

Chapter 12

Contract Pricing



2014 Contract Attorneys Deskbook

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CHAPTER 12

CONTRACT PRICING

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CHAPTER 12

CONTRACT PRICING

I. INTRODUCTION

A. Objectives

Following this block of instruction, the student should:

1. Understand the purpose of the Truth in Negotiations Act (TINA) and how it is implemented, including regulatory guidance and case law interpreting that guidance.
2. Understand the various methods used by the Government to establish price reasonableness of a contract award, to include the different types of contractor pricing information available to determine price reasonableness, and when to require its submission.
3. Understand what defective pricing is and the remedies available to the Government.

B. References

1. The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, and also found at 41 U.S.C. Chapter 35 – Truthful Cost or Pricing Data [formerly codified in Title 41 at §§ 254b(a) – 254b(h)]. The language of 41 U.S.C. Chapter 35 essentially mirrors 10 U.S.C. § 2306a with minor modifications.
2. Federal Acquisition Regulation (FAR) Subpart 15.4.
3. Department of Defense FAR Supplement (DFARS) Subpart 215.4, Contract Pricing; DFARS Procedures, Guidance, and Information (PGI) 215.4, Contract Pricing.
4. DoD Contract Pricing Reference Guides, a five volume set maintained by the Undersecretary of Defense for Acquisition, Technology, and Logistics Office of the Deputy Director of Defense Procurement and Acquisition Policy for Cost, Pricing, and Finance; and developed jointly by the Federal Acquisition Institute and the Air Force Institute of Technology, located at: www.acq.osd.mil/dpap/cpic/cp/contract_pricing_reference_guides.html. These guides are not directive and should be considered informational only. FAR 15.404-1(a)(7).

5. Defense Contract Audit Agency (DCAA) Manual 7640.1, The DCAA's Contract Audit Manual, provides technical audit guidance and techniques, audit standards, and technical policies and procedures followed by DCAA personnel in the execution of a contract audit. Its material is instructive for some aspects of contract pricing. It is also referred to as the "CAM." It is available at: <http://www.dcaa.mil/cam.html>.

II. DEFINITIONS

- A. **"Cost or Pricing Data"** is a legal term of art.¹ It is all facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement upon price. It is also defined in the FAR's definitions section, 2.101. Cost or pricing data are:
 1. More than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.
 2. Factual – not judgmental – and verifiable. While cost or pricing data do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. See also DCAA Manual 7640.1 ¶ 14-104.4.
- B. **"Certified Cost or Pricing Data"** as defined at FAR 2.101 means "cost or pricing data" required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or is required to be certified, in accordance with 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements in accordance with 10 U.S.C. 2306a and 41 U.S.C. Chapter 35.
 1. When TINA requires "cost or pricing data," it is always required to be certified. The format for certification is found at FAR 15.406-2.
 2. When certified cost or pricing data is required, the contracting officer will always do a cost analysis, and sometimes will also perform a price analysis to determine if the price is fair and reasonable based on market research or comparison of proposed prices received in response to a solicitation.

¹ The FAR definitions for cost or pricing data, certified cost or pricing data, and data other than certified cost and pricing data were redefined in August 2010 in order to clarify the existing authority. Court cases prior to this time may refer to only two categories: "Cost or Pricing Data" and "Information Other Than Cost or Pricing Data." See FAC 2005-45; FAR Case 2005-036; Fed. Reg. Vol 75, No. 167, 53135 – 53153.

- C. **“Data Other Than Certified Cost or Pricing Data”** or **“DOTCCPD”** means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15-2 of FAR 15.408, but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror’s estimation process, including, but not limited to, (1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and (2) the nature and amount of any contingencies included in the proposed prices. See FAR 2.101
1. This type of data is never required to be certified.
 2. When adequate price competition exists, generally no additional data is necessary. The contracting officer will always do a price analysis for commercial item procurements and, in some situations, may also do a limited cost analysis to determine if the price is fair and reasonable.
 3. When this type of data is requested, if the Contractor fails to provide the data, it is generally ineligible for award. FAR 15.403-3(a)(4).
- D. Note that this data can include information that has been excluded from “cost and pricing data” by definition or by court ruling. So, for example, judgmental information may be requested as DOTCCPD.
- E. **“Price”** is cost plus any fee or profit applicable to the contract type. FAR 15.401.
- F. **“Pricing”** is the process of establishing a reasonable amount or amounts to be paid for supplies or services. FAR 2.101

III. GENERAL PRICING CONCEPTS

- A. Concept Number One – Purchase supplies and services at fair and reasonable prices.
1. It is Government policy to purchase supplies and services at fair and reasonable prices.
 2. Contracting officers are responsible to ensure the Government purchases supplies and services from responsible sources at fair and reasonable prices. **The contracting officer is responsible for evaluating the reasonableness of offered prices.** FAR 15.402(a) & 15.404-1(a)(1).

- a. The contracting officer's primary concern is the overall price the Government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. FAR 15.405(b).
 - b. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government. Therefore, the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result – a price that is fair and reasonable to both the Government and the contractor. FAR 15.405(b).
3. In certain situations, **TINA requires contractors to make disclosures of information** to the contracting officer so the Government can determine it is getting a fair and reasonable price.
- B. Concept Number Two. Obtain necessary information in the least burdensome manner possible, given the circumstances of each procurement.
1. **In establishing the reasonableness of offered prices, the contracting officer must NOT obtain more information than is necessary.** Contracting officers must not require unnecessarily the submission of cost or pricing data. FAR 15.402(a).
 2. The FAR balances the Government's desire for a fair and reasonable price against the burdensome administrative cost associated with contractor disclosures under TINA. Unnecessary requirements for cost or pricing data increase proposal preparation costs, extend acquisition lead-time, and waste both contractor and Government resources. FAR 15.402(a)(3).
 3. Order of Precedence. To the extent cost or pricing data is not required by TINA, the contracting officer must generally use the following order of precedence when requesting information to determine price reasonableness. FAR 15.402(a)(2)(i) & FAR 15.402(a)(2)(ii):
 - a. First, request no additional information if the agreed upon price is based upon **adequate price competition**. FAR 15.402(a)(2)(i).
 - (1) If an unusual circumstance leads the contracting officer to conclude that additional information is required to determine price reasonableness, then:

- (2) Additional information shall be obtained from sources other than the offeror(s), to the maximum extent practicable. FAR 15.403-3(b).
 - (3) The contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches. FAR 15.403-3(b).
- b. Second, if adequate price competition among competing offerors is not present, request additional price information from sources other than the offeror(s), to the maximum extent practicable. Other steps for obtaining comparison prices are in FAR 15.402(a)(2)(ii)(A).
- (1) This can mean requesting information related to prices, relying first upon:
 - (a) Information available within the Government, such as independent Government estimates;
 - (b) Information obtained from sources other than the offeror, and if necessary;
 - (c) Information related to prices includes established catalog or market prices or previous contract prices;
 - (d) Limited Information obtained from the offeror. When there is NOT adequate price competition and prices are NOT set by law or regulation, the contracting officer may find it is necessary to obtain information from the offeror to evaluate price reasonableness. In that case, the contracting officer shall require, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously.
- c. Third, request other than certified data if needed to determine fair and reasonable price. FAR 15.402(a)(2)(ii)(B).
- d. Fourth, request certified cost or pricing data, if authorized. Under TINA's threshold, the contracting officer should use every means available to determine a fair and reasonable price before requesting certified cost or pricing data. FAR 15.402(a)(3). See also FAR 15.403-1(a) & (b) for other limitations on obtaining certified data.

- C. Concept Number Three. Contracting officers use a variety of proposal analysis techniques to determine if a proposed contract is fair and reasonable. The objective of proposal analysis is to ensure the final agreed-to price is fair and reasonable. FAR 15.404-1(a). Other implementing regulations and guidance controls when the contracting officer can or must use particular techniques.
1. In general there are four categories of proposal analysis techniques:
 - a. Price analysis techniques – Is the overall price fair & reasonable?
 - b. Cost analysis techniques – Are underlying costs fair & reasonable?
 - c. Cost realism analysis – Are the contractor’s proposed costs realistic?
 - d. Technical analysis – Does the Government need specialized resources to do this?
 2. In general, price each contract separately and independently.
 - a. To ensure a fair and reasonable price, the contracting officer may use analytical techniques and procedures singly or in combination with others. The complexity and circumstances of each acquisition should determine the level of detail. The contracting officer may request the advice and assistance of other experts to ensure an appropriate analysis is performed. FAR 15.404-1(a)(1) & FAR 15.404-1(a)(5).
 - b. Do not use proposed price reductions under other contracts as an evaluation factor. FAR 15.402(b)(1).
 - c. Do not consider losses or profits realized or anticipated under other contracts. FAR 15.402(b)(2).
 - d. Do not include contingencies in a contract price to the extent that the contract provides for a price adjustment based upon the occurrence of the contingency. FAR 15.402(c).
 3. **“Price Analysis”** is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. FAR 15.404-1(b)(1). A price analysis is required on procurements where a contractor is not required to submit certified cost or pricing data. FAR 15.404-1(a)(2). When a contractor submits certified cost or pricing data, a “cost analysis” is required, but a price analysis is still recommended to verify the overall price is fair and reasonable. FAR 15.404.1(a)(3).

