Undefinitzed Contract Actions (UCAs) are “any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. Examples are letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun.” UCAs are discussed at DFARS Subpart 217.74.

UCAs are a pain.

We have written about them before. See, for example, **this article** (written in 2017), in which we advised contractors to “try very hard to avoid them.”

UCAs are a pain for government contracting officers, as well. Often, they are under pressure to definitize the UCA, which tends to mean they are trying to evaluate the contractor definitization proposal, prepare a Pre-Negotiation Memo, get business clearance, confirm funds are available AND monitor the contractor’s ongoing performance—all at the same time. It ain’t fun and it ain’t pretty … as a rule.

And speaking of rules, on June 29, 2018, the DAR Council published a final rule (implementing DFARS **Case 2015-D024**) that modified weighted guidelines profit analysis for UCAs. It stated—

If the contractor demonstrates efficient management and cost control through the submittal of a timely, qualifying proposal (as defined in 217.7401(c)) in furtherance of definitization of an undefinitized contract action, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.

Whoohoo!

(That comment immediately above was sarcasm.)

That same final rule also stated: “If a substantial portion of the costs have been incurred prior to

definitization, the contracting officer may assign a [weighted guidelines profit] value as low as 0 percent, regardless of contract type."

Thus, the DAR Council giveth and the DAR Council taketh away. And lo, it was done.

As part of the finalization of the rule, the DAR Council received public comments (as is required). A couple of the comments pointed out that the DAR Council was ignoring Congress' direction with respect to UCA definitization, as codified in Section 811 of the 2017 National Defense Authorization Act (NDAA). Section 811 required that contractor profit be based on its situation at the time it submitted a "qualifying" proposal, not on the situation at the time the UCA was definitized. In typical DAR Council fashion, the rule-makers hand-waved the comment away, by stating that DFARS Case 2017-D022 had been opened to implement the requirements of Section 811.

But DFARS Case 2017-D022 was never issued. In another typical bureaucratic maneuver, DFARS Case 2017-D022 was " **merged** " into DFARS Case 2018-D008, such that the requirements of Section 811 of the 2017 NDAA were combined with the requirements of Section 815 of the NDAA "relating to commercial items."

Yeah, that makes no sense to us either. It's probably a typo, because Section 815 didn't deal with commercial items. Instead, Section 815 made it much harder for contracting officers to unilaterally definitize a UCA—which is what happens if negotiations break down. If you follow the first link above, you can find an example of that unfortunate and unpleasant situation.

With us so far?

If so, you are ready to hear about DFARS **Case 2018-D008** , a proposed rule issued on February 16, 2019.

Remember, the proposed rule is supposed to combine requirements from two NDAAs into one. Let's see how the DAR Council did.

The proposed rule, if implemented as drafted, make three significant revisions, as follows:

-

If a UCA is definitized after the end of the 180-day period beginning on the date the contractor submits a qualifying proposal, the head of the agency shall ensure profit reflects the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

-

The definitization of a UCA may not be extended by more than 90 days beyond the maximum 180-day definitization schedule negotiated in the UCA without a written determination by the Secretary of the military department concerned, the head of the defense agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment, that it is in the best interests of the military department, the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action.

-

Contracting officers of the Department of Defense may not enter into a UCA for a foreign military sale unless the contract action provides for definitization within 180 days and the contracting officer obtains approval from the head of the contracting activity. The head of the agency may waive this requirement if necessary to support a contingency or humanitarian or peacekeeping operation.

Those three points above came from the 2017 NDAA. In addition, the proposed rule states:

Contracting officers may not unilaterally definitize a UCA with a value greater than $50 million until—

-

The end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or the date on which the amount of funds expended under the contractual action is equal to more than 50 percent of the negotiated overall not-to-exceed price for the contractual action;

-

The service acquisition executive for the military department that awarded the contract or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a defense agency or other component of the Department of Defense, approves the definitization in writing;

-

The contracting officer provides a copy of the written approval to the contractor; and

-

A period of 30 calendar days has elapsed after the written approval is provided to the contractor.

That part above came from the 2018 NDAA.

So far, so good.

In addition, the definition of “qualifying proposal” would be revised (again). If the proposed rule is implemented as drafted, then a qualifying proposal would be one that “contains sufficient information to enable DoD to conduct a ‘meaningful audit’.” The former language defined it as a proposal that contains sufficient information to enable DoD to conduct a “complete and meaningful audit.” That change is nice, but we continue to point out that the definition is *hella squishy*
. What happens if the contracting officer determines that field pricing assistance isn’t necessary? What happens if the auditor doesn’t like the proposal, but the contracting officer believes they can negotiate a fair and reasonable price? What happens if the customer requires the contractor to submit a proposal over and over and over again, using the pretext that it is not

auditable?

Call us cynical, but we have concerns.

Anyway, that’s the proposed rule. With background that was curiously omitted. As always, public comments may be submitted. If you have some UCAs, consider commenting on the proposed rule.