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Department of Defense Contract Pricing

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The Department of Defense (DOD) frequently turns to private contractors to provide it with the goods and services that DOD needs to carry out its mission. Federal contracting regulations require that contract prices be “fair and reasonable,” and include several mechanisms that DOD may exercise to ensure that it is not overcharged by these private vendors. Still, in instances throughout DOD’s history, it has accused some contractors of overcharging the government, leading some observers to claim a loss of taxpayer money.

Congress has enacted legislation to establish processes by which DOD may determine whether a contract’s price is fair and reasonable, including the Truthful Cost and Pricing statute (10 U.S.C. §§ 3701-08 and 41 U.S.C. §§ 3501-09). In versions of the National Defense Authorization Act (NDAA) over the past ten years, Congress has enacted changes to contract pricing-related statutes, including raising the Truthful Cost and Pricing statute cost threshold, and changing criteria for contracting officers to use in determining if a contract’s price is fair and reasonable.

Private vendors have been accused of overcharging the U.S. government since the Revolutionary War. In the past five years, several high-profile civil cases involving the Department of Justice have attracted public and congressional attention to the issue of DOD contract pricing.

Congress is considering legislation that increases cost-related data submission requirements for DOD vendors. It could also consider legislation that applies current requirements to more vendors. Alternatively, Congress might consider loosening some of these requirements to allow more contractors to enter the field and bolster competition to drive down prices. Congress may also consider whether or not to give DOD additional resources to improve how it collects and analyzes the pricing data that it does receive directly from vendors.

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Department of Defense Contract Pricing: Purpose and Background

The Department of Defense (DOD) often relies on private contractors to provide the goods and services needed to carry out its mission, and DOD spends more than any other federal agency on contracts. DOD contract obligations in Fiscal Year 2022 (FY2022) totaled roughly \$414.5 billion, or about 60% of total federal contract obligations.¹

While they are similar in some respects, the federal and private sectors frequently operate differently. For example, the federal government may act as the single purchaser of certain goods and services, which can result in a monopsony (a market with only one buyer), while the private sector includes multiple buyers and multiple sellers, resulting in more competition.² Furthermore, federal contracting regulation requires that contract prices be “fair and reasonable,” and allows government officials to ask contractors for pricing data to ensure this.³

DOD contracting-related statutes are covered in both Title 41 and Title 10 of the *U.S. Code*. Title 41 addresses general federal procurement policy that applies to DOD unless otherwise covered in Title 10, which applies to the armed forces specifically. Title 10 addresses several DOD-specific exceptions regarding procurement policy. The procurement provisions in Title 41 and Title 10 are implemented by the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS)—the DOD-FAR supplement. (For additional information, see CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, coordinated by Erika K. Lunder). Congressional clients seeking further information may contact David H. Carpenter.

DOD’s process for procuring goods and services differs in some ways from that of other executive agencies. DOD’s need for a unique set of rules and institutions is reflected in the DOD-specific procurement statutes contained in Title 10 and its regulatory implementation, the Defense Federal Acquisition Regulation Supplement (DFARS).⁴ Government officials aim to ensure that DOD contract obligations fund “fair and reasonable” contracts and do not allow contractors to gain what some sources call “excessive profits.”⁵

Federal regulations acknowledge that a lack of competition may result in the types of excessive profits that the government aims to avoid. The Federal Acquisition Regulation (FAR) states that “practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants.”⁶ Both the legislative and executive branches have attempted to reduce the amount of “excessive profits” for DOD

¹ Government Accountability Office, “A Snapshot of Government-Wide Contracting for FY 2022,” August 2023. Obligations occur when an agency enters a contract with vendors, employs personnel, or otherwise commits to expending appropriated funds.

² RAND Corporation, “Profit Regulations of Defense Contractors and Prizes for Innovation,” 2005, pp. v-vii.

³ 48 C.F.R. §15.402. Generally, it is common practice to refer to the “FAR” (e.g., “FAR 6.302,” or “Subpart 15.3 of the FAR”) in conversation and text yet cite the *Code of Federal Regulations* (e.g., 48 C.F.R. §42.302) when identifying the FAR as the source of material.

⁴ The DFARS is the DOD’s implementation and supplementation of the FAR.

⁵ RAND, “Price-Based Acquisition: Issues and Challenges for Defense Department Procurement of Weapon Systems,” 2005, p. 16

⁶ 3 C.F.R. §3.301.

contractors since the genesis of the defense acquisition system that emerged at the end of World War II.⁷

Competitively Bid DOD Contracts

Title 10 and the DFARS reflect the idea that DOD sometimes must procure its goods and services differently than other federal agencies, necessitating unique adaptations of the statutory and regulatory framework. Notwithstanding such exceptions, the government-wide procurement provisions of Title 41 and the FAR apply to DOD unless otherwise specified in Title 10 or the DFARS. Section 3301 of Title 41 requires that executive agencies “obtain full and open competition through the use of competitive procedures” when “conducting a procurement for property and services.”⁸ This stipulation includes several exceptions, such as contracts that acquire commercially available products, and contracting actions in which the prime contract is valued at or below the simplified acquisition threshold, which is generally \$250,000.⁹

The FAR states that “normally, effective price competition results in realistic pricing,” and promotes competition as the primary method through which the government can ascertain a fair and reasonable contract price.¹⁰ The FAR defines two or more competitive offerors for a given contract as “adequate price competition.”¹¹ Competitively bid contracts, or contracts with two or more bidders, are the default mode for both DOD and the rest of the federal government. This method incentivizes contractors to win the contract by bidding a lower price than their competitor(s).¹²

DOD uses several types of competitively bid contracts, including fixed-priced contracting and cost-reimbursement contracting.¹³ Fixed-priced contracting awards the contract to the vendor with the lowest offered price that can meet all required specifications.¹⁴ The FAR states that this type of contract places “full responsibility on the contractor for performance costs and resulting profit or loss.”¹⁵ The FAR also states that fixed-price contracts are “ordinarily in the government’s interest.”¹⁶ The government incurs less risk using this method. Critics of fixed-price contracting argue that it is too inflexible for companies, and may lead to increased claims and litigation by contractors.¹⁷

⁷ Thomas L. McNaugher, “New Weapons, Old Politics: America’s Military Procurement Muddle,” (The Brookings Institution, 1989), Ch. 2.

⁸ 41 U.S.C. §3301; See also 10 U.S.C. §3201.

