

DoD thresholds for cost and pricing data poised to increase to \$2M, reducing contractor risks of defective pricing and CAS liability

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In just over two months, the dollar threshold triggering the requirement for certified cost and pricing data under Federal Acquisition Regulation (“FAR”) 15.403-4 and application of the Cost Accounting Standards (“CAS”) pursuant to FAR 9903.201-1 will increase from \$750,000 to \$2 million for all Department of Defense (“DoD”) contracts.

In a memorandum, dated April 13, 2018, the Defense Pricing/Defense Procurement and Acquisition Policy (“DP/DPAP”) advises DoD contracting officers that, effective July 1, 2018, they shall use \$2 million as the threshold for obtaining certified cost and pricing data (a requirement rooted in the Truthful Cost or Pricing Data statute, still commonly referred to as the “Truth in Negotiations Act” or “TINA”). See Mem. from Shay Assad, Director, Defense Pricing/Defense Procurement and Acquisition Policy, DARS Tracking No: 2018-O0012 (Apr. 13, 2018) (“Memorandum”). The \$2 million figure represents a 167% increase over the previous threshold of \$750,000 and will still be subject to periodic updating to keep pace with inflation, pursuant to 41 U.S.C. § 1908.

Because the CAS threshold is tied, by statute, to the TINA threshold, the July 1 increase will also raise the threshold for application of the CAS. *Id.*; see 41 U.S.C. § 1502(b)(1)(B); 48 C.F.R. § 9903.201-1. Therefore, in lieu of FAR clauses 52.230-1 through 52.230-5, where the CAS threshold is referenced, contracting officers will be citing the provisions set forth in Attachment 1 to DP/DPAP’s April 13th guidance. Memorandum at 1.

This class deviation implements section 811 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. No. 115-91, 131 Stat. 1283) (“2018 NDAA”), which amends 10 U.S.C. § 2306a and 41 U.S.C. § 3502. Consistent with FAR 1.404(c) and the Defense Federal Acquisition Regulation Supplement 201.4, this class deviation only applies to DoD contracts. While section 811 of the 2018 NDAA amends Title 41 for both DoD and civilian contracts, neither the General Services Administration (“GSA”) nor the National Aeronautics and Space Administration (“NASA”) have yet incorporated these changes. Accordingly, the TINA and CAS thresholds remain at \$750,000 for all civilian agency contracts.

While this threshold increase is likely to ease the regulatory burden and liability risk to contractors (and might even facilitate a quicker pre-award phase for solicitations below the threshold), contractors should note that contracting officers may still seek to require cost or pricing data without certification, pursuant to FAR 15.403-3(a)(1)(ii). Accordingly, contractors should review their contract opportunities and amend their internal policies to ensure conformity with the threshold increase in their own proposals as well as their subcontracts. Additionally, the increased threshold means the government will have a smaller population of contracts subject to defective pricing audits, potentially increasing the likelihood of an audit for negotiated contracts in excess of \$2 million. On the other hand, civilian agency contractors should continue to apply the \$750,000 threshold or risk being found non-responsive to solicitation requirements, at least until similar, applicable GSA or NASA guidance arrives or the FAR Council amends FAR Parts 15 and 30, in accordance with 41 U.S.C. § 1303. We will keep you apprised of all further developments related to the implementation of section 811 of the 2018 NDAA, including its incorporation by the civilian agencies.

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