently the regulatory/definitional standard is in FAR 15.403-1(c)(1)(ii) and (iii) (See 10 USC §2306a (b)(1)(A)). If adequate price competition exists contractors are exempt from providing (certified) cost/pricing data as well as the attendant liability associated with any such submittal. The FAR provision provides, in effect, that under the particulars of an acquisition, when multiple offers are “expected” to be received, then the receipt of only one offer may be deemed a result of a competitive acquisition (subject to the provisions therein) and “other than cost/pricing information” would be used in pricing determinations.

DoD has directed Contracting Officers to “no longer use (that specific FAR) standard...to determine that the offered price is based on adequate competition when only one offer is received.” DoD Contracting Officers are to utilize a revised definition whereby in those situations where only one offer is received, they may have to re-advertise the solicitation (or obtain a waiver) and/or engage in negotiations with that responding offeror.

“The basis for these negotiations shall be either certified cost or pricing data or other than certified cost or pricing data, as appropriate. In no event, should the negotiated price exceed the price originally offered.”

**COMMENT:** Nothing indicates when it is “appropriate” to obtain certified cost/price data. Originally, DoD noticed that this change would be inserted into the PGI but subsequently publicly acknowledged that it will be incorporated into the DFARS. Other issues include...

- The memo does not address the impact on subcontractors, lower tier subcontractors and how primes are to interpret TINA given this direction to Contracting Officers.
- The “turn-around” time for DCAA to accomplish its additional auditing obligations in a timely manner is lacking.
- No deviation from the FAR was issued notwithstanding that it is inconsistent with the FAR standard.
- There will be additional paperwork requirements which would trigger provisions of the Paperwork Reduction Act including the requisite OIRA clearance within OMB.
- Finally, there was no Federal Register publication for notice/comment.

## Points of Contact

ADROffice@Rumbaugh.net  
www.Rumbaugh.net

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In the past this publication has stated that...”how much data is needed and having the data does not ensure closure.” It is really a negotiation skill issue. Quoting from the November 2, 2007, Update (which quoted from an earlier Update):

“What is the ‘real’ problem? Does everyone (really) know how to ascertain whether a price is ‘fair and reasonable’—to both parties? It is submitted that having ‘additional’ information does not necessarily make a price ‘fair and reasonable’ in the opinion of that requesting party, if not, both parties. Could the Government provide additional contract management tools to assist Contracting Officers obtain a fair and reasonable price to both parties? The Navy recently implemented a policy change that is a step in that direction—see... (the March 2007) Update on recent Navy ADR changes.... Merely having ‘more’ information does not ensure a price is fair and reasonable. Additional contract management and negotiation tools that empower Contracting Officers on ‘getting-to-closure’ on fair/reasonable pricing should have been ‘the order of the day’!”

Discuss with counsel.

- NCMA has noticed its 29<sup>th</sup> Government Contract Management Conference, in Arlington, Virginia, for December 9-10, 2010... [www.ncmahq.org](http://www.ncmahq.org). It has also posted some of the presentation material at <http://www.ncmahq.org/Events/gcmcl0detail.cfm?ItemNumber=7847&token=17960&userID=32790>

Finally, this author will be presenting during the December 9<sup>th</sup> sessions, “And...the Rules-of-the-Road for the Promulgation of Government Contract Clauses/Regulations are...?” Powerpoint slides are available at <http://www.ncmahq.org/Events/PresentationDetail.cfm?ItemNumber=8576>

ADR Offices of  
**CHARLES E. RUMBAUGH**  
Arbitrator/Private Judge/Mediator  
310.373.1981 // 310.373.4182 (fax)

Los Angeles  
San Francisco

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