⁹ Federal Register, “Federal Acquisition Regulation: Increased Micro-Purchase and Simplified Acquisition Thresholds,” July 2020.

¹⁰ Federal Acquisition Regulation, §16.104.

¹¹ Federal Acquisition Regulation, §15.403-1. The FAR defines “adequate price competition” but does not explicitly define “fair and reasonable price.”

¹² Defense Acquisition University, “Fair and Reasonable Price Determination.”

¹³ There are many other types of contracting types, including sub-categories of fixed-priced and cost-reimbursement contracts, which can be found in the FAR, §16.

¹⁴ FAR, §16.202-1. Specifically, a firm-fixed-price contract’s price is “not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract.”

¹⁵ Ibid.

¹⁶ FAR, §16.104.

¹⁷ Sandra I. Erwin, National Defense Magazine, “Pentagon Acquisition Chief Warns About Misuse of ‘Fixed Price’ Contracts,” February 2013.

In contrast, cost-reimbursement contracting reimburses the contractor for the “allowable incurred costs.”¹⁸ Cost-reimbursement contracts allow contractors to take on less financial risk when developing a product and therefore may be more desirable to some vendors. The FAR states that cost-reimbursement contracts provide “only a minimum incentive to control costs.”¹⁹ Critics of cost-reimbursement contracts argue that while contractors are nominally prevented from overcharging the government under this structure, companies can hide profits in overhead charges and services fees.²⁰

Sole-Source DOD Contracts

Sole-source contracts are contracts in which the government has only solicited, and negotiated with, one source.²¹ Title 10 and Title 41 refer to sole-source contracts as procedures “other than competitive procedures,”²² while the FAR refers to sole-source contracts as “contracting without providing for full and open competition.”²³ This definition by negation may suggest that, per statute and regulation, this type of contracting should be the exception and not the norm.

Title 10 states that DOD “shall obtain full and open competition through the use of competitive procedures.”²⁴ It also contains several exceptions that allow for a sole-source contract under certain circumstances, including if:

- Only one “responsible source” can fulfill the contract’s requirements;²⁵
- Procurement of the good or service has an “unusual and compelling urgency”;²⁶
- A national emergency or need to “achieve industrial mobilization” exists;²⁷
- The offeror bids a concept that is “unique or innovative” and “not otherwise available”;²⁸
- The contract is for certain types of commercial products;²⁹
- The contract is for certain types of research and innovation awards; and³⁰
- The contract is for certain types of small businesses.³¹

Title 10 requires that DOD contracting officers provide detailed justification for such exceptions and receive approval to proceed from their agency head or other designated official.³²

¹⁸ FAR, §16.301-1.

¹⁹ FAR, §16.306.

²⁰ Harvey Sapolsky et al, “U.S. Defense Politics: The Origins of Security Policy,” (Routledge, 2020), Ch. 8.

²¹ FAR, §2.101.

²² 10 U.S.C., §3204. 41 U.S.C. § 4103.

²³ FAR, §6.3.

²⁴ 10 U.S.C., §3201.

²⁵ 10 U.S.C. §3204(a).

²⁶ 10 U.S.C. §3204(c).

²⁷ 10 U.S.C. §3204(a).

²⁸ 10 U.S.C., §3204(b).

²⁹ 10 U.S.C. §3204(a).

³⁰ 10 U.S.C. §3204(d).

³¹ DFARS, PGI 219.808-1: Sole Source, September 2023.

³² 10 U.S.C., §3204(e). Additionally, these justifications are required to be made publicly available within a certain timeframe.

Additionally, statute and regulation require DOD to conduct what is called a “price negotiation” process for sole-source contracts.³³ Some sole-source contracts also require that the contractor submit pricing data and information to help prevent overcharging the government. This process is explained in the next section of this report.

Statutes and Regulation Regarding Contract Pricing

Statutes and regulations regarding contract pricing aim to ensure that the contract price is both fair and reasonable. Statute and regulation also recognize the role that profit plays in motivating vendors to compete for government contracts.³⁴ Reconciling incentives for vendors to bid for government contracts with fair and reasonable prices is a central tension of federal acquisition regulation.

In the absence of competition among multiple incentivized vendors, determining a fair and reasonable cost of a DOD contract is complex. The FAR acknowledges “the uncertainties involved in performance and their possible impact upon costs,” for sole-source contracts. It also requires the government to identify and evaluate these uncertainties. The FAR also states that contracts involving “complex requirements, particularly those unique to the government, usually result in greater risk assumption by the Government.”³⁵ Many DOD contracts contain complex, government-unique requirements, particularly high-cost procurement contracts for complex combat and weapons systems.

Government contracting officers are tasked with understanding these complex requirements and ensuring that the final contract price is fair and reasonable. According to the FAR, contracting officers are responsible for “evaluating the reasonableness of the offered prices” using a variety of techniques and procedures.³⁶ Several statutes and regulations provide guardrails for DOD contract pricing, attempting to ensure that prices remain fair and reasonable. These guardrails include requiring that contractors provide cost and pricing data, and that contractors submit this data in a uniform and timely manner. Selected laws and regulations are discussed below. Certain data requirements are not levied on all types of contracts.

Truthful Cost or Pricing Data (10 U.S.C. §§3701-08; 41 U.S.C. §§3501-09)

The Truth in Negotiations Act (TINA) was enacted in 1962 to prevent government contractors from overcharging the U.S. government.³⁷ The name has since changed to be Truthful Cost or Pricing Data, although it is still commonly called TINA. While certain parts of the statute have changed since its original enactment, TINA is currently codified at 41 U.S.C. §§3501-09 and 10 U.S.C. §§3701-08.³⁸ The current statute contains definitions and provides guidelines for how agencies should require and certify cost and pricing data. TINA is implemented in regulation in both the FAR and DFARS.³⁹

³³ 10 U.S.C. §3204.

³⁴ Federal Acquisition Regulation, §15.402.

³⁵ FAR, §16.104.

³⁶ FAR, §15.404-1.

³⁷ P.L. 87-63, 70A §128, <https://www.congress.gov/87/statute/STATUTE-76/STATUTE-76-Pg528.pdf>.

³⁸ 41 U.S.C., Ch. 35; 10 U.S.C., Ch. 271.

³⁹ See FAR, §15.403, and DFARS PGI 215.4: Contract Pricing, October 2023.