- a. Non-exclusive list of price analysis techniques. There are various price analysis techniques and procedures used by the contracting officer to examine and evaluate a proposed price to determine if it is fair and reasonable.
- (1) Comparison of proposed prices received in response to a solicitation. This is used whenever there is adequate price competition. This is a preferred technique. FAR 15.404-1(b)(2)(i); FAR 15.404-1(b)(3).
 - (2) Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This is a preferred technique. FAR 15.404-1(b)(2)(ii); FAR 15.404-1(b)(3).
 - (3) Application of parametric estimating methods or rough yardsticks to highlight significant inconsistencies that warrant additional pricing inquiry. Example: Price per square foot. FAR 15.404-1(b)(2)(iii).
 - (4) Comparison with published price lists, similar indices, and discount or rebate arrangements. FAR 15.404-1(b)(2)(iv).
 - (5) Comparison of proposed prices with independent Government cost estimates. FAR 15.404-1(b)(2)(v).
 - (a) The FAR does not define independent Government cost estimate (IGCE), nor does it provide what constitutes an independent Government estimate (IGE), but both terms are used within the FAR. Part 15 is the only FAR part to use IGCE, with other areas of the FAR using the term IGE.
 - (b) Normally, this estimate is completed prior to release of the solicitation to the public for competition, or prior to any offer to purchase being made. Often, the contracting officer's representative (COR) or the contracting officer's technical representative (COTR) prepares it with assistance from the supporting contracting office.
 - (c) FAR Sections 36.203 and 36.605, pertaining to architect-engineering work and construction, are the only sections of the FAR to require that an IGE be

performed. Some Federal agencies require an IGE to be performed for procurements exceeding amounts set for the simplified acquisition threshold. See The Defense COR Handbook, Appendix 6, at <https://acc.dau.mil/communitybrowser.aspx?id=475206> and the Assistant Secretary of the Army (ALT) Memorandum for PARCs and Policy Chiefs, Number 12-26, dated 13 April 2012.

- (d) Regarding simplified acquisition procurements, FAR 13.106-3(a)(2)(vi) provides that a contracting officer may use comparison to an IGE as the basis for a statement of price reasonableness, if only one quotation or offer is received.
 - (6) Comparison of proposed prices with prices obtained through market research for similar items. FAR 15.404-1(b)(2)(vi).
 - (7) Analysis of DOTCCPD provided by the offeror. FAR 15.404-1(b)(2)(vii).
- b. **“Value Analysis”** can give insight into the relative worth of a product. It can be used in conjunction with the seven price analysis techniques listed above. FAR 15.404-1(b)(4). It is a technique created by Lawrence D. Miles in the 1940’s and is based upon the application of a function analysis to component parts of a product to find ways to reduce component costs.
4. **“Cost analysis”** is an analysis by the contracting officer that reviews and evaluates separate cost elements and profit within a proposal in order to assist in determining whether the Government has been presented with a fair and reasonable price, or whether there is cost realism (explained below). FAR 15.404-1(c). Cost analysis is required when a contractor must provide certified cost and pricing data. FAR 15.404-1(a)(3). Its use is optional when DOTCCPD is instead being reviewed. FAR 15.404-1(a)(4). It requires the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. FAR 15.404-1(c).

- a. The various cost analysis techniques and procedures provided at FAR 15.404-1(c)(2):
- (1) Verification of cost or pricing data and evaluation of cost elements, including –
 - (a) The necessity for, and reasonableness of, proposed costs, including allowances for contingencies;
 - (b) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;
 - (c) Reasonableness of estimates generated by appropriately calibrated and validated parametric models or cost-estimating relationships; and
 - (d) Application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.
 - (2) Evaluation of the effect of the offeror's current practices upon future costs to ensure the effects of inefficient or uneconomical past practices are not projected into the future. This should include trend analysis of basic labor and material costs when pricing production of recently developed complex equipment. FAR 15.404-1(c)(2)(ii).
 - (3) Comparison of costs proposed by the offeror for individual cost elements with –
 - (a) Actual costs previously incurred by the same offeror;
 - (b) Previous cost estimates from the offeror or from other offerors for the same or similar items;
 - (c) Other cost estimates received in response to the Government's request;
 - (d) Independent Government cost estimates (IGCE) by technical personnel; and
 - (e) Forecasts of planned expenditures. FAR 15.404-1(c)(2)(iii).

- (4) Verification that the cost submissions are in accordance with contract cost principles, FAR Part 31, and Cost Accounting Standards (CAS), where applicable. FAR 15.404-1(c)(2)(iv).
- (5) Review of whether cost or pricing data necessary to make the proposal suitable for negotiation has not been submitted or identified in writing. FAR 15.404-1(c)(2)(v).
- (6) To evaluate subcontractor costs, analysis of the results of any “Make-Or-Buy” program reviews. A Make-Or-Buy program review looks at whether a contractor should make a component or subcontract the work. It is generally used only on contracts over \$12.5 million that also require cost or pricing data. FAR 15.404-1(c)(2)(vi) & FAR 15.407-2.
- (7) “Should-Cost” Reviews. FAR 15.407-4. Should-Cost Reviews are a specialized form of cost analysis that evaluate the economy and efficiency of the contractor's existing work force, methods, materials, equipment, real property, operating systems, and management. They differ from traditional evaluation methods because they do not assume a contractor’s historical costs reflect efficient and economical operation. There are two types of should-cost reviews:
 - (a) Program Should-Cost Review. This review is used to evaluate significant elements of direct costs, such as labor and material. It also evaluates indirect costs that are usually associated with the production of major systems. A separate audit report is also required for this review. See FAR 15.407-4(b).
 - (b) Overhead Should-Cost Review. This review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, real property and equipment, depreciation, plant maintenance and security, taxes, and general and administrative expenses. A separate audit report is also required for this review. See FAR 15.407-4(c).

5. **“Cost realism analysis”** is mandatory on all cost-reimbursement contracts. They are optional on fixed price incentive contracts and some other competitive contracts. The objective is to determine the probable cost of performance for each offeror in order to ensure the final price is fair and reasonable. FAR 15.404-1(d).
- a. Definition. “Cost realism” is a proposal analysis technique used by the contracting officer to independently review and evaluate specific elements of each offeror’s proposed cost estimate to determine whether the estimated proposed cost elements are:
 - (1) Realistic for the work to be performed;
 - (2) Reflective of a clear understanding of the requirements; and
 - (3) Consistent with the unique methods of performance and materials described in the technical proposal. FAR 2.101 and FAR 15.404-1(d).
 - b. Probable Cost of Performance. The probable cost may differ from the proposed cost and should reflect the Government’s best estimate of the cost of any contract that is most likely to result from the offeror’s proposal. The probable cost is used to evaluate which contract is the best value to the Government. FAR 15.404-1(d)(2)(i).
 - c. A cost realism analysis may also be used on:
 - (1) Competitive fixed-price incentive contracts
 - (2) In exceptional cases, on other competitive fixed price type contracts when:
 - (a) New requirements may not be fully understood by competing offerors;
 - (b) There are quality concerns; or
 - (c) Past experience indicates that contractors’ proposed costs have resulted in quality or service shortfalls. FAR 15.404-1(d)(3).
 - d. Results of a cost realism analysis may be used in performance risk assessments and responsibility determinations. However, the offered prices shall not be adjusted as a result of the analysis and

the proposals shall be evaluated using the criteria in the solicitation. FAR 15.404-1(d)(3).

- e. Cost realism generally addresses whether a cost estimate is too low, while price reasonableness generally addresses whether a price is too high. First Enterprise v. United States, 611 Fed. Cl. 109, 123 (2004).
6. **“Technical Analysis”** is a proposal analysis technique used by the contracting officer when personnel with specialized knowledge, skills, experience or capability in engineering, science, or management are needed to assist the contracting officer in determining the need for and the reasonableness of the resources proposed for use by a contractor, assuming a reasonable economy and efficiency of resources. FAR 15.404-1(e)(1).
- a. At a minimum, the analysis includes:
 - (1) The types and quantities of material proposed;
 - (2) The need for the types and quantities of labor hours the contractor is proposing to use, and the labor mix; and
 - (3) Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis. FAR 15.404-1(e)(2).
 - b. The contracting officer should request technical price evaluative assistance in evaluating items that are “similar to” items to be purchased, or commercial items that are “of a type” as those to be procured, or requiring minor modifications from that of proposed deliverables. FAR 15.404-1(e)(3).

