"TINA" Sweep Policy Change

The "Sweep", as a creation of the 1980's designed to reduce the incidences of defective pricing found in non-compliance with the Truth in Negotiations Act (or TINA), adds significantly to the Procurement Acquisition Lead Time (PALT). This webinar will answer the questions: What is TINA? What is Defective Pricing? What is SWEEP data? and What is the impact of this policy shift? In addition to answering these questions, a workflow learning tool to help facilitate, motivate and document more timely submissions of current cost and pricing data during negotiations will be discussed.
Disclaimer

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“TINA” Sweep Policy Change

• The Policy Memoranda - now (June 2018), and then (June 1989).

• The TINA statute
  – What acquisitions does TINA cover? Coverage/exceptions
  – Cost and Pricing Data statutorily defined?
  – What is defective pricing, and its remedy?
  – What are statutory requirements for offsets?

• The Regulations (FAR Part 15.4 selections)
  – The FAR certificate, responsibilities (contractor and Government), and “cut-off” dates.

• What is TINA – an ASBCA rendering of its purpose.

• Scenarios (Was it adequately disclosed, or Not? Is it Cost or Pricing Data, or Not?)

• A potential Workflow Tool (TINA CnP Data Disclosure Tool – a draft work in process)
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 PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Reducing Acquisition Lead Time by Eliminating Inefficiencies Associated with Cost or Pricing Data Submissions After Price Agreement ("Sweep Data")

On October 5, 2017, the Secretary of Defense issued a memorandum ("Guidance from Secretary Jim Mattis") identifying three lines of effort necessary to maintain the Department’s position as the world’s preeminent fighting force. The third line of effort focused on bringing business reforms, including streamlining of the requirement identification and acquisition processes, to the Department of Defense.

In an effort to be responsive to the Secretary’s call for streamlining acquisition processes, the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)) is assessing the Department’s acquisition policies and practices so as to identify and address those that impede efficiency. One such practice that significantly contributes to the timeframe between price agreement and contract award relates to the contractor’s submission of additional cost or pricing data (referred to as "sweep data") concurrently with or after the submission of the Certificate of Current Cost or Pricing Data subsequent to price agreement.

Delays associated with contractor efforts to collect and submit cost or pricing data which should have been, but were not, provided to the Contracting Officer in a timely manner prior to agreement on price unnecessarily increase acquisition lead time, both by delaying submission of the Certificate of Current Cost or Pricing Data, and by requiring the Contracting Officer to review the “sweep” data, assess the impact on the negotiated price, and come to an agreement with the contractor on that price impact.

While there is no statutory or regulatory requirement for contractors to perform a cost and pricing data “sweep” after the conclusion of price negotiations (because the requirement is to submit the data prior to the conclusion of price negotiations), untimely submissions of “sweep” data may be indicative of estimating system deficiencies, and, if habitual, appropriate corrective action should be taken.

DFARS 252.215-7002(d)(4)(xiv) states, “An acceptable estimating system shall be updated to provide procedures to update cost estimates and notify the Contracting Officer in a timely manner throughout the negotiation process” (not after the conclusion of the negotiation process).

Effective immediately, for actions subject to the Truth in Negotiations Act, Contracting Officers shall request offerors execute the Certificate of Current Cost or Pricing Data as soon as practicable, but no later than five business days after the date of price agreement. Contracting Officers shall implement this policy for all future solicitations that require a Certificate of Current Cost or Pricing Data and, to the extent practicable, in currently open solicitations.

Contracting Officers shall defer consideration of the impact of any cost or pricing data submitted by a contractor after price agreement is reached until after award of the contract action in order to avoid delays in the awarding of the contract. Any cost or pricing data submitted after price agreement shall be reviewed and dispositioned after award of the contract action, pursuant to FAR 15.407-1, to establish whether it is rendered that the certified cost or pricing data submitted up to the point of price agreement was defective, and to determine whether the Government is entitled to a price adjustment in accordance with FAR 52.215-10 or FAR 52.215-11.

The June 7, 1989, OASD (P&L) memo, subject “Contractor Delays in Submitting Certificates of Current Cost or Pricing Data,” is hereby rescinded, and replaced by this memorandum.

My point of contact for this memorandum is Ms. Gina Bova who can be reached at regina.m.bova.civ@mail.mil, or 703-695-7146.