TINA is intended to support contracting officers and other government officials involved in the contracting process. According to the Department of Justice, TINA's goal was to "help level the playing field in sole-source contracts... by making sure that government negotiators have access to the cost or pricing data that the offeror used when developing its proposal."⁴⁰ Similarly, the Defense Contract Audit Agency (DCAA), which performs DOD's contract audits, states "the purpose of [TINA] is to put the Government on equal footing with the contractors when submitting certified cost or pricing data."⁴¹

The offeror of a sole-source contract that exceeds the TINA threshold (currently \$2 million) must submit certified cost or pricing data that is "accurate, complete, and current" to the government.⁴² These requirements are usually determined during the contract's negotiation process, and often must also include subcontract cost data. TINA also includes penalties for contractors that do not comply with its requirements.

Under TINA, a contractor found to have provided the government defective pricing, or data that is not "accurate, complete, and current," can be subject to a "price adjustment remedy." Such a remedy may require the contractor to repay DOD a portion of the money it earned on the contract, sometimes with interest applied.⁴³ Contractors may also be held liable for making false or fraudulent claims under, for example, the False Claims Act, the anti-fraud provision of the Contracts Dispute Act, and the Program Fraud Civil Remedies Act. For more information, see CRS Report R45322, *Selected Legal Tools for Maintaining Government Contractor Accountability*, by David H. Carpenter.

DOD's Defective Pricing Audit Process

Contractors may not always submit sufficiently accurate or up-to-date pricing data required by TINA. According to DCAA, "defective pricing occurs when a contractor does not submit or disclose to the government certified cost or pricing data that is accurate, complete, and current prior to reaching a price agreement."⁴⁴ Throughout DOD's contracting process, statutory and regulatory requirements are in place to try to prevent, identify, and ameliorate defective pricing.

Federal regulations impose 14 principles of ethical conduct with which federal employees must comply.⁴⁵ One of these principles requires that federal employees "shall disclose waste, fraud, abuse, and corruption to the appropriate authorities."⁴⁶ This includes any potential defective pricing, and means that DOD contracting officers have an affirmative responsibility to report any suspected cases of defective pricing. Title 10, United States Code, Sec. 3702 contains the statutory requirements for DOD's cost or pricing data certification process.

⁴⁰ Department of Justice, "Government Contractor Agrees to Pay \$8.4 Million to Resolve Claims Related to its Failure to Disclose Cost or Pricing Data," November 2022.

⁴¹ Defense Contract Audit Agency, "Guidebook," Ch. 14, p. 11.

⁴² DFARS, PGI 215.4: Contract Pricing, October 2023.

⁴³ Ibid.

⁴⁴ Defense Contract Audit Agency, "Guidebook," Ch. 14.

⁴⁵ 5 C.F.R. § 2635.101(b). This is not applicable to enlisted members of the uniformed service. The Uniform Code of Military Justice does not contain an equivalent provision.

⁴⁶ Department of Justice, "The 14 General Principles of Ethical Conduct." The basis for these principles can be found in 5 C.F.R., §2635.101, "Basic Obligation of Public Service," which includes similar language.

While not all cases of defective pricing are fraudulent, some defective pricing audits may become fraud cases. Because DOD does not prosecute fraud, such a case would then be investigated by the Department of Justice.⁴⁷

Multiple factors and definitions from both statute and regulation determine how contractors may be found responsible for overcharging the government. The phases of this process can be separated into three categories: pre-negotiation, negotiation, and post-award, which are discussed in turn below.

Pre-Negotiation

Before a contract is negotiated and ultimately awarded (pre-negotiation), DOD normally releases a *request for proposal* (RFP). This is a document that outlines the contract's requirements and its anticipated terms and conditions.⁴⁸ The FAR contains procedures contracting officers must follow when drafting any contract's RFP. The procedures require offerors to submit certified cost or pricing data. Contractors must provide the cost and pricing data, the information used during the contractor's price estimating process, and "the relationship between line-item prices and the total contract price."⁴⁹ The FAR specifically notes that:

there is a clear distinction between submitting certified cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of certified cost or pricing data is met when all accurate certified cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the Contracting Officer or an authorized representative.⁵⁰

This language explicitly requires offerors to submit cost or pricing data with a degree of analytical rigor and curation beyond simply submitting raw data. It also establishes a standard that the data submitted must be "reasonably available," which is a requirement that DOD may later assess during the audit process. Also subject to assessment in the event of an audit, per the FAR, is the vendor's obligation to provide the data to the government, whether or not the government requests it.

Additionally, although contracting officers are responsible for examining cost and pricing data, this wording of the FAR places some of the burden directly on the offeror as well, with consequences should the offeror be found to have submitted inaccurate data. These consequences will be discussed below.

Negotiation

During contract negotiations, contracting officers must develop a Price Negotiation Memorandum (PNM), which DCAA may use later during the auditing process, if a contract is believed to have defective pricing. Per the FAR, this document supports "[determination] of fair and reasonable price" and "documents the contracting officer's determination that the statutory price or fee

⁴⁷ 31 U.S.C. §3729-3733. According to the Department of Justice, the False Claims Act (FCA) was originally enacted "in response to defense contractor fraud during the American Civil War." <https://www.justice.gov/civil/false-claims-act>. DOD can bring fraud claims under the Program Fraud Civil Remedies Act <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/550505p.pdf>.

⁴⁸ Defense Acquisition University, "Request for Proposal."

⁴⁹ FAR, §15.203.

⁵⁰ FAR, §15.408.

limitations have not been exceeded.”⁵¹ The FAR states that cost or pricing data must be submitted “as close as practicable to the date of agreement on price” between the offeror and the government.⁵² This submission includes an acknowledgement by the contractor that the data it is submitting is “accurate, complete, and current.”⁵³ TINA also requires that similar cost or pricing data be submitted before a prime contract’s price is modified to exceed \$500,000.⁵⁴

The contracting officer is to conduct a “proposal analysis” of the data to “ensure that the final agreed-to price is fair and reasonable.”⁵⁵ DOD has specific guidelines and processes to analyze the pricing of certain goods and services.⁵⁶ Even if a contract is not subject to TINA requirements, the contractor may still need to provide what statute and regulation refer to as “data other than certified cost or pricing data.” The Government Accountability Office (GAO) defines this as “pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair or reasonable price or to determine cost realism.”⁵⁷

Post-Contract Award

The defective pricing audit occurs post-contract award.⁵⁸ DCAA may conduct Truth in Negotiation audits to ensure that the contract cost has been accurate. It is to use the PNM that was submitted pre-award, as well as any other data that it collected during the pre-negotiation and negotiation phases as references during the audit.