IV. TRUTH IN NEGOTIATIONS ACT (TINA) - INTRODUCTION

A. Evolution

- 1. May 1959 – The Government Accountability Office (GAO) reported a large number of overpricing cases.
- 2. October 1959 – DoD revised the Armed Services Procurement Regulation (ASPR), a predecessor to the FAR, to require contractors to provide a

Certificate of Current Cost or Pricing Data during contract negotiations. In 1961, DoD added a price reduction clause to the ASPR.

3. 1962 – Congress passed TINA. Pub. L. No. 87-653, 76 Stat. 528 (1962) (codified at 10 U.S.C. § 2306f). TINA applied to DoD, the Coast Guard, and NASA. Public Law 89-369 extended TINA’s reach to all Executive Branch Departments and Agencies.
4. Significant amendments to TINA occurred in 1986 (Pub. L. No. 99-661, 100 Stat. 3946), 1994 (the Federal Acquisition Streamlining Act of 1994 (FASA)), and 1996 (the Clinger-Cohen Act of 1996, a.k.a. the Federal Acquisition Reform Act of 1996 (FARA)).
5. **TINA is currently codified at 10 U.S.C. § 2306a and 41 U.S.C. Chapter 35. It is covered in FAR 15.403.**

B. Purpose

1. TINA requires contractors, sub-contractors and prospective contractors to provide the Government with information on the costs (“cost or pricing data”) of a procurement in certain limited circumstances. If the information provided is not accurate, complete, and current, the Government has the right to certain remedies against the contractor.
2. TINA’s purpose is to level the negotiation playing field by ensuring that Government negotiators have access to the same pricing information as the contractor’s negotiators. The purpose of TINA is not to detect fraud. However, this result is often an ancillary effect.
3. “The objective of these provisions is to require truth in negotiating. Although not all elements of costs are ascertainable at the time a contract is entered into, those costs that can be known should be furnished currently, accurately, and completely. If the costs that can be determined are not furnished accurately, completely, and as currently as is practicable, the Government should have the right to revise the price downward to compensate for the erroneous, incomplete, or out-of-date information.” S. REP. NO. 1884, at 3 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476, 2478.
4. “In enacting the Truth in Negotiations Act, Congress recognized that in a noncompetitive atmosphere, contractors had little motivation to base their prices upon the lowest possible costs.” *Hardie-Tynes Mfg. Co.*, ASBCA No. 20367, 76-1 B.C.A. para. 11,827, at 56,475, 56,480. TINA was designed to prevent and avoid “situations in which inaccurate, incomplete,

or noncurrent information is known by the contractor, but withheld from the Government to its detriment.” Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342, 1346 (Ct. Cl.1973). Contractors must certify “to the best of their knowledge and belief, that the ‘cost or pricing data [they] submitted [to the Government] was accurate, complete and current.’” Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1402 (Fed. Cir. 1986) (brackets in original) (citing TINA). “When a contractor has breached its duty to disclose such data . . . the Government is entitled to a downward price adjustment in the amount of the overstated costs.” Unisys Corp. v. United States, 888 F.2d 841, 844-845 (1989) (citing M-R-S Mfg. Co. v. United States, 492 F.2d 835 (Ct. Cl. 1974)).

5. TINA sets a threshold, as well as other limits, for obtaining cost and pricing data. The threshold is adjusted for inflation and rounded to the nearest \$50,000 every five years. It is currently \$700,000.²
Note: FAR Case 2008-024 adjusted the cost and pricing threshold to \$700,000. This adjustment is effective 01 October 2010.

V. TINA - REQUIREMENTS FOR COST OR PRICING DATA

- A. Disclosure Requirements. Contractors submit cost or pricing data only for large-dollar, negotiated contract actions. Disclosure can be either mandatory or nonmandatory.
 1. **Mandatory disclosure.** 10 U.S.C. § 2306a(a)(1); 41 U.S.C. § 3502(a); FAR 15.403-4(a)(1). Unless an exception applies, the contracting officer must require the contractor or applicable subcontractor to submit certified cost or pricing data before accomplishing any of the following actions:
 - a. Award of a negotiated contract expected to exceed \$700,000 (except undefinitized actions such as a letter contracts);

² The formula is “[e]ffective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.” Section 1201 of the Federal Acquisition Streamline Act of 1994 (FASA), P.L. 130-355, 108 Stat. 3243; see also 65 Fed. Reg. 60,553. The threshold was adjusted effective October 2010 pursuant to the statutory requirement to keep it constant in terms of fiscal year 1994 dollars. See 65 Fed. Reg. 60,553; see also, 10 U.S.C. § 2306a(a)(7) and 41 U.S.C. § 3502(g).

- b. Award of a subcontract at any tier expected to exceed \$700,000 if the Government required the prime contractor and each higher-tier subcontractor to submit certified cost or pricing data;³
- c. Modification of:
 - (1) Any sealed bid or negotiated prime contract involving a price adjustment⁴ expected to exceed \$700,000 (regardless of whether cost or pricing data was initially required); or
 - (2) Subcontract at any tier involving a price adjustment expected to exceed \$700,000 if the Government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data under the original contract or subcontract.
- d. Negotiated final pricing actions such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts are considered contract modifications requiring cost or pricing data if:
 - (1) The total final price agreement for such settlements or agreements exceeds \$700,000; or
 - (1) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds \$700,000. See also FAR 49.105(c)(15).

2. Nonmandatory

10 U.S.C. § 2306a(c); 41 U.S.C. § 3504(a).

³ If the head of contracting activity (HCA) has waived the requirement for submission of certified cost or pricing data for the prime contractor or one of its higher-tier subcontractors, the prime contractor or higher-tier subcontractor is considered to have been required to submit cost or pricing data for the purpose of this rule, although data was not actually submitted by the prime contractor or higher-tier subcontractor due to the waiver. Consequently, a lower-tier subcontractor expected to exceed the \$700,000 threshold must submit cost or pricing data, unless an exception applies or the waiver specifically includes that lower-tier subcontractor. FAR 15.403-1(c)(4).

⁴ Price adjustment amounts must include both increases and decreases. For example, a \$100,000 net modification resulting from a decrease of \$300,000 and an increase of \$400,000 qualifies as a \$700,000 price adjustment necessitating cost or pricing data. This requirement does not apply when unrelated and separately priced changes (for which cost or pricing data would not otherwise be required) are included in one modification for administrative convenience. FAR 15.403-4(a)(1)(iii).

- a. Unless prohibited because an exception applies, the head of the contracting activity (HCA) can authorize a contracting officer to obtain cost or pricing data for pricing actions expected to cost between the simplified acquisition threshold and \$700,000 if the HCA finds that it necessary to determine whether the price is fair and reasonable and is factually supported. The HCA's decision must be documented in writing and is may not be further delegated. FAR 15.403-4(a)(2).

B. Six Exceptions to the Certified Cost or Pricing Data Requirements

1. Simplified Acquisitions. FAR 15.403-1(a). A contracting officer cannot require a contractor to submit certified cost or pricing data for a procurement that is at or below the simplified acquisition threshold.
2. Adequate Price Competition. 10 U.S.C. § 2306a(b)(1)(A)(i); 41 U.S.C. § 3503(a)(1)(A); FAR 15.403-1(b)(1) and (c)(1). A contracting officer cannot require a contractor to submit cost or pricing data if the agreed upon price is based upon adequate price competition.
 - a. Definition of adequate price competition if two or more offers are received. FAR 15.403-1(c)(1)(i).
 - (1) Adequate price competition exists if two or more responsible offerors, competing independently, submitted responsive offers; and
 - (2) The Government will award the contract to the offeror whose proposal represented the best value, and in which price was a substantial factor in the source selection. FAR 15.403-1(c)(1)(i)(A); and
 - (3) The contracting officer did not find the successful offeror's price unreasonable.⁵ See Serv-Air, Inc., B-189884, Sept. 25, 1978, 78-2 CPD ¶ 223, aff'd on recons., Mar. 29, 1979, 79-1 CPD ¶ 212 (holding that cost or pricing data was not required because there was adequate price competition); cf. Litton Sys., Inc., Amecom Div., ASBCA No. 35914, 96-1 BCA ¶ 28,201 (denying the contractor's motion for summary judgment because a dispute of fact existed regarding whether there was adequate price competition).

⁵ The contracting officer must: (1) support any finding that the successful offeror's price was unreasonable with a statement of facts; and (2) obtain approval at a level above the contracting officer. FAR 15.403-1(c)(1)(i)(B).

