



## OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

ACQUISITION,  
TECHNOLOGY,  
AND LOGISTICS

FEB 04 2015

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: Commercial Items and the Determination of Reasonableness of Price for  
Commercial Items

The Department acquired well in excess of \$60B in commercial items in the last fiscal year (FY). Section 831 of the FY 2013 National Defense Authorization Act (NDAA), "Guidance and Training Related to Evaluation Reasonableness of Price", requires the Department to issue guidance on the use of the authorities provided by 10 U.S.C. §2306(a) and §2379, and to include in that guidance standards for determining when additional cost information is required in determining reasonableness of price for commercial items.

We are currently processing a proposed rule for the Defense Federal Acquisition Regulation Supplement (DFARS) that will address the standards required by section 831. In conjunction, we will issue a revision to the DFARS Procedures, Guidance, and Information (PGI) and an update of the DoD Commercial Item Handbook, to include more detail and a variety of illustrative scenarios and examples. In the meantime, this memorandum is intended to provide guidance for Contracting Officers as to how they should approach the pricing of items purported to be commercial.

The concept behind the commercial items pricing exception to the Truth in Negotiation Act is that the item, its value, and its price, are results of supply and demand in a commercial marketplace where buyers and sellers have other commercial alternatives which compete with the commercial item(s) being procured. The determination of an item described as "commercial of-a-type" has been difficult for Contracting Officers. Assuming that one has adequate supporting data from the contractor involved and appropriate technical support, it should take a Contracting Officer a reasonable period of time to determine whether an item is commercial. ***As a matter of policy, Contracting Officers should establish a goal of making a commercial item determination within ten business days after assembling all the support data, either from available sources or from the contractor, if necessary.*** In any case, the commercial item determination should be accomplished promptly. Whether we deem an item to be commercial or not, ***the key consideration should be: "Am I paying a fair and reasonable price?"***

A commerciality determination enables a Contracting Officer to acquire the item utilizing procedures in FAR Part 12 instead of FAR Part 15. When acquiring commercial items, the preference is to use market-based pricing when determining a fair and reasonable price. If market based pricing is not available, FAR Part 12 provides the flexibility to use a variety of pricing techniques to include, but not limited to, cost/price analyses, parametric estimating, should-cost techniques and/or analogous pricing of similar items in determining whether the Government is paying a fair and reasonable price. ***If market based pricing is not available, a Contracting Officer may use cost-based analysis, but he/she is not required to use cost-based analysis as the means of determining price reasonableness.***

Contracting Officers are reminded that the FAR, Subparts 15.403-1(c)(3) and 15.403-3, and the DFARS PGI Subpart 215.403-3, already recognize that there are times when other than certified cost and/or pricing information is needed to determine a fair and reasonable price. ***“Other than certified cost or pricing data” takes many forms.*** In certain instances, the only difference between “certified cost and pricing data” and “other than certified cost and pricing data” can be the fact that the data is certified.

***Contracting Officers are reminded that the primary purpose of obtaining “other than certified cost or pricing data” is to support the justification that the Government is paying a fair and reasonable price for the item being procured.*** (Note, however, with regard to major weapons systems along with their components and spare parts, DFARS 234.7002 implements 10 U.S.C. §2379 which provides those items ***may be treated as commercial items only if*** the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price.) The preference in the FAR is for Contracting Officers to seek information through market research and other Governmental sources. In cases where items have minimal or no sales history to non-governmental entities, market research by the Contracting Officer is difficult and often fruitless. In these instances, the contractor should be asked to provide information on why the price it wishes the Government to pay is fair and reasonable. The statute and the regulation provide that the Contracting Officer shall require “appropriate information on the prices at which the ***same or similar*** items have been previously sold that is adequate for evaluating the reasonableness of the price for the procurement.” ***Contracting Officers should not interpret this guidance as discouraging effective deliberative market research, but the Contracting Officer should require contractor submitted information when needed to make an appropriate determination of price reasonableness. The contractor should be in the best position to substantiate why the price it wishes the Government to pay is fair and reasonable.***

If a Contracting Officer determines that the “other than certified cost or pricing data” submitted justifies a fair and reasonable price, he or she should document the file and move forward. ***The standard to be used by Contracting Officers is whether a reasonable businessman or business woman reviewing the data would conclude that it is sufficient to demonstrate that the taxpayers are paying a fair and reasonable price for the item.***

In response to requests for “other than certified cost or pricing data,” the contractor shall provide that information in the form in which it is regularly maintained by an offeror in its business operations. Section 831 requires that requests for uncertified cost information for the purposes of evaluating reasonableness of price are sufficiently documented. In furtherance of this requirement, the contract file must contain: (1) a justification of the need for the additional cost information; (2) a copy of any request from the Department to the contractor for such additional cost information; and (3) any response that the Contracting Officer receives from the

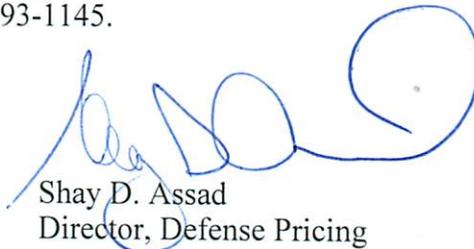
contractor to the request, including any rationale or justification provided by the contractor for a failure to provide the cost information requested. In the event that a contractor is not willing to provide this information to justify its proposed price, Contracting Officers should solicit the assistance of their management

Please ensure that your contracting community is aware of this policy pertaining to documentation requirements and adheres to these requirements. The DFARS PGI will be updated to incorporate the documentation guidance. The Government Accountability Office has been directed to conduct a review of the Department's implementation of the requirements of Section 831.

Section 831 also requires the Department to develop training for the acquisition workforce on the use of the authority provided by sections 2306a(d) and 2379 of title 10, U.S.C., in evaluating price reasonableness for commercial items, and to develop a cadre of experts within the Department to provide expert advice to the acquisition workforce on the use of these authorities. We are working with the Defense Acquisition University to develop a Continuous Learning Course that will provide training to the acquisition community on the requirements and their implementation.

The Defense Contract Management Agency (DCMA) Cost & Pricing Center has been designated to establish the cadre of acquisition professionals that will provide expert advice to the acquisition workforce on the use of those authorities. DCMA will be assisted by the Defense Contract Audit Agency and the Navy Price Fighters in performing this mission. This team will function as advisors in determining the commerciality of items that are being procured and provide pricing support. A separate memorandum will be issued regarding the commercial pricing cell within the DCMA Cost & Pricing Center.

Contracting Officers have great latitude and discretion with regard to commerciality determinations. In the past, significant periods of time have been spent contemplating the commercial nature of a particular item. We need to be more timely in making commercial item determinations, as the more germane issue is to ensure that we are paying a fair and reasonable price for the commercial items we acquire. My point of contact for these matters is Patricia Foley, [patricia.g.foley.civ@mail.mil](mailto:patricia.g.foley.civ@mail.mil) or 703-693-1145.



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Director, Defense Pricing