When conducting the audit, DCAA analyzes the cost or pricing data that was submitted during the negotiation process. It applies the standards outlined in TINA and regulation, including whether:

- The data was “reasonably available”;
- The data was disclosed to the government; and
- The government relied on this data during its price negotiation and agreement.⁵⁹

According to its audit manual, DCAA begins post-award audits with a “risk assessment” and scoping exercise. The risk assessment allows DCAA to understand what areas of the contract require further evaluation.⁶⁰

DOD has several options if it finds that a contractor has submitted defective cost and pricing data. One option is to seek a “price adjustment remedy,” where the contractor and DOD can settle the case. If this happens, DOD can issue a Recommended Price Adjustment (RPA), or “an amount reported by DCAA in a post-award audit that reflects the estimated increase in contract price

⁵¹ FAR, §15.404-4.

⁵² FAR, §15.406-2.

⁵³ Ibid.

⁵⁴ 10 U.S.C. §2306a.

⁵⁵ DFARS, PGI 215.404-1: Proposal Analysis Techniques, September 2023.

⁵⁶ For example, the Defense Contract Management Agency has specific guidance for contracting officers to determine commercially available item pricing. See, <https://www.dcmil.commercial-item-group/>.

⁵⁷ Government Accountability Office, “*Federal Contracting: Implementation of Changes to Cost or Pricing Data Requirements*,” GAO-22-105307, April 2022, p. 6.

⁵⁸ Defective Pricing, or Post-Award Audits, are one of several types of audits that DCAA conducts. Other types of audits may be found in *DODI 7640.02 Policy for Follow-Up on Contract Audit Reports*, available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/764002p.pdf#page=14>.

⁵⁹ Defense Contract Audit Agency, “Guidebook,” Ch. 14.

⁶⁰ Ibid.

caused by a contractor submitting defective cost or pricing data.”⁶¹ It may also refer fraudulent activity to the DOJ or administratively pursue a Program Fraud Civil Remedies Act fraud claim.⁶² DOD’s definition of an RPA reflects the FAR language about the responsibility of defective pricing falling on the contractor instead of the government: the contract’s defective price is *caused by the contractor*.⁶³

As a second option, DOD can also recover its overpayment with interest. Per statute, if a contractor is found to have submitted defective cost or pricing data that led to overpayment by the government,

...the contractor shall be liable to the United States-

(A) for interest on the amount of such overpayment, to be computed-

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.⁶⁴

Per the False Claims Act, a contractor may also be subject to paying up to three times the original amount of damages, as well as a “penalty that is linked to inflation.”⁶⁵

Case Study: DOD Inspector General Audit of TransDigm

In 2021, DOD’s Inspector General (DODIG) released a report of its audit on the TransDigm Group Inc. (TransDigm), a DOD contractor that provides spare parts for aircraft. The audit was the result of a congressional request to determine “whether TransDigm earned excess profits.”⁶⁶

DODIG found that TransDigm earned a total excess profit of “at least \$20.8 million” in over one hundred separate contracts and further noted that DOD was not fully able to conduct a cost analysis as TransDigm did not submit cost or pricing data for its contracts.⁶⁷

The audit also asserted that TransDigm’s business model was to produce highly specialized spare parts, allowing it to operate in a sole-source environment that often involved low dollar-value contracts that did not surpass the TINA threshold, but that added up to large revenue totals for the company.⁶⁸

Finally, DODIG noted that the “the lack of policy compelling contractors to provide uncertified cost data when requested” can lead to excess contractor profits. DOD IG recommended that DOD Defense Pricing and Contracting (DPC) Principal Director review and potentially update the DFARS to strengthen cost analysis requirements “to determine price reasonableness for sole-source parts not subject to TINA.”⁶⁹

⁶¹ Department of Defense, “Policy for Follow-Up on Contract Audit Reports,” April 2015, p. 18. DFARS, PGI 215.402: Pricing Policy, September 2023.

⁶² CRS Report R45322, *Selected Legal Tools for Maintaining Government Contractor Accountability*, by David H. Carpenter

⁶³ FAR, §15.408.

⁶⁴ 10 U.S.C., §2306a.

⁶⁵ U.S. Department of Justice, “The False Claims Act,” April 2023. <https://www.justice.gov/civil/false-claims-act>.

⁶⁶ Department of Defense Office of Inspector General, “Audit of the Business Model for TransDigm Group Inc. and Its Impact on Department of Defense Spare Parts Pricing,” December 2021.

⁶⁷ Ibid.

⁶⁸ Ibid. According to the audit, more than 95% of the contracts that TransDigm won from DOD were not subject to TINA cost or pricing data requirements.

⁶⁹ Ibid.

According to testimony given by Deputy Inspector General Theresa S. Hull following the report's release, "the issues raised in this audit are not limited to just this company and its contracts with DOD. Sole source contractors' unwillingness to share cost data, and DOD contracting officers' limited success in negotiating fair and reasonable prices for sole-source parts are common findings that DODIG has highlighted in our audit reports for more than 20 years."⁷⁰

Cost Accounting Standards Rules

DOD's cost accounting standards (CAS) differ slightly from its process for auditing defective pricing, although the two procedures share some purpose and execution. The purpose of the CAS is to provide general accounting regularity and uniformity across all of DOD's many contractors.⁷¹ This, in turn, allows contracting officers to better understand contract accounting data, including data that may be used in contract pricing. The cost elements included in a contract proposal must also be consistent with the contractor's cost accounting system.⁷²

CAS requirements and their connection of cost information and contract negotiation are codified in statute: according to 41 U.S.C. §1502 "cost accounting standards... shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of... all negotiated prime contract and subcontract procurements."⁷³

Several categories of procurement are exempt from CAS rules, including:

- Contracts for commercial items (explained in greater detail later in this report);
- Contracts where the prices are "set by law or regulation";
- Firm fixed-price contracts "awarded on the bases of adequate price competition"; and
- Contracts under \$7.5 million.⁷⁴

Additionally, the military departments and the Office of the Secretary of Defense are authorized to grant CAS waivers in compliance with the FAR and statute. This includes proving that the contract would not be "reasonably obtained" without the waiver; the price of the contract can still be determined to be "fair and reasonable" without CAS data; and that "there are demonstrated benefits to granting the waiver."⁷⁵

Title 41 also establishes the Cost Accounting Standards Board (CASB), a federal organization tasked with generating and promulgating accounting practices and standards. These standards are codified in Part 9904 of the FAR.⁷⁶ The FAR notes that one of the federal government

⁷⁰ Department of Defense Office of Inspector General, "Statement of Theresa S. Hull, Deputy Inspector General for a Hearing on 'Price Gouging in Military Contracts: New Inspector General Report Exposes Excess profit Obtained by TransDigm Group,'" January 2022, p. 3.