- b. Definition of adequate price competition if one offer received. FAR 15.403-1(c)(1)(ii).
- (1) Adequate price competition exists if the Government reasonably expected that two or more responsible offerors, competing independently, would submit offers; and
 - (2) Even though the Government only received one proposal, the contracting officer reasonably concluded that the offeror submitted its offer with the expectation of competition.⁶
 - (3) **See Appendix A for additional rules applying to DoD.**
- c. Adequate price competition when there is current or recent prices for the same or similar items. FAR 15.403-1(c)(1)(iii). Adequate price competition exists if price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition. See Norris Industries, Inc., ASBCA No. 15442, 74-1 BCA ¶ 10,482 (concluding that there was not adequate price competition where only one recent previous contract was for a quantity comparable to current contract).
- (1) **See Appendix A for additional rules applying to DoD.**
- d. Requiring a contractor to submit certified cost or pricing data when there is adequate competition may be an abuse of the contracting officer's discretion. See United Technologies Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444 (rejecting Air Force's contention that the contracting officer had absolute discretion both to require certified cost or pricing data and to include a price adjustment clause where the price was negotiated based upon adequate price competition).

⁶ The contracting officer can reasonably conclude that the offeror submitted its offer with the expectation of competition if circumstances indicate that the offeror: (1) believed that at least one other offeror was capable of submitting a meaningful offer; and (2) had no reason to believe that other potential offerors did not intend to submit offers; and the determination that the proposed price is based on adequate competition is reasonable, and is approved at a level above the contracting officer. FAR 15.403-1(c)(1)(ii)(A)(B).

3. Prices set by law or regulation. FAR 15.403-1(c)(2). Pronouncements in the form of periodic rulings, reviews, or similar actions of a Government body, or embodied in the laws, are sufficient to set a price.
4. Commercial items.
 - a. Acquisitions of items meeting the commercial item definition in FAR 2.101 are exempt from the requirement for cost or pricing data. FAR 15.403-1(c)(3).
 - b. The Department of Defense must annually report to Congress all commercial item procurements over \$15,000,000 that received an exemption from the cost or pricing data requirements. DFARS 215.403-1(c)(3)(B).
5. Modifications to commercial items. When minor modifications to commercial items do not make the item “non-commercial,” then:
 - a. If funded by an agency other than DoD, NASA, or Coast Guard, no cost or pricing data is required. FAR 15.403-1(c)(3)(iii)(A).
 - b. If funded by DoD, NASA, or the Coast Guard, cost or pricing data is only required if the total price of all such modifications under a particular contract action exceed the greater of \$700,000 or five percent of the contract’s total price. FAR 15.403-1(c)(3)(iii)(C).
 - c. When purchasing **services** that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, they may be considered commercial items **ONLY** if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services. FAR 15.403-1(c)(3)(ii); Section 868, Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, Pub. L. 110-417, 14 Oct 2008.
 - (1) In order to make this determination, the contracting officer may request that the offeror submit prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers; and
 - (2) If the contracting officer determines that the information described above is not sufficient to determine the

reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs and overhead rates may be requested. FAR 15.403-1(c)(3)(ii)(B)&(C).

6. Waivers

a. The HCA, without power of delegation, may waive in writing the requirement for cost or pricing data in exceptional cases if the price can be determined to be fair and reasonable without submission of cost or pricing data.⁷ FAR 15.403-1(c)(4).

(1) Example: If cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated information, a waiver may be granted.

b. DoD has additional restrictions on waivers. DFAR 215.403-1(c)(4). The HCA may apply the exceptional circumstance waiver authority only after making a determination that:

(1) The property or services cannot reasonably be obtained under the contract, sub-contract, or modification, without the waiver;

(2) The price can be determined to be fair and reasonable without the submission of certified cost or pricing data; and

(3) There are demonstrated benefits to granting the waiver. See PGI 215.403-1(c)(4)(A) for DoD procedures.

(4) An annual report to Congress is required for all waivers granted under FAR 15.403-1(b)(4), for any commercial item contract, subcontract, or modification expected to have a value of over \$15 million.

7. Other exceptions

a. Exercise of an option. The exercise of an option at the price established at contract award or initial negotiation does not require cost or pricing data. FAR 15.403-2(a).

⁷ See Footnote 3, *supra*.

- b. Interim Billings: Proposals used solely for overrun funding or interim billing price adjustments. FAR 15.403-2(b).
- c. Defense of NBC attack. Any acquisition of supplies or services that the HCA determines are used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, will be treated as a commercial item and will be exempt from certified cost or pricing data. If the contract exceeds \$17.5 million and is awarded upon a sole source basis, then cost or pricing data requirements apply. FAR 12.102(f)(1) and FAR 12.102(f)(2)(ii).

C. Defining Cost or Pricing Data. See FAR Section 2.101, Definitions.

1. Examples of cost or pricing data:

- a. Vendor quotations;
- b. Nonrecurring costs: Those costs which are generally incurred on a one-time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction engineering, initial spoilage and rework, and specialized work force training. This is different from recurring costs that vary with the quantity being produced, such as labor and materials. Separately defined at FAR 17.103;
- c. Information on changes in production methods and in production or purchasing volume;
- d. Data supporting projections of business prospects and objectives and related operational costs;
- e. Unit-cost trends such as those associated with labor efficiency;
- f. Make-or-buy decisions. This term refers to the prime contractor's decisions regarding whether to use subcontracting to ensure the lowest overall cost to the Government. The term "make item" refers to an item or work effort produced or performed by the prime contractor rather than "buying" the item from a subcontractor.
 - (1) "Make-or-buy program" is separately defined at FAR 2.101 and is separately covered in Subpart 15.4 at FAR 15.407-2;
- g. Estimated resources to attain business goals; and

- c. These distinctions are often difficult to make. Information that mixes fact and judgment may require disclosure because of the underlying factual information. See, e.g., Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195; cf. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842 (holding that reports regarding estimated labor hours were not required to be disclosed because they were “pure judgment”).
- d. Cost or pricing data may in some instance include information that would be considered judgmental if the facts and data are so intertwined with judgments that the judgments must be disclosed to make the facts or data meaningful. A decision to act upon judgmental data, should be disclosed even if not yet implemented. H.R. Conf. Rep. No. 446, 100th Cong., 1st Sess. 657.
- e. **Management decisions** are generally a conglomeration of facts and judgment. See, e.g., Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722. To determine whether management decisions could reasonably be expected to have a significant bearing upon costs and, therefore, be classified as cost or pricing data, one should consider the following factors:
- (1) Did management actually make a “decision?” Kisco Co., ASBCA No. 18432, 76-2 BCA ¶12,147.
 - (2) Was the management decision made by a person or group with the authority to approve or disapprove actions affecting costs?
 - (3) Did the management decision require some sort of “action” affecting the relevant cost element, or was the “decision” more along the lines of preliminary planning for possible future action?
 - (4) Is there a substantial relationship between the management decision and the relevant cost element?
 - (5) Is the management decision the type of decision that prudent buyers and sellers would reasonably expect to affect price negotiations significantly?
 - (6) A management decision to act, which has not been implemented, may be cost or pricing data in certain circumstances. Appeals of Lockheed Corporation, ASBCA

Nos. 36420, 37495 and 39195, 95-2 BCA ¶27,722; H.R. Conf. Rep. No. 100-446, 100th Cong., 1st Sess. 657, reprinted in 1987 U.S. Code Cong. & Admin News 1769; see Boeing Co., ASBCA No. 33881, 92-1 BCA ¶24,414 and Appeal of Millipore Corp., GSBCA no. 9453, 91-1 BCA 23,345 (1991) (finding a contractor's imminent plans to revise its dealer discount program to be cost or pricing data).

4. Cost or pricing data must be significant.
 - a. The contractor must disclose the data if a reasonable person (i.e., a prudent buyer or seller) would expect it to have a significant effect upon price negotiations. Plessey Indus., Inc., ASBCA No. 16720, 74-1 BCA ¶ 10,603.
 - b. Prior purchases of similar items may be "significant data." Kisco Co., ASBCA No. 18432, 76-2 ¶ 12,147; Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.
 - c. The duty to disclose extends not only to data that the contractor knows it will use, but also to data that the contractor thinks it might use. If a reasonable person would consider the data in determining cost or price, the data is significant and the contractor must disclose it. Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121; P.A.L. Sys. Co., GSBCA No. 10858, 91-3 BCA ¶ 24,259 (holding that a contractor should have disclosed vendor discounts even though the Government was not entitled to them).
 - d. The amount of the overpricing is not determinative of whether the information is significant. See Conrac Corp. v. United States, 558 F.2d 994 (1977) (holding that the Government was entitled to a refund totaling one-tenth of one percent of the total contract price); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489 (holding that the Government was entitled to a refund totaling two-tenths of one percent of the total contract price); but see, Boeing Co., ASBCA No. 33881, 92-1 BCA ¶ 24,414 (holding that a \$268 overstatement on a \$1.7 billion contract was "*de minimis*").
 - e. The DCAA Contract Audit Manual (DCAA CAM) states that potential defective pricing price adjustments of five percent of the contract value or \$50,000, whichever is less, should normally be

considered immaterial by auditors. DCAA CAM ¶ 14-120.1. These materiality criteria do not apply when:

- (1) A contractor's deficient estimating practices results in recurring defective pricing; or
- (2) The potential price adjustment is due to a systemic deficiency which affects all contracts priced during the period. DCAA CAM ¶ 14-120.1.

