

You Like Checklists? Too Bad: Another One is on the Way!

Written by Nick Sanders
Friday, 24 May 2013 00:00



Ah, checklists.

Love ‘em, hate ‘em: you can’t get away from ‘em.

‘Specially in the world of 21st Century government contracting.

We’ve already said [our piece](#) about DCAA’s proclivity to use checklists in lieu of auditor judgment.

We’ve already said [too much](#) about DOD’s new Proposal Adequacy Checklist, now enshrined in the DFARS like an ancestral vase, containing the ashes of the venerated (and yet departed) Contracting Officer ability to write clear solicitation Section L proposal instructions, and the CO ability to evaluate cost proposals s/he receives.

And now comes the Forward Pricing Rate Proposal Adequacy Checklist, courtesy of [DFARS Case 2012-D035](#)

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Because this is a proposed DFARS rule, it will not affect all contractors—just the ones trying to

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sell to the Pentagon. So there's that, anyway.

The purpose of the proposed rule is to “provide[] guidance to contractors for the submittal of forward pricing rate proposals by requesting that contractors submit a proposed forward pricing rate proposal adequacy checklist with their forward pricing rate proposals to ensure submission of thorough, accurate, and complete proposals.” The assumption being, of course, that without such a checklist those ignorant defense contractors won't be able to submit FPRPs that are thorough, accurate, and complete. Almost as if no contractor had ever submitted a thorough, accurate, and complete FPRP in the history of defense contracting, stretching back at least to the publication of the Federal Acquisition Regulations in 1984.

The proposed revision would add a section to the current language at DFARS 215-403-5 (“Instructions for submissions of certified cost or pricing data or data other than cost or pricing data pursuant to the procedures in FAR 42.1701(b)”). The additional language would state—

(b)(3) For contractors following the commercial contract cost principles in FAR 31.2, if the contracting officer determines that a forward pricing rate proposal should be obtained pursuant to FAR 42.1701, the contracting officer shall require that the forward pricing rate proposals comply with FAR 15.408, Table 15-2, and DFARS 252.215-7002. The contracting officer should request that the proposal be submitted to the Government at least 90 days prior to the implementation date for the proposed rates. To ensure the proposal is complete, the contracting officer shall request the contractor complete the contractor forward pricing rate proposal adequacy checklist at Table 215-XX, and submit it with the forward pricing rate proposal.

Before we get into the actual Table 215-XX requirements, let's take a second and look at that paragraph above. First of all, it clearly implies that submission of FPRPs requires compliance with the Truth-in-Negotiations Act (TINA), when it requires contractors to submit FPRPs that comply with Table 15-2. In fact, the only time contractors must comply with the format requirements of FAR Table 15-2 is when they are submitting “certified” cost or pricing data associated with a pricing action subject to TINA. Otherwise, compliance with FAR Table 15-2 format requirements is discretionary. Since the proposed rule makes compliance with Table 15-2 mandatory, and only TINA-compliant proposals must comply with Table 15-2, then it seems quite clear that the DAR Council thinks FPRPs are subject to TINA.

But does TINA really apply to Forward Pricing Rate Proposals? Let's look at the DCAA Contract Audit Manual (February 19, 2013 edition), at 14-103.2 (“TINA Applicability”). It says—

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The TINA applies to negotiated prime contracts, modifications, and subcontracts where the Government required certified cost or pricing data. (See FAR 15.403-1 and DFARS 215.403-1 for exceptions to this requirement.) In addition, this includes interdivisional work, final price redeterminations, equitable adjustments, and termination settlements. TINA also applies to modifications of advertised contracts when the modification exceeds the applicable dollar threshold. TINA also applies to change orders when the absolute value of the increase and decrease exceeds the applicable dollar thresholds, even though the net change in price itself is under the threshold.

We are sorry. We do not see FPRPs in the above list of contract actions subject to TINA. In fact, FPRPs are *not* contract actions; *they are proposals to establish rates to be used in pricing future contract actions that may be subject to TINA*.

If you need further evidence to support our position that TINA is not applicable to FPRPs, ask yourself the following questions.

1.

TINA requires an executed Certificate of Current Cost or Pricing Data (CCPD), certifying that all cost or pricing data submitted is accurate, current, and complete as of the date of completion of price negotiation. What is the date of completion of price negotiation on a set of Forward Pricing Rates? What is the price that was established by submission of an FPRP?