⁷¹ 41 U.S.C. §1502.

⁷² DFARS, §252.215-7009.

⁷³ 41 U.S.C. §1502.

⁷⁴ Ibid.

⁷⁵ DFARS, §230.2.

⁷⁶ FAR Part 9904. Additional exemptions and procedures can be found in the CFR. The FAR is Chapter 1 of CFR, Title 48, and the DFARS is Chapter 2 of the CFR, Title 48. <https://www.ecfr.gov/current/title-48>.

representatives on the CASB must be a DOD representative with “experience in Government contract cost accounting,” appointed by the Secretary of Defense.⁷⁷

The DFARS contains specific criteria for an “acceptable accounting system,” including that the system and its associated cost data are “reliable” and “consistent” with DOD billing procedures.⁷⁸ DOD officials must be able to “rely upon information produced by the system that is needed for management purposes.”⁷⁹ Contracting officers must note the applicable CAS requirements when issuing a contract solicitation.⁸⁰

Critics of CAS requirements, including some commentators associated with the defense industry, assert that auditing systems are inflexible and deter some companies from wanting to contract with DOD.⁸¹

Case Study: Department of Justice Investigation of Booz Allen Hamilton

In July 2023, Booz Allen Hamilton, a company that frequently contracts with the Department of Defense and other federal agencies, settled a Department of Justice lawsuit alleging that the company had overcharged government customers.⁸² Booz Allen Hamilton agreed to pay \$377 million in response to allegations dating from 2011 to 2021 that it “improperly charged costs to its government contracts and subcontracts that should have been billed to its commercial and international contracts.”⁸³ According to the Department of Justice, Booz Allen Hamilton also “failed to disclose to the government the methods by which it accounted for costs supporting its commercial and international businesses.” The lawsuit was filed under a “whistleblower provision” of the False Claims Act by a former Booz Allen Hamilton employee. The Defense Contract Agency (DCAA) supported the Justice Department during its investigation.⁸⁴

Selected Recent National Defense Authorization Act Provisions Related to DOD Contract Pricing

Congress has historically addressed contract pricing, particularly DOD contract pricing. Several provisions in recent National Defense Authorization Acts (NDAAs) have focused on improving DOD’s contract pricing processes. These include, but are not limited to, the provisions listed below.

⁷⁷ FAR, §30. The other Federal representative must be a representative from the General Services Administration (GSA). Two individuals from the private sector are also members of the CASB, and the head of the CASB is the Administrator of the Office of Federal Procurement Policy (OFPP), an office within the Office of Management and Budget (OMB).

⁷⁸ DFARS, §252.242-7006.

⁷⁹ Ibid.

⁸⁰ FAR, §30.201-3. “(a) The contracting officer shall insert the provision at 52.230-1, Cost Accounting Standards Notices and Certification, in solicitations for proposed contracts subject to CAS as specified in 48 CFR 9903.201.”

⁸¹ *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, January 2019, https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume2/Recommendation_30.pdf.

⁸² Department of Justice, “Booz Allen Agrees to Pay \$377.45 Million to Settle False Claims Act Allegations,” July 2023.

⁸³ Ibid.

⁸⁴ Ibid.

Fiscal Year 2018 NDAA (P.L. 115-91)

Section 811 of the NDAA for FY2018 modified Title 10's cost or pricing data and reporting requirements.⁸⁵ It increased the threshold for contracts requiring certified cost or pricing data from \$750,000 to \$2,000,000. According to a GAO study on the impacts of this threshold increase, this change halved the number of contracts subject to TINA requirements.⁸⁶ This provision also modified Title 10 to allow contracting officers to require that offerors submit data other than certified cost or pricing data.⁸⁷

John S. McCain NDAA for Fiscal Year 2019 (P.L. 115-232)

Section 890 of the NDAA for FY2019 established a pilot program to accelerate DOD's contracting and pricing processes for contracts greater than \$50 million.⁸⁸ The program allowed selected contracts to reduce the required amount of cost or pricing data submitted to the government, and allowed acquisition officials to base price reasonableness determinations on "actual cost and pricing data for purchases of the same or similar [DOD] products."⁸⁹ The pilot program was extended by two years in Section 825 of the FY2020 NDAA⁹⁰ and by one additional year in Section 818 of the FY2023 NDAA.⁹¹

DOD launched the pilot program in 2019, allowing contracting officers with prior approval from the Principal Director, Defense Pricing and Contracting (DPC) to deviate from DFARS cost or pricing data requirements.⁹² DOD noted in the issuance of guidance for the pilot program that the program was intended to "assess the impact of the efficiencies achieved... including reducing contractor proposal costs and the time required to award contracts" greater than \$50 million.⁹³

In early 2023, DOD extended the pilot program and issued guidance stating that contracting officers may "determine the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of providing complete certified cost or pricing data."⁹⁴ DOD noted that this pilot program is "best suited" for contracts with a "recurring nature for which there is reliable, historical actual cost data, and with companies that have approved business systems."⁹⁵ Additionally, DOD noted that fixed-price incentive contracts are not required

⁸⁵ P.L. 115-91, §811.

⁸⁶ Government Accountability Office, *Federal Contracting: Implementation of Changes to Cost or Pricing Data Requirements*, April 2022, p. 14. With the \$750,000 threshold, less than 1% of DOD and the National Aeronautics and Space Administration's (NASA) awards were subject to TINA cost or pricing data requirements; when the NDAA increased the threshold to \$2,000,000, approximately 0.5% of DOD and NASA's awards were subject to these requirements.

⁸⁷ *Ibid.*, p. 2.

⁸⁸ P.L. 115-232, §890.

⁸⁹ *Ibid.*

⁹⁰ P.L. 116-92, §825.

⁹¹ P.L. 115-232, §818.

⁹² Department of Defense, "Class Deviation: Sec 890 Pilot Program to Accelerate Contracting and Pricing Processes," April 2019.

⁹³ Department of Defense, "Class Deviation: Sec 890 Pilot Program to Accelerate Contracting and Pricing Processes," April 2019, p. 2.