5. Court and Board Decisions

- a. Receipt of additional sealed bids from suppliers was held to be cost and pricing data because knowledge of undisclosed bids clearly was information that a prudent buyer or seller would reasonably expect to affect price negotiations. Aerojet Solid Propulsion Co. v. White, 291 F.3d 1328 (Fed. Cir. 2002).
- b. A contractor's computer generated report, used as an estimating tool for system unit costs at a given period of time, was found to be cost or pricing data, even though the selection of that estimating tool at that time was a judgment and the results were estimates. Appeal of Texas Instruments, Inc., ASBCA 23678, 87-3 BCA 20195 (1987).

D. Submission of Cost and Pricing Data

1. Procedural requirements

- a. Format. FAR 15.403-5.
 - (1) In the past, contractors used a Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet, to submit cost or pricing data; however, this form is obsolete.
 - (2) Today, the contracting officer can:
 - (a) Require contractors to submit cost or pricing data in the format specified in FAR 15.408, Table 15-2;
 - (b) Specify an alternate format; or
 - (c) Allow contractors to use their own format.

- b. Submitting the certified cost or pricing data.
- (1) Contractors must ensure they submit the data to the proper Government official, generally the contracting officer or the contracting officer's authorized representative. 10 U.S.C. § 2306a(a)(3); 41 U.S.C. § 3502(c).
 - (2) The boards often look at whether the person to whom the disclosure was made participated in the negotiation of the contract. See Singer Co., Librascope Div. v. United States, 217 Cl. Ct. 225, 576 F.2d 905 (1978) (holding that disclosure to the auditor was not sufficient where the auditor was not involved in the negotiations); Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342 (Ct. Cl. 1973) (holding that disclosure to the ACO was not sufficient where the ACO had no connection with the proposal and the contractor did not ask the ACO to forward the data to the PCO); cf. Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489 (holding that disclosure to the ACO was sufficient where the ACO was involved in the negotiation of the disputed rates and knew that the subject contract was being negotiated); Litton Sys., Inc., Amecom Div., ASBCA Nos. 34435, et. al., 93-2 BCA ¶ 25,707 (holding that disclosure of indirect cost actuals to resident auditor based upon established practice was sufficient disclosure though auditor did not participate in negotiations).
- c. Adequate Disclosure. A contractor can meet its obligation if it provides the data physically to the Government and discloses the significance of the data to the negotiation process. M-R-S Manufacturing Co. v. United States, 492 F.2d 835 (Ct. Ct. 1974).
- (1) The contractor must advise Government representatives of the kind and content of the data and their bearing upon the prospective contractor's proposal. Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195.
 - (2) Making records available to the Government may constitute adequate disclosure. Appeals of McDonnell Douglas Helicopter Sys., ASBCA No. 50447, 50448, 50449, 2000 BCA ¶ 31,082 (furnishing or making available historical reports to DCAA resident auditor and DLA in-plant

personnel in connection to Apache procurement make-buy decisions held adequate).

- (3) Knowledge by the other party of the data's existence is no defense to a failure to provide data. Grumman Aerospace Corp., ASBCA No. 35188, 90-2 BCA ¶ 22,842 (prime contractor's alleged knowledge of subcontractor reports not sufficient because subcontractor was obligated to physically deliver the data).

2. Obligation to Update Data

- a. The contractor is obligated to disclose data in existence as of the date of price agreement. Facts occurring before price agreement and coming to the negotiator's attention after that date must be disclosed before award if they were "reasonably available" before the price agreement date.
- b. The contractor's duty to provide updated data is not limited to the personal knowledge of its negotiators. Data within the contractor's (or subcontractor's) organization are considered readily available.
- c. Near the time of price agreement, a contractor sometimes conducts internal "sweeps" of cost or pricing data to ensure it meets its disclosure requirements.

3. Certification of the Certified Cost or Pricing Data

- a. Requirement. FAR 15.406-2. When cost or pricing data is required, the contractor must submit a Certificate of Current Cost or Pricing Data using the format found at FAR 15.406-2(a). See 10 U.S.C. § 2306a(a)(2) and 41 U.S.C. § 3502(b)(requiring any person who submits cost or pricing data to certify that the data is accurate, complete, and current).
- b. Due date for certificate. The certificate is due as soon as practicable after the date the parties conclude negotiations and agree to a contract price. FAR 15.406-2(a).
- c. Failure to submit certificate. A contractor's failure to certify its cost or pricing data does not relieve it of liability for defective pricing. 10 U.S.C. § 2306a(f)(2); 41 U.S.C. § 3507(b); see S.T. Research Corp., ASBCA No. 29070, 84-3 BCA ¶ 17,568.

VI. DATA OTHER THAN CERTIFIED COST OR PRICING DATA

- A. Application: Even if an exception to cost or pricing data applies to an acquisition, the contracting officer is still required to determine price reasonableness. In order to make this determination, the contracting officer may require data other than certified cost or pricing data, including information related to prices and cost information that would otherwise be defined as cost or pricing data, if certified.
1. General requirements. 10 U.S.C. § 2306a(d); 41 U.S.C. § 3505; FAR 15.403-3(a). The contracting officer shall –
 - a. Obtain whatever data are available from Government or other secondary sources, using it to determine fair and reasonable price;
 - b. Require submission of DOTCCPD from the offeror to the extent necessary to determine a fair and reasonable price, if determined that adequate data from sources other than the offeror are not available. This includes requiring data from an offeror to support cost realism analysis;
 - c. Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;
 - d. Require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold;⁸ and
 - e. Consider the guidance in Section 3.3, Chapter 3, Volume I of the DoD Contract Pricing Reference Guide to determine data an offeror shall be required to submit.
 - f. The contractor's format for submitting the data shall be used, ensuring that the data used to support price negotiations are sufficiently current. Requests for updated data should be limited to data that affects adequacy of the proposal for negotiations, such as changes in price lists.
 2. Adequate price competition. FAR 15.403-3(b).
 - a. Additional information is not required to determine price reasonableness and/or cost realism when adequate price competition, defined at FAR 15.403-1(c)(1), exists.

⁸ This requirement does not apply if offeror's proposed price is: (1) based on adequate price competition; or (2) set by law or regulation. FAR 15.403-1(b)(1)&(2).

- b. If there are unusual circumstances where it is concluded that additional data are necessary in determining price reasonableness, the contracting officer must obtain the information from sources other than the offeror to the maximum extent practicable.
 - c. The contracting officer may request data other than certified cost or pricing data to:
 - (1) Determine the cost realism of competing offers; and/or
 - (2) Evaluate competing approaches.
- B. Submission of Data Other Than Certified Cost or Pricing Data. FAR 15.403-3(a)(2); FAR 15.403-5(a)(3) and (b)(2); FAR 15.408(l) and (m).
- 1. The contracting officer must state the requirement to submit data other than certified cost or pricing data in the solicitation. See FAR 52.215-20 (Requirements for Certified Cost or Pricing Data or Data Other than Certified Cost or Pricing Data); FAR 52.215-21 (Requirements for Certified Cost or Pricing Data or Data Other than Certified Cost or Pricing Data – Modifications).
 - 2. If the contracting officer requires the submission of data other than certified cost or pricing data, the contractor may submit the information in its own format unless the contracting officer concludes that the use of a specific format is essential and describes the required format in the solicitation.
 - 3. The offeror is not required to certify data other than certified cost or pricing data.
 - 4. A contractor or subcontractor who fails to submit requested DOTCCPD is ineligible for award. FAR 15.403-3(a)(4). The HCA may determine that it is in the best interest of the Government to make the award to that offeror after considering:
 - a. The effort made to obtain the data;
 - b. The need for the item or service;
 - c. The increased cost or significant harm to the Government if award is not made.