2.

The remedy for a TINA violation (called “defective pricing”) is a unilateral downward price adjustment (plus interest on any overpayments). How would a price adjustment associated with a set of Forward Pricing Rates be calculated?

Yeah, no.

Also, look at the statement that says, “The contracting officer should request that the proposal be submitted to the Government at least 90 days prior to the implementation date for the proposed rates.” The Pentagon would have the contractor calculate its best guess of future indirect cost rates to be incurred, and then wait 90 days to use those rates.

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Think about it.

If the contractor had submitted those rates, but did not use them (or at least disclose them) on its proposals for 90 days, then any proposal subject to TINA submitted during that period *would have been defectively priced*

. Nope. When submitting proposals subject to TINA, the contractor should always be using its most current direct and indirect cost estimates (or at least disclosing them). Any other practice essentially invites the government to have post-award audit findings.

So, once again: *Yeah, no.*

As for the Checklist itself, there are 27 required items. None of the 27 items are particularly objectionable, though perhaps some will be considered burdensome for many contractors who consider estimates of future direct and indirect costs three, four, or five years in the future to be more in the nature of a scientific wild ass guess (SWAG) than a rigorous and auditable cost estimate.

Is this Checklist even necessary?

Well, the fact of the matter is that many contractors have been complaining for several years that they can no longer reach agreement with their DCMA Administrative Contracting Officers (ACOs) on Forward Pricing Rates to be used. DCMA has resorted to issuing Forward Pricing Rate Recommendations (FPRRs)—which are essentially unilateral determinations of the rates that DOD will agree to in contract negotiations—instead of the bilateral Forward Pricing Rate Agreements (FPRAs). This is not a good thing and leads to protracted negotiations and contractor complaints of unfairness.

As we've [opined before](#), we see two primary causes of the dearth of FPRAs. One root cause is that DCAA cannot perform both a timely and high-quality GAGAS-compliant audit on contractor FPRPs. Even though the audit agency has [recently revised](#) its audit guidance in this area,

our view

is that DCAA's continued attempts to comply with GAGAS in audits of what are essentially contractor guesses about the state of the company many years in the future is both overzealous and overreaching.

The second root cause, as we've told our readers before, is that DCMA itself has created [a process](#)

that is overly bureaucratic, and it's executed by DCMA personnel who have—in the opinion of both GAO and DCMA leadership—lost the critical skill sets and expertise to perform it. Again, we are not pulling this assertion from some rectal database full of imaginary numbers; this is one of the

key findings

from the Government Accountability Office, based on interviews of DCMA contracting personnel.

Apparently, the rule-makers at the DAR Council believe they have found a third root cause for the lack of FPRAs. It's the contractors' fault. If only those lazy contractors would submit thorough, accurate, and complete FPRPs, then the auditors could audit timely, reach high-quality (and supportable!) conclusions, and then the ACOs could work their bureaucratic processes more quickly. Problem solved!

Yeah, no.

We're not saying that contractor FPRPs are perfect; certainly, there is room for improvement. But mandating a Checklist and requiring contractors to comply with the format of FAR Table 15-2 ain't gonna fix the problem.

This is another example of bureaucrats fixing a problematic process by adding more processes. We discussed that unfortunate phenomenon [right here](#). DCMA would be better off, in our view, by training up its contracting workforce to restore the lost expertise, and then giving the trained personnel discretion to enter into FPRAs without the burdensome and time-consuming oversight of the current process. DCAA would be better off, in our view, by admitting that contractor FPRPs are not the same as cost proposals submitted to enter into a priced contract, and permitting auditors more flexibility in audit approach. (Establishing firm deadlines wouldn't hurt either.) Taking an incurred cost audit approach to a SWAG is never going to work out well for either DCAA or the contractor.

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If we've persuaded you that something's amiss with this proposed rule, you can submit your comments to the DAR Council. As the proposed rules says in the Federal Register—

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email [Jasmeet K. Seehra@omb.eop.gov](mailto:Jasmeet.K.Seehra@omb.eop.gov), with a copy to the Defense Acquisition Regulations System, Attn: Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Why not take advantage of the invitation and submit your comments?