⁹⁴ Department of Defense, "Class Deviation: Sec 890 Pilot Program to Accelerate Contracting and Pricing Processes," March 2023. <https://www.acq.osd.mil/dpap/policy/policyvault/USA002420-22-DPC.pdf>.

⁹⁵ *Ibid.*

for the pilot program, but could reduce the cost risk and allow DOD to measure results more easily.⁹⁶

Fiscal Year 2020 NDAA (P.L. 116-92)

Section 803 of the NDAA for FY2020 renders an offeror “who fails to make a good faith effort to comply with a reasonable request” for price or cost data ineligible to win the contract award unless the head of the contracting agency submits certain criteria for justification.⁹⁷ It also requires that the Undersecretary of Defense for Acquisition and Sustainment (A&S) submit a report identifying contractors that “have denied multiple requests” for cost or pricing data but still received a contract award.⁹⁸

Section 803 also bars contracting officers from determining whether a price is “fair or reasonable” only using historical prices.⁹⁹ DOD fully implemented this amendment to the U.S. code as an amendment to the DFARS in August 2023.¹⁰⁰

Waivers and Exceptions

Federal law provides several exceptions and authorizes waivers to various contract pricing requirements. As a result, waivers and exceptions play an important role in contract pricing oversight. Determining what contracts are or are not required to fulfill cost and pricing data submission depends on how the exception process is codified, as well as the requirements for a waiver. Below are several key categories of contracts that currently are generally exempt from DOD contracting requirements. Procurement agency heads may also waive TINA requirements in “an exceptional case.”¹⁰¹

Indefinite Delivery, Indefinite Quantity Contracts

The Federal Acquisition Regulation (FAR) definition of an indefinite delivery, indefinite quantity (IDIQ) contract reads, “provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements.”¹⁰² According to the General Services Administration (GSA), “[IDIQ contracts] are used when GSA can’t determine, above a specified minimum, the precise quantities of supplies or services that the government will require during the contract period.”¹⁰³

According to a GAO study, IDIQ contracts account for roughly one-third of total government contract obligations.¹⁰⁴ While DOD’s sole-source IDIQ contracts must follow certified cost or

⁹⁶ Ibid.

⁹⁷ P.L. 116-92, §803. The justification criteria for exception requires that the head of the contracting activity determine that the contract is “in the best interest of the Government” based on several considerations.

⁹⁸ P.L. 116-92, §803.

⁹⁹ Ibid.

¹⁰⁰ Department of Defense, “Defense FAR Supplement Publication Notice,” October 2023.

¹⁰¹ 10 U.S.C., §2306a. The FAR’s only example listed for its agency head exception determination is for cases where an offeror has already provided cost and pricing data, but does not include any other potential examples of “exceptional cases.” See DFARS PGI 125.4, “Contract Pricing.”

¹⁰² FAR, §16.504.

¹⁰³ General Services Administration, “Indefinite Delivery, Indefinite Quantity Contracts,” <https://www.gsa.gov/small-business/register-your-business/explore-business-models/indefinite-delivery-indefinite-quantity-idiq>.

¹⁰⁴ U.S. Government Accountability Office, *Federal Contracts: Agencies Widely Used Indefinite Contracts to Provide Flexibility to Meet Mission Needs*, 17-329, April 13, 2017, <https://www.gao.gov/products/gao-17-329>.

pricing data requirements like other sole-source DOD contracts, the more flexible nature of the timelines and ordering associated with IDIQ contracts arguably has led to less-defined prices, as well as inconsistent application of pricing requirements.¹⁰⁵ The 2017 GAO study found that prices for IDIQ contracts at DOD “were established at different points, depending on how well-defined the contract requirements were at the time of the contract award.”¹⁰⁶

Commercial Items

The process of determining whether an item is commercial or not is a critical component of defense contract pricing, as it normally determines the level of scrutiny a contract receives. Commercial items are products or services that are sold or provided to the general public “under terms and conditions similar to those offered to the Federal Government.”¹⁰⁷ Commercial items are exempt from many procurement-related statutory and regulatory requirements, including those regarding pricing.¹⁰⁸

Commercial items are often exempt from pricing requirements based on a presumption that a fair market price has already been set on the commercial market. The DFARS treats commercial items as a separate group from noncommercial items, but notes that “obtaining sufficient data from the offeror is particularly critical in situations where an item is determined to be a commercial product or service” that is sole source.¹⁰⁹

DOD’s Defense Contract Management Agency (DCMA), maintains a Commercial Item Database for DOD contracting officers’ use when writing and assessing contract solicitations.¹¹⁰ A 2018 GAO study on how DOD makes commercial item determinations noted that “in some cases, contracting officers reviewing a prior determination discovered that it was based on inaccurate information.”¹¹¹

According to DAU, “common items” of commercial applications include:

- Commercial off-the-shelf (COTS) Defense Business Systems, or information systems that support DOD business operations (including contract pricing systems);
- Cyber services;
- Cloud services;
- Software licenses; and
- Telecommunications and wireless services.¹¹²

¹⁰⁵ For example, solicitations for multiple-award IDIQ contracts for similar services that are awarded to every qualifying offeror do not require cost or price as a consideration for contract award. See 10 U.S.C. §3241.

¹⁰⁶ U.S. Government Accountability Office, *Federal Contracts: Agencies Widely Used Indefinite Contracts to Provide Flexibility to Meet Mission Needs*, 17-329, April 13, 2017, <https://www.gao.gov/products/gao-17-329>.

¹⁰⁷ FAR, Subpart 2.1. The FAR also includes products or services that are “soon to be sold to the general public” as commercial products, as well as products that “have evolved” from commercial products with “minor modifications of a type not customarily available in the commercial marketplace.”

¹⁰⁸ 10 U.S.C., §2306a. For example, commercial items are specifically exempt from TINA requirements.

¹⁰⁹ DFARS PGI 125.4, “Contract Pricing.”

¹¹⁰ Defense Contract Management Agency, “Commercial Item Group.”

¹¹¹ Government Accountability Office, “Defense Contracts: Improved Information Sharing Could Help DOD Determine Whether Items Are Commercial and Reasonably Priced,” July 2018, p. 2.

¹¹² Defense Acquisition University, “Contracting Cone: Federal Supply Schedule.”