VII. CONTRACT PRICING BY METHOD OF CONTRACTING

- A. Sealed Bidding. FAR 14.408-2 and FAR 15.404-1(b).
1. Certified cost or pricing data is not required for contracts obtained initially by sealed bidding when two or more offerors, competing independently, submit priced offers satisfying requirements. FAR 15.403-1(c)(1). Modifications, however, may require cost or pricing data if they are over the threshold and an exception does not apply. FAR 15.403-4(a)(1)(iii).
 2. Contracting officer must determine the prices offered are reasonable in light of all prevailing circumstances before awarding the contract. Particular care should be taken if only one bid is received. FAR 14.408-2.
 3. Price analysis techniques may be used as guidelines. The contracting officer must consider whether the bids are unbalanced. FAR 15.404-1(g).
 - a. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more Contract Line Item Numbers (CLINs) are significantly over or understated.
 - b. The contracting officer may reject a bid if it is determined that the unbalanced prices pose an unacceptable risk. FAR 15.404-1(g)(3).
- B. Simplified Acquisitions. FAR Part 13.
1. The contracting officer shall not request certified cost or pricing data for items at or under the simplified acquisition threshold. FAR 15.403-1(a).
 2. Micropurchases. FAR 13.202.
 - a. To the extent possible, micro-purchases shall be distributed equitably among qualified suppliers.
 - b. Micropurchases may be awarded without soliciting competitive quotations if the authorized purchaser considers the price to be reasonable. If competitive quotations were solicited and award was made to other than the low quoter, documentation to support the purchase may be limited to identification of the solicited concerns and an explanation for the award decision. FAR 13.202(b).
 - c. The administrative cost of verifying the reasonableness of the purchase price may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need only be taken if the authorized purchaser:

- (1) Suspects the price may not be reasonable; or
 - (2) No comparable pricing information is readily available for that item. FAR 13.202(a)(3).
3. Price reasonableness for simplified acquisitions. FAR 13.106-3.
- a. The contracting officer should evaluate price and other factors in an efficient and minimally burdensome manner. The contracting officer must determine the proposed price is fair and reasonable.
 - b. Whenever possible, base price reasonableness upon competitive quotations.

If only **one response** is received, include a statement of price reasonableness in the contract file. The statement may be based upon (1) market research, (2) comparison of proposed price with prices found reasonable on previous purchases, (3) current price lists, catalogs, or advertisements, (4) a comparison of similar items in a related industry, (5) the contracting officer's personal knowledge of the item being purchased, (6) comparison to an independent Government estimate, or (7) any reasonable basis.

C. Commercial Items - 10 U.S.C. § 2306a(d)(2); 41 U.S.C. § 3505(b)(1); FAR 15.403-1(c)(3); FAR 15.403-3(c); and defined at FAR 2.101.

1. At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable. FAR 15.403-3(c).
 - a. The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable.⁹
 - b. The contracting officer must establish price reasonableness in accordance with FAR 13.106-3 (Simplified Acquisition Procedures), FAR 14.408-2 (Sealed Bidding), or FAR Part 15.4 (Contract Pricing), as applicable.
 - (1) The contracting officer should be aware of customary commercial terms and conditions when pricing commercial items.

⁹ In an evaluation of how DoD prices commercial items, the GAO identified problems with the Government's price analysis. In more than half of the purchases, the contracting officer compared the offered price with the offeror's catalog price, or with the price paid in previous procurements. The Government negotiated lower prices in only three of the thirty-three cases. Government Accountability Office, Contract Management: DoD Pricing of Commercial Items Needs Continued Emphasis, Report No. GAO/NSIAD-99-90 (June 24, 1999).

- (2) The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.
 - (3) Commercial item prices are affected by the following factors: speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements.
 - c. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit DOTCCPD for further analysis.
 - (1) Requests for sales data must be limited to data for the same or similar items during a relevant time period; and
 - (2) To the maximum extent possible, requests for data other than certified cost or pricing data must be limited in scope to include only information that is in the form regularly maintained by the offeror as part of its commercial operations. FAR 15.403-3(c)(2).
- 2. The contracting officer may not request certified cost or pricing data for commercial items as long as the Government is not modifying it. FAR 15.403-1(c)(3).
 - d. If the contracting officer determines a claimed commercial item is non-commercial, and no other exception or waiver applies, cost or pricing data is required.
 - e. When minor modifications to commercial items do not make the item "non-commercial," then:
 - (1) If funded by an agency other than DoD, NASA, or Coast Guard, no cost or pricing data is required. FAR 15.403-1(c)(3)(iii)(A).
 - (2) If funded by DoD, NASA, or the Coast Guard, cost or pricing data is only required if the total price of all such modifications under a particular contract action exceed the greater of \$700,000 or five percent of the total price of the contract. FAR 15.403-1(c)(3)(iii)(C).

2. If an item is procured by a sole source award of less than \$17.5 million to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack and only qualifies as a commercial item pursuant to FAR 12.102(f)(1), then the item is exempt from cost or pricing data requirements. FAR 15.403-1(c)(3)(iv).

D. Competitive Negotiations.

1. The contracting officer is responsible to determine price reasonableness for the prime contract, including subcontracts. The contracting officer may request the advice and assistance of other experts to ensure that an appropriate analysis is performed. The contracting officer is responsible to follow all the pricing policies previously discussed in this outline. FAR 15.404-3 and 15.404-1(a)(5).
2. A price analysis is required whenever TINA does not require certified cost or pricing data. When certified cost or pricing data is required, a price analysis is also recommended to verify the overall price is fair and reasonable. A cost analysis is required when TINA requires certified cost or pricing data in order to evaluate the reasonableness of individual cost elements. FAR 15.404-1(a)(2) & (3).
3. Data other than certified cost or pricing data. See Section VI, *supra*.

VIII. DEFECTIVE PRICING

- A. Definition defective cost or pricing data: It is cost or pricing data that, as of the date of agreement on the price of the contract (or another date as agreed to), is subsequently discovered to have been inaccurate, incomplete, or noncurrent. 10 U.S.C. § 2306a(e)(1)(B); 41 U.S.C. § 3506(a)(2). Under TINA and contract price reduction clauses, the Government is entitled to an adjustment in the contract price, to include profit or fee, when it relied upon defective cost or pricing data.
- B. Audit Rights. Subsequent to award of a negotiated contract under which the contractor submitted cost or pricing data, the Government has several rights to audit the contractor's records.
 1. Contracting agency's right.
 - a. Statutory basis. 10 U.S.C. § 2306a(g); 41 U.S.C. § 3508. For the purpose of evaluating the accuracy, completeness and currency of cost or pricing data, TINA gives the head of an agency, acting through an authorized representative, the right to examine contractor (or subcontractor) records. This right is identical to the

rights given to the head of an agency under 10 U.S.C. § 2313(a)(2) and 41 U.S.C. § 4706(b)(2).

- b. Definitions. 10 U.S.C. § 2313(i); 41 U.S.C. § 4706(a). The term “records” includes “books, documents, accounting procedures and practices, and any other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.”
- c. Examination authority. 10 U.S.C. § 2313(a)(2), (e)-(f); 41 U.S.C. § 4706(b)(2), (f)-(g).
 - (1) The head of an agency, acting through an authorized representative, has the right to examine all records related to:
 - (a) The proposal for the contract (or subcontract);
 - (b) The discussions conducted on the proposal;
 - (c) The pricing of the contract (or subcontract); or
 - (d) The performance of the contract (or subcontract).
 - (2) The examination right expires three years after final payment on the contract.
 - (3) The examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.
- d. Contract clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding) and FAR 52.215-2 (Audit and Records – Negotiation) both state that the contracting officer, an authorized representative of the contracting officer, and the Comptroller General, have the right to examine and audit the contractor’s records for specific information when cost or pricing data has been submitted.
- e. Subpoena power. 10 U.S.C. § 2313(b); 41 U.S.C. § 4706(c)(1).

- (1) The Director of DCAA¹⁰ can subpoena any of the records that 10 U.S.C. § 2313(a) gives the HCA the right to examine.
 - (2) The Director of the DCAA can enforce this subpoena power by seeking an order from an appropriate U.S. district court.
 - (3) DCAA's subpoena power does not extend to a contractor's internal audit reports. United States v. Newport News Shipbldg. and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988) (Newport News I).
 - (a) Internal audits are not related to a particular contract.
 - (b) Internal audits contain the subjective evaluations of the contractor's audit staff.
 - (4) DCAA's subpoena power is aimed at obtaining objective data upon which to evaluate the specific costs a contractor charged to the Government.
- (1) DCAA's subpoena power extends to a contractor's federal income tax returns and other financial data. United States v. Newport News Shipbldg. and Dry Dock Co., 862 F.2d 464 (4th Cir. 1988) (Newport News II).
 - (5) DCAA's subpoena power is not limited to records relating to a contractor's pricing practices.
 - (6) DCAA's subpoena power extends to objective factual records relating to overhead costs that the contractor may pass on to the Government.
 - (7) DCAA's subpoena power also extends to a contractor's work papers for its federal income tax returns and financial statements. United States v. Newport News Shipbldg. and

¹⁰ For civilian agencies, this right extends to the Inspector General of an executive agency, or upon the request of the head of an executive agency, the Director of the DCAA or the Inspector General of the General Services Administration. 41 U.S.C. § 4706(c)(1).

Dry Dock Co., 737 F. Supp. 897 (E.D. Va. 1989) (Newport News III), aff'd, 900 F.2d 257 (4th Cir. 1990).