Shay D. Assad
Director, Defense Pricing/Defense Procurement and Acquisition Policy
MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (RD&A)
ASSISTANT SECRETARY OF THE NAVY (S&L)
ASSISTANT SECRETARY OF THE AIR FORCE (AQ)
DIRECTORS OF DEFENSE AGENCIES

SUBJECT: Contractor Delays in Submitting Certificates of Current Cost or Pricing Data

A number of questions have been raised related to situations where contractors are delaying the submission of Certificates of Current Cost or Pricing Data. Federal Acquisition Regulation (FAR) 15.804-4(a) requires that the certificate be signed and submitted as close as practicable to the date when agreement on price is reached. Despite this requirement, some contractors are submitting certificates well in excess of 30 days after the date of agreement on price. Such excessive delays may be indicative of a deficiency in the estimating system and appropriate corrective action should be taken. In situations where the contractor submits additional cost or pricing data to the contracting officer along with the certificate, the contracting officer should take the following actions to protect the Government's interests:

1. Require the contractor to provide an impact statement summarizing the impact of the additional data.

2. Reduce the agreed upon price if the data indicate that the negotiated contract price was increased by any significant amount because the contractor did not submit the data prior to price agreement. However, the price shall not be adjusted upward. Offsets should be considered by the contracting officer in accordance with FAR 15.804-7(b)(4), (b)(5), and (b)(6). The fact that a price reduction is made after the original date of agreement on price does not mean the date of agreement on price has changed.

3. Include in the price negotiation memorandum a list of all data submitted by the contractor after the date of agreement on contract price, and the extent to which these data were relied on in order to establish a fair and reasonable price.
Please disseminate this information to all appropriate personnel as soon as possible.

Eleanor Spector
Deputy Assistant Secretary of Defense for Procurement
“Problems” with the old (June 1989)

• First, some virtues exposed in the old ‘89 Memo . . .
  – Require impact statements (actually should do before price agreement as well – see potential Workflow Tool, TINA CnP Data Disclosure Log Tool)
  – Highlights offsets are limited by regulation (and statute) citing Defective Pricing Regulations (then, FAR 15.804-7, now FAR 15.407-1) characterizing proper review.
  – Price Negotiation Memorandum (PNM) to document extent data were reviewed and relied on (or not), and to what extent.

• Problems:
  – Used for NOT making timely and adequate disclosures BEFORE agreement on price . . .
    “I don’t have to disclose data you requested now, you’ll get it in the SWEEP.”
  – Required TWO (2) negotiations, instead of one, on every acquisition before award.
    • First agreement on price made (admittedly by delayed submission of SWEEP data) without Government having ALL the facts
    • Second negotiation an evaluation of SWEEP data (a potentially time consuming Defective Pricing examination), but without certification of offsets.

Contractor Data Disclosures and Certifications (under advent of the SWEEP)

- Contractor Cost/Price Proposal
- FAR Table 15-2
- Field (DCAA) Audit, (DCMA & local) Tech Evaluation
- “handshake” - Date of Agreement On Price
- Certificate Provided along with Data Dump (volumes of undifferentiated data)
- More Current Data becomes available to Contractor – e.g. significant reduction, say to negotiated Subcontractor Cost/Price (fact)
- Disclose the major reduction in Cost/Price now? Or, wait to see if other offsetting data becomes available? Perhaps when specialists aren’t available.
- Disclose now, with a data dump? Or continue to wait until after the SWEEP for potential for offsetting data?
- SWEEP (prolonged?) still waiting/hoping to develop offsetting scenarios to include with disclosure to assert no-change.

LNL TINA SWEEP PRESENTATION, 8/1/2018
The TINA Statute (10 U.S.C. § 2306a, highlighted attached)

- Coverage – negotiated (generally sole source) contracts (>$2M, after 30 June 2018) and modifications (> $750K, if basic contract awarded before 30 June 2018); exceptions (price competition, commercial items, waivers, etc.) may apply.
- Cost or pricing data (defined) – “all facts . . . (as of date of agreement on the price, or another date agreed upon as close to the date of agreement on price as is practicable) . . . a prudent buyer of seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgement was derived.”
- The remedy for “defective pricing” (which occurs when contractors fail to disclose current, complete, and accurate cost or pricing data as of the conclusion of negotiations and this failure causes an increased contract price1)?
  - a contract clause providing for an administrative remedy to reduce the contract price (including profit or fee) as a result of the defect.
- Allowable offsets to the (downward only) administrative price reduction?
  - Requires contractor certification they are entitled to the offset.
  - Contractor proves the offset data were itself cost or pricing data (factual in nature, available before the date of agreement on the price, that went undisclosed).