While commercial items are often subject to less pricing-related requirements, DOD must still be able to determine whether or not its price is reasonable. While marketplace information is often available, GAO found that “obtaining market-related information can be challenging because the products DOD requires may not be widely available in the commercial marketplace.”¹¹³ However, because commercial items are subject to less pricing-related requirements, DOD may struggle to obtain pricing data from vendors of commercial items. According to the same 2018 GAO study, “while pricing data is key to DOD’s ability to determine price reasonableness, several contracting officers reported that contractors were less willing to provide data once an item was determined commercial.”¹¹⁴

Issues for Congress

Regulatory Framework

In the past, Congress has updated the regulatory framework for DOD contract pricing to try to stop vendors from overcharging the government for goods and services. The Weapons Systems Acquisition Reform Act of 2009 (P.L. 111-23), included provisions that aimed to “ensure competition throughout the lifecycle of major defense acquisition programs”¹¹⁵ and to prevent “critical cost growth in major defense acquisition programs.”¹¹⁶

Other past acquisition reform initiatives, such as DOD’s “Better Buying Power,” also included efforts to mandate contracting strategies conducive to improved pricing and increased competition. For example, the initial 2010 Better Buying Power memorandum called to “phase out Time and Material and sole-source ID/IQ contracts wherever possible,” and have “profit/fee tied to weighted guidelines” for cost-plus-fixed-fee contracts.¹¹⁷

Congress may consider whether or not to add statutory guidelines that provide more rigor to the contract pricing process to potentially reduce the chances that the government is overcharged. Conversely, Congress may consider whether or not to pursue a streamlining of the contract pricing process to potentially invite additional vendors into the market and foster competition.

Some critics of certain defense contract pricing statutes and regulations argue that these additional regulatory compliance costs discourage nontraditional vendors, or vendors with little or no recent experience with DOD, from working with DOD, and that the relative complexity of DOD contracting requirements compared with those of the commercial sector constitute a barrier to entry into the defense contracting sector.¹¹⁸ In line with these critiques, one survey of DOD contractors claimed that a quarter of respondents “said their companies have considered pulling

¹¹³ Government Accountability Office, “Defense Contracts: Improved Information Sharing Could Help DOD Determine Whether Items Are Commercial and Reasonably Priced,” July 2018, p. 2.

¹¹⁴ *Ibid.*

¹¹⁵ P.L. 111-23, §202.

¹¹⁶ P.L. 111-23, §206.

¹¹⁷ Undersecretary of Defense for Acquisition, Technology, and Logistics, *Better Buying Power Mandate for Restoring Affordability and Productivity in Defense Spending*, June 28, 2010, pp. 5-6, <https://dair.nps.edu/bitstream/123456789/3837/1/SEC809-RL-10-0143.pdf>.

¹¹⁸ See, for example, Daniel Wilson, “DOD Regulatory Burden Undercutting Small Biz Outreach,” *Law360*, February 13, 2023.

out of at least some government markets,” due to “government-specific regulations that make it too hard or not worthwhile to work for government.”¹¹⁹

Other commentators assert that the actual price of what some analysts call DOD’s “regulatory cost premium,” or the cost imposed on contractors of adhering to contracting regulatory requirements, particularly in comparison with the commercial market, is not certain, and that criticisms claiming that regulation disincentivizes contractors from working with DOD are unfounded. DOD has argued against criticism that contractors profit less with DOD than they would in the commercial sector. A recent DOD study on the financial status of defense contractors found that “in 8 out of 9 key financial metrics, defense contractors out-performed commercial counterparts,” and that “although profit margins are somewhat lower than commercial counterparts, the gap is more than offset by lower asset and investment requirements for defense contractors.”¹²⁰ The same DOD study found that assertions from industry that “in most cases the profitability for government customers is insufficient to finance [R&D] investments did not appear to be demonstrated by the data” that DOD found.¹²¹

A 2001 RAND study on the subject found that many regulatory burden estimates, often sponsored by defense contractors, are “backed by limited data.”¹²² The same RAND study estimated that the costs of regulatory compliance for contractors is about 3%-4%, and states that “most regulatory burden cost savings are in the area of indirect costs and should thus show up in overhead cost savings.”¹²³

According to the 2023 DOD contract finance study, “the Defense Industry is financially healthy.” Furthermore, the DOD study found that “the performance of [the defense] industry, in aggregate, has improved over the past twenty years,” and that profit margins have increased from 7%-9% to 11%-13%.¹²⁴ Congress may consider whether or not to task DOD with performing additional analysis about contractor profits, and/or studying the financial risk that contractors take when working with DOD.

Dollar Thresholds

Only contracts valued above a set dollar amount threshold are subject to certain types of pricing-related regulatory requirements. For example, any contract for less than \$7.5 million is not subject to Cost Accounting Standards and any contract under \$2 million is not subject to Truth in Negotiation Act cost and pricing data submission requirements.¹²⁵

Many of these thresholds are established in statute and Congress may consider increasing or decreasing them, depending on its policy objective. Decreasing the dollar threshold would likely subject more contracts to pricing requirements, while increasing the threshold would likely subject fewer contracts to pricing requirements. Inflation could also affect such policy choices, as

¹¹⁹ Moshe Schwartz and Michelle V. Johnson, “How Not to Alienate Business Partners: A Framework for Addressing Factors Impacting Retention of Defense Contractors,” *George Mason University Greg and Camille Center for Government Contracting White Paper Series*, vol. 19 (November 2023), p. 5.

¹²⁰ Department of Defense, “Contract Finance Study Report,” April 2023, p. 18.

¹²¹ Department of Defense, “Contract Finance Study Report,” April 2023, p. 19.

¹²² RAND, “An Overview of Acquisition Reform Cost Savings Estimates,” 2001, p. xvi.

¹²³ RAND, “An Overview of Acquisition Reform Cost Savings Estimates,” 2001, p. xx.

¹²⁴ Department of Defense, “Contract Finance Study Report,” April 2023, p. 21.

¹²⁵ 41 U.S.C. §1502 and DFARS, PGI 215.4: Contract Pricing, October 2023.

rising inflation rates may subject an increased proportion of contracts to pricing requirements should the current threshold remain the same.¹²⁶

Pricing Data Reliability

Verifying whether a vendor has submitted accurate and current pricing data can be challenging for contracting officers, particularly given the lack of consistent and reliable indicators for military-unique products. According to GAO, when vendors are not required to submit certified cost or pricing data, contracting officers may use other data, including commercial or historical analogs, to determine a fair and reasonable price.¹²⁷ However, as RAND notes, “the widespread competition so important in determining price in the commercial world may not be fully functional in the marketplace for defense-unique weapons systems,”¹²⁸ which makes using commercial price analogs difficult.