2. Comptroller General's right.
 - a. Statutory basis. 10 U.S.C. § 2313(c), (e)-(f); 41 U.S.C. § 4706(d), (f)-(g). The Comptroller General (or the Comptroller General's authorized representative) has the right "to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract..."
 - b. Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) expanded the Comptroller General's rights. Effective October 14, 2009, the Comptroller General may interview current employees regarding transactions being examined during an audit of contracting records. This right does not apply to commercial items contracts. FAC 2005-37, FAR Case 2008-026.
 - c. The Comptroller General's examination right only applies to contracts awarded using other than sealed bid procedures. The Comptroller General's examination right expires three years after final payment on the contract.
 - d. The Comptroller General's examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.
 - e. Contract clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).
 - f. Subpoena power. 31 U.S.C. § 716.
 - (1) The Comptroller General has the power to subpoena the records of a person to whom the Comptroller General has access by law or agreement.
 - (2) The Comptroller General can enforce this subpoena power by seeking an order from an appropriate U.S. district court. United States v. McDonnell-Douglas Corp., 751 F.2d 220 (8th Cir. 1984).
 - g. Scope of the Comptroller General's examination right.

- (1) The term “contract,” as used in the statute, embraces not only the specific terms and conditions of a contract, but also the general subject matter of the contract. Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).
 - (2) For cost-based contracts, the Comptroller General’s examination right is extremely broad; however, for fixed-price contracts, the books or records must bear directly on the question of whether the Government paid a fair price for the goods or services. Bowsher v. Merck & Co., 460 U.S. 824 (1983).
3. Inspector General’s right. 5 U.S.C. App. 3 § 6.
 - a. Statutory basis. 5 U.S.C. App. 3 § 6(a)(1).
 - (1) The Inspector General of an agency has the right “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material . . . which relate to programs and operations with respect to which that Inspector General has responsibilities...”
 - (2) This statutory right requires no contractual implementation.
 - b. Subpoena power. 5 U.S.C. App. 3 § 6(a)(4).
 - (1) The Inspector General has the power to subpoena all data and documentary evidence necessary to perform the Inspector General’s duties.
 - (2) The Inspector General can enforce this subpoena power by seeking an order from an appropriate U.S. district court.
 - c. Scope of the Inspector General’s right. The scope of the Inspector General’s right is extremely broad and includes internal audit reports. United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3d Cir. 1986).
4. FY 2012 NDAA, Section 842 – The Secretary of Defense, upon written determination, may examine any records of a covered contract, grant, or cooperative agreement to ensure that funds available under said agreement are not subject to extortion or corruption; and are not being provided to persons or entities actively supporting an insurgency or actively opposing United States or coalition forces in a contingency operation.

5. Obstruction of a Federal audit. 18 U.S.C. § 1516.
 - a. This statute does not increase or enhance the Government's audit rights.
 - b. The statute makes it a crime for anyone to influence, obstruct, or impede a Government auditor (full or part-time Government/contractual employee) with the intent to deceive or defraud the Government.

IX. DEFECTIVE PRICING REMEDIES

A. Contractual

1. Price adjustment. The Government can reduce the contract price if the Government discovers that a contractor, prospective subcontractor, or actual subcontractor submitted defective cost or pricing data. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 3506(a)(1); and FAR 15.407-1(b)(1).
 - a. Amount. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 3506(a)(1); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).
 - (1) The Government can reduce the contract price by any significant amount by which the contract price was increased because of the defective cost or pricing data. Unisys Corp. v. United States, 888 F.2d 841 (Fed. Cir. 1989); Kaiser Aerospace & Elec. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489; Etowah Mfg. Co., ASBCA No. 27267, 88-3 BCA ¶ 21,054.
 - (2) Profit or fee can be included in the price reduction.
 - (3) Interest. The Government can recover interest on any overpayments it made because of the defective cost or pricing data. 10 U.S.C. § 2306a(f)(1)(A); 41 U.S.C. § 3507(a)(1); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification). The contracting officer must:
 - (a) Determine the amount of the overpayments;

- (b) Determine the date the overpayment was made;¹¹ and
 - (c) Apply the appropriate interest rate.¹²
 - b. Defective subcontractor data. FAR 15.407-1(e)-(f).
 - (1) The Government can reduce the prime contract price regardless of whether the defective subcontractor data supported subcontract cost estimates or firm agreements between the subcontractor and the prime.
 - (2) If the prime contractor uses defective subcontractor data, but subcontracts with a lower priced subcontractor (or fails to subcontract at all), the Government can only reduce the prime contract price by the difference between the subcontract price the prime contractor used to price the contract and:
 - (a) The actual subcontract price if the contractor subcontracted with a lower priced subcontractor; or
 - (b) The contractor's actual cost if the contractor failed to subcontract the work.
 - (3) The Government can disallow payments to subcontractors when these payments result from defective cost or pricing data under:
 - (a) Cost-reimbursement contracts; and
 - (b) All fixed-price contracts except firm fixed-price contracts and fixed-price contracts with economic price adjustments (e.g., fixed-price incentive contracts and fixed-price award fee contracts).

¹¹ For prime contracts, the date of overpayment is the date the Government paid for a completed and accepted contract item. For subcontracts, date of overpayment is the date the Government paid the prime contractor for progress billings or deliveries that included a completed and accepted subcontract item. FAR 15.407-1(b)(7)(ii).

¹² The Secretary of the Treasury sets interest rates on a quarterly basis. 26 U.S.C. § 6621(a),(b). Effective 4 August 2011, FAR Case 2009-034 changed FAR 52.214-27, FAR 52.215-10 and FAR 52.215-11 to require "interest compounded daily as required by 26 USC 6622" to Government overpayments as a result of defective cost or pricing data. This rule replaces the term "simple interest" and aligns with a Court of Appeals for the Federal Circuit decision in Gates v. Raytheon Co., 584 F.3d 1062 (Fed. Cir. 2009).

2. If the Government fails to include a price reduction clause in the contract, courts and boards will read them in pursuant to the Christian Doctrine. University of California, San Francisco, VABCA No. 4661, 97-1 BCA ¶ 28,642; Palmetto Enterprises, Inc., ASBCA No. 22839, 79-1 BCA ¶ 13,736.
3. A defective pricing claim is not subject to the normal six-year statute of limitations. Radiation Sys., Inc., ASBCA No. 41065, 91-2 BCA ¶ 23,971.
4. A defective pricing claim cannot be asserted by the Government as an affirmative defense to a contractor's money claim. Computer Network Sys., Inc., GSBCA No. 11368, 93-1 BCA ¶ 25,260.
5. Penalties. 10 U.S.C. § 2306a(f)(1)(B); 41 U.S.C. § 3507(a)(2); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).
 - a. The Government can collect penalty amounts where the contractor (or subcontractor) knowingly submitted defective cost or pricing data.
 - b. The contracting officer can obtain a penalty amount equal to the amount of the overpayment.
 - c. The contracting officer must consult an attorney before assessing any penalty.
6. Government's burden of proof. The Government bears the burden of proof in a defective pricing case. General Dynamics Corp., ASBCA No. 32660, 93-1 BCA ¶ 25,378. To meet its burden, the Government must prove that:
 - a. The information meets the definition of cost or pricing data;
 - b. The information existed before the date of agreement on price;
 - c. The data was reasonably available before the date of agreement on price;
 - d. The data the contractor (or subcontractor) submitted was not accurate, complete, or current;

- e. The undisclosed data was the type that prudent buyers or sellers would have reasonably expected to have a significant effect upon price negotiations;
 - f. The Government relied on the defective data; and
 - g. The Government's reliance on the defective data caused an increase in the contract price.
7. Once the Government establishes nondisclosure of cost and pricing data, there is a rebuttable presumption of prejudice.
- a. The contractor must then demonstrate that the Government would not have relied upon this information.
 - b. Once demonstrated, the burden of showing detrimental reliance shifts back to the Government.
 - c. Hence, the ultimate burden of showing prejudice rests with the Government.
8. The ASBCA often views defective pricing cases as "too complicated" to resolve by summary judgment. Grumman Aerospace Corp., ASBCA No. 35185, 92-3 BCA ¶ 25,059; McDonnell Douglas Helicopter Co., ASBCA No. 41378, 92-1 BCA ¶ 24,655; but see Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770 (granting the contractor's motion for summary judgment because the Government failed to meet its burden of proof).
9. Successful defenses to price reductions.
- a. The information at issue was not cost or pricing data.
 - b. The Government did not rely on the defective data. 10 U.S.C. § 2306a(e)(2); 41 U.S.C. § 3506(b).
 - c. The price offered by the contractor was a "floor" below which the contractor would not have gone.
10. Unsuccessful defenses to price reductions. 10 U.S.C. § 2306a(e)(3); 41 U.S.C. § 3506(c); FAR 15.407-1(b)(3).
- a. The contractor (or subcontractor) was a sole source supplier or otherwise was in a superior bargaining position.