The Regulation (FAR 15.406-2, and 15.407-1, highlighted attached)

- FAR 15.406-2, Certificate of Current Cost or Pricing Data
  - “Reasonably available” at time of price agreement.
  - Cutoff dates as close as practicable to date of agreement on price . . . as certain data may not be reasonably available before normal periodic closing dates.
  - “Possession of a Certificate of Current Cost or Pricing Data is not a substitute for (Government) examining and analyzing the contractor’s proposal.” (emphasis added)
    (But neither is there a requirement for the Government to continually have to re-audit newly submitted data.)
- FAR 15.407-1, Defective certified cost or pricing data.
  - Price Reduction for Defective Certified Cost or Pricing Data
    - FAR 52.215-10, basic contracts, or
    - FAR 52.215-11, modifications on contracts (even if basic contract award was exempt)
      - Government’s right not affected by enumerated circumstances (also in TINA statute)
      - Conditions for allowing offsets, and circumstances for not allowing offsets (also in TINA statute)
      - Interest (also in TINA statute) tolls from date of overpayment (not financing payments)
      - Penalty (double the price adjustment), only if a knowing submission (also in TINA statute)
Interpretation of TINA

Under the Truth In Negotiations Act, a contractor is obligated to disclose all facts necessary to place the Government in a position equal to the contractor’s with respect to making judgments on Pricing. (citations omitted) This Board has held that in order for there to be effective disclosure of cost or pricing data by a prospective contractor, the Government must either be clearly advised of the relevant cost or pricing data or it must have actual, rather than imputed, knowledge thereof. (citations omitted) It is not enough for a prospective contractor to make available or physically hand over to the Government, for its inspection, files which, if examine, would disclose differences between proposal costs and lowest historical costs. It is also necessary, in order to make disclosures, to advise the Government representatives involved in the proposed procurement, of the kind and content of the cost or pricing data and their bearing on the prospective contractor’s proposal which examination of the file would disclose. This disclosure obligation is satisfied if the Government personnel who participated in the proposal evaluation or contract negotiations were clearly advised of the relevant cost or pricing data or, if they were not so advised, nevertheless had actual knowledge thereof. (citations omitted)

When defective pricing is in issue we have held that ‘each individual case must be resolved on its own particular facts, by application of a rule of reason to determine whether the data was conveyed to the Government in a reasonably meaningful fashion.’ (citations omitted)

• Appeal of General Dynamics Corp., 93-1 BCA P 25378 (1992), emphasis added.

Doing the Government’s Analysis

Pointing out every detail so as to conduct the cost analysis for the Government.

Certification does not relieve Government of responsibility for their own analysis.

Adequate Disclosure

To advise the Government representatives (those making judgements on price in negotiations) of the kind and content of the cost or pricing data and their bearing on the contractor’s proposal.

Somewhere between a “data dump” and doing the Government’s proposal audit/evaluation for them.

A rule of reason on a case-by-case basis.

Data Dump

Instead of merely pointing to room full of file cabinets of data, reproducing and delivery volumes of data to the Government representatives in undifferentiated manner not relating it to the proposal.
Adequate Disclosure? Yes, No? Why, why not?

• Contractor makes their local DCAA (Defense Contract Audit Agency) office aware of the existence of more current factual data?

Adequate Disclosure? Yes, No? Why, why not?

• Contractor makes their local DCAA auditor, who had performed the pre-award audit of the proposal 2 months ago, aware of the existence of more current factual data?
Adequate Disclosure? Yes, No? Why, why not?

• Contractor provides their local DCAA auditor, who had performed the pre-award audit of the proposal 2 months ago, an impact statement that their proposed cost would/should be reduced by a sum certain amount as a result of more current factual data in their plant?

Cost or Pricing Data? Yes, No? Why, why not?

• Contractor refuses to provide actual, current purchase orders on a sampling of parts claiming that is not the basis of their estimate (BOE) used in their proposal of record. Is it cost or pricing data requiring disclosure?
Cost or Pricing Data? Yes, No? Why, why not?

- Contractor completes and submits SWEEP disclosure within five (5) days after date of agreement on price to satisfy new SWEEP policy of June 2018. To offset a downward adjustment of material costs as a result of subcontract negotiations completed six weeks prior, the contractor also submits a revised engineering estimate completed two days before submitting the SWEEP data along with their certificate. Does the revised engineering estimate qualify as cost or pricing data for which the offset should be granted?

Workflow Tool coming to DAU Tools

- Consider the MS Excel Spreadsheet, TINA CnP Data Disclosure Tool, a first draft work-in-progress, to illustrate what might be used pro-actively to help facilitate meaningful disclosures.

- There is a “Forward” worksheet (tab) explaining certain features of the tool which has both a “Notice” and “Disclosure Log” component
  - The “Notice” tab suggests making some ground rules known up front so there are no surprises for either party.
  - The “Disclosure Log” provides an example of compelling adequate disclosures, while also tracking and documenting those disclosures for the Contracting Officer’s record.

- The draft tool also incorporates some of the examples provided in this presentation.
§2306a. Cost or pricing data: truth in negotiations

(a) REQUIRED COST OR PRICING DATA AND CERTIFICATION.- (1) The head of an agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

   (A) An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures that is only expected to receive one bid shall be required to submit cost or pricing data before the award of a contract if-

       (i) in the case of a prime contract entered into after June 30, 2018, the price of the contract to the United States is expected to exceed $2,000,000; and

       (ii) in the case of a prime contract entered into on or before June 30, 2018, the price of the contract to the United States is expected to exceed $750,000.

   (B) The contractor for a prime contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if-

       (i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed $2,000,000;

       (ii) in the case of a change or modification made after July 1, 2018, to a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed $750,000; and

       (iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed $750,000.

   (C) An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and-

       (i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed $2,000,000;

       (ii) in the case of a subcontract entered into after July 1, 2018, under a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed $2,000,000; and

       (iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed $750,000.

   (D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if-

       (i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed $2,000,000; and

       (ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed $750,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) shall be required to certify
that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted—

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under that paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before June 30, 2018, the head of the agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted in accordance with section 1908 of title 41.

(b) EXCEPTIONS—

(1) IN GENERAL.—Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

(A) for which the price agreed upon is based on—
   (i) adequate competition that results in at least two or more responsive and viable competing bids; or
   (ii) prices set by law or regulation;

(B) for the acquisition of a commercial item;

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination; or

(D) to the extent such data—
   (i) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and
   (ii) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract.

(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(3) NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL ITEMS.—(A) The exception in paragraph (1)(B) does not apply to cost or pricing data on noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than the amount specified in subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7), or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.

(B) In this paragraph, the term "noncommercial modification", with respect to a commercial item, means a modification of such item that is not a modification described in section 103(3)(A) of title 41.

(C) Nothing in subparagraph (A) shall be construed—
   (i) to limit the applicability of the exception in subparagraph (A) or (C) of paragraph (1) to cost or pricing data on a noncommercial modification of a commercial item; or
   (ii) to require the submission of cost or pricing data on any aspect of an acquisition of a commercial item other than the cost and pricing of noncommercial modifications of such item.

(4) COMMERCIAL ITEM DETERMINATION.—(A) For purposes of applying the commercial item exception under paragraph (1)(B) to the required submission of certified cost or pricing data, the contracting officer may presume that a prior commercial item determination made by a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such item.
(B) If the contracting officer does not make the presumption described in subparagraph (A) and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity.

(C) Not later than 30 days after receiving a request for review of a commercial item determination under subparagraph (B), the head of a contracting activity shall:
   (i) confirm that the prior determination was appropriate and still applicable; or
   (ii) issue a revised determination with a written explanation of the basis for the revision.

(5) A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial items in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions.

(6) Determination by Prime Contractor.—A prime contractor required to submit certified cost or pricing data under subsection (a) with respect to a prime contract shall be responsible for determining whether a subcontract under such contract qualifies for an exception under paragraph (1)(A) from such requirement.

(c) Cost or Pricing Data on Below-Threshold Contracts.—
   (1) Authority to Require Submission.—Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

   (2) Exception.—The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

   (3) Delegation of Authority Prohibited.—The head of a procuring activity may not delegate functions under this paragraph.

(d) Submission of Other Information.—
   (1) Authority to Require Submission.—When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the offeror shall be required to submit to the contracting officer data other than certified cost or pricing data (if requested by the contracting officer), to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement. If the contracting officer determines that the offeror does not have access to and cannot provide sufficient information on prices for the same or similar items to determine the reasonableness of price, the contracting officer shall require the submission of information on prices for similar levels of work or effort on related products or services, prices for alternative solutions or approaches, and other information that is relevant to the determination of a fair and reasonable price.

   (2) Limitations on Authority.—The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):
      (A) Reasonable limitations on requests for sales data relating to commercial items.
      (B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.
      (C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

   (e) Price Reductions for Defective Cost or Pricing Data.—(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

      (B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.
In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that-

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor-

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost and pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2).

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if-

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if-

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(f) INTEREST AND PENALTIES FOR CERTAIN OVERPAYMENTS.- (1) If the United States makes an overpayment to a contractor under a contract subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, 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.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(g) RIGHT OF UNITED STATES TO EXAMINE CONTRACTOR RECORDS.-For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, the head of an agency shall have the authority provided by section 2313(a)(2) of this title.

(h) DEFINITIONS.-In this section:

(1) COST OR PRICING DATA.-The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) SUBCONTRACT.-The term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(3) COMMERCIAL ITEM.-The term "commercial item" has the meaning provided such term in section 103 of title 41.
15.406 Documentation.

15.406-1 Prenegotiation objectives.

(a) The prenegotiation objectives establish the Government’s initial negotiation position. They assist in the contracting officer’s determination of fair and reasonable price. They should be based on the results of the contracting officer’s analysis of the offeror’s proposal, taking into consideration all pertinent information including field pricing assistance, audit reports and technical analysis, fact-finding results, independent Government cost estimates and price histories.

(b) The contracting officer shall establish prenegotiation objectives before the negotiation of any pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. When cost analysis is required, the contracting officer shall document the pertinent issues to be negotiated, the cost objectives, and a profit or fee objective.


(a) When certified cost or pricing data are required, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and must include the executed certificate in the contract file.

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer’s representative in support of

* are accurate, complete, and current as of 

** This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm _____________________________________________

Signature _________________________________________

Name ____________________________________________

Title _____________________________________________

Date of execution***_______________________________

* Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(END OF CERTIFICATE)

(b) The certificate does not constitute a representation as to the accuracy of the contractor’s judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor’s responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(c) The contracting officer and contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the contractor’s or a subcontractor’s organization on matters significant to contractor management and to the Government will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.

(d) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the contractor’s proposal.

(e) If certified cost or pricing data are requested by the Government and submitted by an offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.
15.406-3 Documenting the negotiation.

(a) The contracting officer shall document in the contract file the principal elements of the negotiated agreement. The documentation (e.g., price negotiation memorandum (PNM)) shall include the following:

(1) The purpose of the negotiation.
(2) A description of the acquisition, including appropriate identifying numbers (e.g., RFP No.).
(3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.
(4) The current status of any contractor systems (e.g., purchasing, estimating, accounting, and compensation) to the extent they affected and were considered in the negotiation.
(5) If certified cost or pricing data were not required in the case of any price negotiation exceeding the certified cost or pricing data threshold, the exception used and the basis for it.
(6) If certified cost or pricing data were required, the extent to which the contracting officer—
   (i) Relied on the certified cost or pricing data submitted and used them in negotiating the price;
   (ii) Recognized as inaccurate, incomplete, or noncurrent any certified cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated; or
   (iii) Determined that an exception applied after the data were submitted and, therefore, considered not to be certified cost or pricing data.
(7) A summary of the contractor’s proposal, any field pricing assistance recommendations, including the reasons for any pertinent variances from them, the Government’s negotiation objective, and the negotiated position. Where the determination of a fair and reasonable price is based on cost analysis, the summary shall address each major cost element. When determination of a fair and reasonable price is based on price analysis, the summary shall include the source and type of data used to support the determination.
(8) The most significant facts or considerations controlling the establishment of the prenegotiation objectives and the negotiated agreement including an explanation of any significant differences between the two positions.
(9) To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action).
(10) The basis for the profit or fee prenegotiation objective and the profit or fee negotiated.
(11) Documentation of fair and reasonable pricing.

(b) Whenever field pricing assistance has been obtained, the contracting officer shall forward a copy of the negotiation documentation to the office(s) providing assistance. When appropriate, information on how advisory field support can be made more effective should be provided separately.

15.407 Special cost or pricing areas.

15.407-1 Defective certified cost or pricing data.

(a) If, before agreement on price, the contracting officer learns that any certified cost or pricing data submitted are inaccurate, incomplete, or noncurrent, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price. The contracting officer shall consider any new data submitted to correct the deficiency, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotiating the contract price. The price negotiation memorandum shall reflect the adjustments made to the data or the corrected data used to negotiate the contract price.

(b)(1) If, after award, certified cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price or an earlier date agreed upon by the parties given on the contractor’s or subcontractor’s Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data. This entitlement is ensured by including in the contract one of the clauses prescribed in 15.408(b) and (c) and is set forth in the clauses at 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data, and 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications. The clauses give the Government the right to a price adjustment for defects in certified cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor.

(2) In arriving at a price adjustment, the contracting officer shall consider the time by which the certified cost or pricing data became reasonably available to the contractor, and the extent to which the Government relied upon the defective data.

(3) The clauses referred to in paragraph (b)(1) of this subsection recognize that the Government’s right to a price adjustment is not affected by any of the following circumstances:
   (i) The contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position.
   (ii) The contracting officer should have known that the certified cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer.
   (iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

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(iv) **Certified cost or pricing data were required:** however, the contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract.

(4) Subject to paragraphs (b)(5) and (6) of this subsection, the contracting officer shall allow an offset for any understated certified cost or pricing data submitted in support of price negotiations, up to the amount of the Government’s claim for overstated pricing data arising out of the same pricing action (e.g., the initial pricing of the same contract or the pricing of the same change order).

(5) An offset shall be allowed only in an amount supported by the facts and if the contractor—

(i) Certifies to the contracting officer that, to the best of the contractor’s knowledge and belief, the contractor is entitled to the offset in the amount requested; and

(ii) Proves that the certified cost or pricing data were available before the “as of” date specified on the Certificate of Current Cost or Pricing Data but were not submitted. Such offsets need not be in the same cost groupings (e.g., material, direct labor, or indirect costs).

(6) An offset shall not be allowed if—

(i) The understated data were known by the contractor to be understated before the “as of” date specified on the Certificate of Current Cost or Pricing Data; or

(ii) The Government proves that the facts demonstrate that the price would not have increased in the amount to be offset even if the available data had been submitted before the “as of” date specified on the Certificate of Current Cost or Pricing Data.

(7)(i) In addition to the price adjustment, the Government is entitled to recovery of any overpayment plus interest on the overpayments. The Government is also entitled to penalty amounts on certain of these overpayments. Overpayment occurs only when payment is made for supplies or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in 32.001.

(ii) In calculating the interest amount due, the contracting officer shall—

(A) Determine the defective pricing amounts that have been overpaid to the contractor;

(B) Consider the date of each overpayment (the date of overpayment for this interest calculation shall be the date payment was made for the related completed and accepted contract items; or for subcontract defective pricing, the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which included payments for a completed and accepted subcontract item); and

(C) Apply the underpayment interest rate(s) in effect for each quarter from the time of overpayment to the time of repayment, utilizing rate(s) prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2).

(iii) In arriving at the amount due for penalties on contracts where the submission of defective certified cost or pricing data was a knowing submission, the contracting officer shall obtain an amount equal to the amount of overpayment made. Before taking any contractual actions concerning penalties, the contracting officer shall obtain the advice of counsel.

(iv) In the demand letter, the contracting officer shall separately include—

(A) The repayment amount;

(B) The penalty amount (if any);

(C) The interest amount through a specified date; and

(D) A statement that interest will continue to accrue until repayment is made.

(c) If, after award, the contracting officer learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately verified by the contractor as of the time of negotiation, the contracting officer shall request an audit to evaluate the accuracy, completeness, and currency of the data. The Government may evaluate the profit-cost relationships only if the audit reveals that the data certified by the contractor were defective. The contracting officer shall not reprice the contract solely because the profit was greater than forecast or because a contingency specified in the submission failed to materialize.

(d) For each advisory audit received based on a postaward review that indicates defective pricing, the contracting officer shall make a determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, the contracting officer should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. The contracting officer shall prepare a memorandum documenting both the determination and any corrective action taken as a result. The contracting officer shall send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative contracting officer (ACO). A copy of the memorandum or other notice of the contracting officer’s determination shall be provided to the contractor. When the contracting officer determines that the contractor submitted defective cost or pricing data, the contractor, in accordance with agency procedures, shall ensure that information relating to the contracting officer’s final determination is reported in accordance with 42.1503(h). Agencies shall ensure updated information that changes a contracting officer’s prior final determination is reported into the FAPIIS module of PPIRS in the event of a—

(1) Contracting officer’s decision in accordance with the Contract Disputes statute;

(2) Board of Contract Appeals decision; or

(3) Court decision.

(e) If both the contractor and subcontractor submitted, and the contractor certified, or should have certified, cost or pricing data, the Government has the right, under the clauses at 52.215-10, Price Reduction for Defective Certified Cost or
Pricing Data, and 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications, to reduce the prime contract price if it was significantly increased because a subcontractor submitted defective data. This right applies whether these data supported subcontract cost estimates or supported firm agreements between subcontractor and contractor.

(f) If Government audit discloses defective subcontractor certified cost or pricing data, the information necessary to support a reduction in prime contract and subcontract prices may be available only from the Government. To the extent necessary to secure a prime contract price reduction, the contracting officer should make this information available to the prime contractor or appropriate subcontractors, upon request. If release of the information would compromise Government security or disclose trade secrets or confidential business information, the contracting officer shall release it only under conditions that will protect it from improper disclosure. Information made available under this paragraph shall be limited to that used as the basis for the prime contract price reduction. In order to afford an opportunity for corrective action, the contracting officer should give the prime contractor reasonable advance notice before determining to reduce the prime contract price.

(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower priced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indirect cost and profit markups) between the subcontract price used for pricing the prime contract, and either the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the actual subcontract price is based are not themselves defective.

(2) Under cost-reimbursement contracts and under all fixed-price contracts except firm-fixed-price contracts and fixed-price contracts with economic price adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor certified cost or pricing data shall be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15.408(b) and (c). The Government has a continuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract price.

15.407-2 Make-or-buy programs.

(a) General. The prime contractor is responsible for managing contract performance, including planning, placing, and administering subcontracts as necessary to ensure the lowest overall cost and technical risk to the Government. When make-or-buy programs are required, the Government may reserve the right to review and agree on the contractor’s make-or-buy program when necessary to ensure negotiation of reasonable contract prices, satisfactory performance, or implementation of socioeconomic policies. Consent to subcontracts and review of contractors’ purchasing systems are separate actions covered in part 44.

(b) Definition. “Make item,” as used in this subsection, means an item or work effort to be produced or performed by the prime contractor or its affiliates, subsidiaries, or divisions.

(c) Acquisitions requiring make-or-buy programs. (1) Contracting officers may require prospective contractors to submit make-or-buy program plans for negotiated acquisitions requiring certified cost or pricing data whose estimated value is $13.5 million or more, except when the proposed contract is for research or development and, if prototypes or hardware are involved, no significant follow-on production is anticipated.

(2) Contracting officers may require prospective contractors to submit make-or-buy programs for negotiated acquisitions whose estimated value is under $13.5 million only if the contracting officer—

(i) Determines that the information is necessary; and

(ii) Documents the reasons in the contract file.

(d) Solicitation requirements. When prospective contractors are required to submit proposed make-or-buy programs, the solicitation shall include—

(1) A statement that the program and required supporting information must accompany the offer; and

(2) A description of factors to be used in evaluating the proposed program, such as capability, capacity, availability of small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns for subcontracting, establishment of new facilities in or near labor surplus areas, delivery or performance schedules, control of technical and schedule interfaces, proprietary processes, technical superiority or exclusiveness, and technical risks involved.

(e) Program requirements. To support a make-or-buy program, the following information shall be supplied by the contractor in its proposal:

(1) Items and work included. The information required from a contractor in a make-or-buy program shall be confined to those major items or work efforts that normally would require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional equipment or real property to produce. Raw materials, commercial items (see 2.101), and off-the-shelf items (see 46.101) shall not be included, unless their potential impact on contract cost or schedule is critical. Normally, make-or-buy programs should not include items or work efforts estimated to cost less than 1 percent of the total estimated contract price or any minimum dollar amount set by the agency.

(2) The offeror’s program should include or be supported by the following information:

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