Organizational limitations also make analysis of pricing data difficult. While past DOD acquisition reforms, including the Weapon System Acquisition Reform Act of 2009 and the Better Buying Power initiative, included acquisition workforce improvements, some analysts assert that issues with the workforce still exist. For example, according to the Section 809 Panel, a congressionally mandated committee tasked with studying acquisition regulations, “contracting officers too often request a specific service from [DOD’s auditing offices] without consulting internal technical specialists about the best way to meet their needs.”¹²⁹ The Section 809 Panel also found disconnects between different pricing-related roles within DOD. For example, DOD contracting officers “express they do not believe auditors can or will tailor their services to meet contracting officer needs, especially in the pre-award area relating to cost and pricing services.”¹³⁰

DOD may be able to overcome these organizational and bureaucratic limitations with additional capacity and/or training. The 809 Panel report found that DOD could “attempt to rebuild organic pricing capability at the agency level” by “dedicating resources to build pricing expertise.”¹³¹ The report also noted that “the primary dilemma confronting the Acquisition Workforce (AWF) is the need to fill critical skill gaps,” partially due to DOD civilian workforce reductions in the 1990s.¹³² However, the defense acquisition workforce has increased overall from about 126,000 individuals in 2008 to more than 187,000 in 2021.¹³³ This may indicate that many of these issues may stem from causes other than lack of personnel.

¹²⁶ DOD’s 2022 guidance, “Managing the Effects of Inflation with Existing Contracts” is one example of DOD attempts to provide Contracting Officers guidance on addressing inflation and its potential negative impacts on the defense industrial base. <https://www.acq.osd.mil/dpap/policy/policyvault/USA001773-22-DPC.pdf>.

¹²⁷ U.S. Government Accountability Office, *Federal Contracting: Implementation of Changes to Cost or Pricing Data Requirements*, 22-105307, April 2022, p. 2, <https://www.gao.gov/assets/gao-22-105307.pdf>.

¹²⁸ Mark A. Lorell, John C. Graser, and Cynthia R. Cook, *Price Based Acquisition: Issues and Challenges for Defense Department Procurement of Weapon Systems*, RAND, 2005, p. 15, https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG337.pdf.

¹²⁹ Section 809 Panel, “Report on the Advisory Panel on Streamlining and Codifying on Acquisition Regulations, Volume 1,” January 2018, p. 70.

¹³⁰ Ibid. The report found that many contracting officers do not find all these audits necessary but still must complete them due to statutory and regulatory requirements and that these audits ultimately “delay the acquisition process.”

¹³¹ Section 809 Panel, “Report on the Advisory Panel on Streamlining and Codifying on Acquisition Regulations, Volume 1,” January 2018, p. 71.

¹³² Section 809 Panel, “Report on the Advisory Panel on Streamlining and Codifying on Acquisition Regulations, Volume 2,” January 2018, p. 64-65.

¹³³ Office of the Undersecretary of Defense for Acquisition and Sustainment, *Workforce Metrics: 2021 Executive Summary*, 2021, <https://www.hci.mil/about/workforce-metrics.html>.

In addition to increasing the number of personnel in the AWF, DOD announced in 2022 that it was “implementing the most significant update to acquisition certification since the 1990 Defense Acquisition Workforce Improvement Act,” to allow personnel to get more practical experience and spend less time in training.¹³⁴ Congress may consider assessing the effectiveness of new initiatives such as this to determine if DOD has adequately considered its pricing capabilities.

Commercial Item Determinations

A provision in the Conference Report of the FY2024 NDAA calls for the Undersecretary of Defense for Acquisition and Sustainment (USD(A&S)) to conduct a study on the feasibility of “establishing a default determination that products and services acquired by [DOD] are commercial and do not require commercial determination.”¹³⁵ If this provision were ultimately enacted, it could impact DOD contract pricing requirements, as commercial items are often exempt from some pricing-related requirements (see “Commercial Items” for additional detail).

Enacting this provision may eventually result in a default commercial determination for DOD contracts may result in a higher percentage of commercial contract determinations than are currently classified as such. Should Congress eventually establish the default contract determination as commercial, this would decrease the administrative burden upon contracting officers for use of commercial contracts, and could thus incentivize officials to determine that more contracts are commercial than they currently do. In turn, this may render more contracts exempt from contract pricing data requirements.

Tradeoffs for Small Businesses and Subcontractors

While cost accounting and pricing data requirements can be beneficial for DOD as it negotiates contract prices, and can serve as a contractor accountability measure, some of these requirements may drive away potential vendors, particularly small businesses, subcontractors, and nontraditional vendors. The government-unique cost accounting capabilities required to contract with DOD can add a cost burden that smaller companies may not be able to shoulder.

In January 2023, DOD released its “Small Business Strategy,” which acknowledged some of the challenges small businesses face when contracting DOD, stating that “a complex web of entry points and intricate regulations... are pushing firms away from us.”¹³⁶ The Small Business Strategy also acknowledged that DOD’s “regulations and business practices can be difficult to understand or otherwise create barriers or increase the cost of doing business with DOD.”¹³⁷ DOD also noted that it had solicited input from industry on government practices and regulations and is using those comments to inform how it can “improve small business participation in procurements.”¹³⁸ Congress may consider whether or not to take steps to ensure that regulatory

¹³⁴ Department of Defense, “Strengthening, Empowering the Acquisition Workforce Through Modernization,” press release, February 2022, <https://www.defense.gov/News/News-Stories/Article/Article/2927317/strengthening-empowering-the-acquisition-workforce-through-modernization/>.

¹³⁵ Senate Armed Services Committee, conference report to accompany H.R. 2670, 118th Cong., December, 2023, Section 875.

¹³⁶ Department of Defense, *Small Business Strategy*, January, 2023, p. 2, <https://media.defense.gov/2023/Jan/26/2003150429/-1/-1/0/SMALL-BUSINESS-STRATEGY.PDF>.

¹³⁷ Department of Defense, *Small Business Strategy*, January, 2023, p. 5, <https://media.defense.gov/2023/Jan/26/2003150429/-1/-1/0/SMALL-BUSINESS-STRATEGY.PDF>.

¹³⁸ Department of Defense, *Small Business Strategy*, January, 2023, p. 17, <https://media.defense.gov/2023/Jan/26/2003150429/-1/-1/0/SMALL-BUSINESS-STRATEGY.PDF>.

guardrails are strong enough to prevent government overpayment of contracts without making DOD contracting an inaccessible for a diverse array of contractors.

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