- b. The contracting officer should have known that the cost or pricing data the contractor (or subcontractor) submitted was defective. FMC Corp., ASBCA No. 30069, 87-1 BCA ¶ 19,544.
 - c. The contract price was based upon total cost and there was no agreement about the cost of each item procured under the contract.
 - d. The contractor (or subcontractor) did not submit a Certificate of Current Cost or Pricing Data.
11. Offsets. 10 U.S.C. § 2306a(e)(4)(A)-(B); 41 U.S.C. § 3506(d); FAR 15.407-1(b)(4)-(6); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).
- a. The contracting officer must allow an offset for any understated cost or pricing data the contractor (or subcontractor) submitted.
 - b. The amount of the offset may equal, but not exceed, the amount of the Government’s claim for overstated cost or pricing data arising out of the same pricing action.
 - c. The offset does not have to be in the same cost grouping as the overstated cost or pricing data (e.g. material, direct labor, or indirect costs).
 - d. The contractor must prove that the higher cost or pricing data:
 - (1) Was available before the “as of” date specified on the Certificate of Current Cost or Pricing Data; and
 - (2) Was not submitted.
 - e. The contractor is not entitled to an offset under two circumstances:
 - (1) The contractor knew that its cost or pricing data was understated before the “as of” date specified on the Certificate of Current Cost or Pricing Data. See United Tech. Corp., Pratt & Whitney v. Peters, No. 98-1400, 1999 U.S. App. LEXIS 15490 (Fed. Cir. July 12, 1999) (affirming in part ASBCA’s denial of offsets for “sweep” data intentionally withheld from Government).
 - (a) Prior to the 1986 TINA amendments, contractors could obtain offsets for intentional understatements.

See United States v. Rogerson Aircraft Controls, 785 F.2d 296 (Fed. Cir. 1986) (holding that a contractor, under pre-1986 TINA, could offset intentional understatements that were “completely known to the Government at the time of the negotiations and in no way hindered or deceived the Government”).

- (b) Even under the pre-1986 TINA, the offset must be based upon cost or pricing data. Errors in judgment cannot serve as a basis for an offset. See AM General Corp., ASBCA No. 48476, 99-1 BCA ¶ 30,130 (characterizing contractor’s decision to amortize nonrecurring costs of HMMWV production as “at most, errors of judgment” that failed to support an offset).

- (2) The Government proves that submission of the data before the “as of” date specified on the Certificate of Current Cost or Pricing Data would not have increased the contract price in the amount of the proposed offset.

B. Administrative Remedies

- 1. Termination of the contract. FAR Part 49; Joseph Morton Co. v. United States, 3 Cl. Ct. 120 (1983), aff’d, 757 F.2d 1273 (Fed. Cir. 1985).
- 2. Suspension and debarment. FAR Subpart 9.4; DFARS Subpart 209.4.
- 3. Cancellation of the contract. 18 U.S.C. § 218; FAR Subpart 3.7.
- 4. The Program Fraud Civil Remedies Act of 1986. 31 U.S.C. §§ 3801-3812; DOD Dir. 5505.5 (Aug. 30, 1988).

C. Judicial remedies.

- 1. Criminal.
 - a. False Claims Act. 18 U.S.C. § 287. See Communication Equip. and Contracting Co., Inc. v. United States, 37 CCF ¶ 76,195 (Cl. Ct. 1991) (unpub.) (holding that TINA does not preempt the False Claims Act so as to limit the Government’s remedies).
 - b. False Statement Act. 18 U.S.C. § 1001. See, e.g., United States v. Shah, 44 F.3d 285 (5th Cir. 1995).

- c. The Major Fraud Act. 18 U.S.C. § 1031.
- 2. Civil.
 - a. False Claims Act. 10 U.S.C. §§ 3729-33. Civil penalty between \$5,500 and \$11,000, plus treble damages. 10 U.S.C. §§ 3729(a).
- D. Fraud indicators. DOD Inspector General's web link found at <http://www.dodig.mil/resources/fraud/scenarios.html>.
 - 1. High incidence of persistent defective pricing.
 - 2. Continued failure to correct known system deficiencies.
 - 3. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.
 - 4. Failure to make complete disclosure of data known to responsible personnel.
 - 5. Protracted delay in updating cost or pricing data to preclude possible price reduction.
 - 6. Repeated denial by responsible contractor employees of the existence of historical records that are later found to exist.
 - 7. Repeated utilization of unqualified personnel to develop cost or pricing data used in estimating process.

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APPENDIX



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

APR 27 2011

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Improving Competition in Defense Procurements – Amplifying Guidance

My attached November 24, 2010, memorandum “Improving Competition in Defense Procurements” provided implementing guidance for the direction provided in the USD(AT&L) memorandum “Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending” dated September 14, 2010. The focus of my memorandum was on maximizing competition in situations where only one offer is received in a procurement utilizing competitive procedures. The purpose of this memorandum is to amplify that guidance in response to questions that have been raised.

The policy guidance set out in the November 24, 2010, memorandum is applicable to all competitive procurements of supplies and services above the Simplified Acquisition Threshold (SAT), including commercial items and construction. Further, it covers procurements accomplished under the procedures in Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) parts/subparts 8.4, 12, 13.5, 14, 15, and 16.5. Exceptions to this policy are procurements in support of emergency acquisitions for contingency operations, humanitarian assistance, disaster relief, peacekeeping operations, or recovery from nuclear, biological, chemical, or radiological attacks against the United States. However, the use of these exceptions does not mitigate the need for competition nor the requirement for a determination that the price is fair and reasonable.

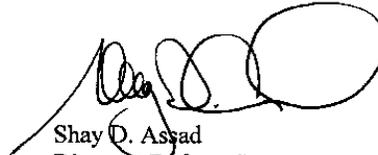
Unless an exception applies or a waiver is granted, the following procedures apply:

- If the solicitation was advertised for fewer than 30 days and only one offer is received, then the contracting officer shall cancel and resolicit for an additional period of at least 30 days; or

- If a solicitation allowed at least 30 days for receipt of offers and only one offer was received, then the contracting officer shall not depend on the standard at FAR 15.403-1(c)(ii) in determining the price to be fair and reasonable. Rather, the contracting officer shall use price or cost analysis in accordance with FAR 15.404-1 to make that determination. If the contracting officer believes that it is necessary to enter into negotiations with an offeror, the basis for these negotiations shall be either certified cost or pricing data or data other than certified cost or pricing data, as appropriate, in accordance with FAR 15.403-1(c), DFARS 215-403-1(c) and FAR 15.403-3(b). The negotiated price should not exceed the offered price.

Waivers to the policy requirement to resolicit or the requirement to conduct negotiations are permitted. The waiver authority is the Head of the Contracting Activity (HCA). However, the HCA may delegate this authority to not lower than one level above the contracting officer.

I recognize that implementation of this policy may have the unintended consequence of increasing the contracting community's workload, but given today's scarcity of resources we need to ensure effective competition to the maximum extent possible. Every dollar saved through effective competition benefits the warfighter and the taxpayers. Should you have additional questions on this policy, please contact Mr. Larry McLaury at 703-697-6710 or e-mail address larry.mclaury@osd.mil.



Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

NOV 24 2010

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION & LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
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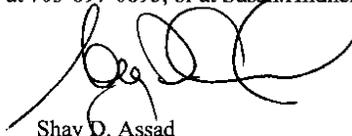
SUBJECT: Improving Competition in Defense Procurements

This memorandum provides additional guidance for competitive situations in which only one offer is received in response to a solicitation and is based on the direction provided in the USD(AT&L) memorandum "Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending" dated September 14, 2010. To maximize the savings that are obtained through competition, contracting officers will no longer use the standard at FAR 15.403-1(c)(1)(ii) or (iii) to determine that the offered price is based on adequate competition when only one offer is received.

Effective immediately, you will ensure that if a solicitation was open for less than 30 days and only one offer was received, the contracting officer shall re-advertise the solicitation for a minimum of an additional 30 days, unless a waiver is obtained from the head of the contracting activity. Further, if the solicitation was open for at least 30 days, or has been re-advertised and still only one offer is received, the contracting officer shall conduct negotiations with the offeror, unless this requirement is specifically waived by the head of the contracting activity. 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.

Contracting officers shall document the results of the negotiations in the Business Clearance/Pricing Negotiation Memorandum in accordance with FAR 15.406-3 and DFARS PGI 215.406-3 in the same manner as any negotiated procurement. Contract Review Boards or other similar review mechanisms should be used to ensure the Business Clearance/Pricing Negotiation Memorandum documents the process and supports the negotiated price as being fair and reasonable. The Peer Reviews conducted post award will be the mechanism for assessing the application of this process.

The intent of this guidance is to ensure more effective competition that will result in more effective use of the Department's resources and savings for the taxpayer. Should you have any questions, please contact Mrs. Susan Hildner at 703-697-0895, or at Susan.Hildner@osd.mil.

A handwritten signature in black ink, appearing to read 'Shay D. Assad', with a stylized flourish extending to the right.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy