

and (j)(2) "\$10,000" and adding "\$15,000" in its place.

52.228-15 [Amended]

■ 74. Amend section 52.228-15 by removing from the clause heading "(Nov 2006)" and adding "(Oct 2010)" in its place; and removing from the introductory text of paragraph (b) "\$100,000" and adding "\$150,000" in its place.

52.244-6 [Amended]

■ 75. Amend section 52.244-6 by—

- a. Removing from the clause heading "(Jun 2010)" and adding "(Oct 2010)" in its place;
- b. Removing from paragraph (c)(1)(iii) "\$550,000" and adding "\$650,000" in its place, and removing "\$1,000,000" and adding "\$1.5 million" in its place; and
- c. Removing from paragraph (c)(1)(vi) "(Jun 1998)" and adding "(Oct 2010)" in its place.

52.248-1 [Amended]

■ 76. Amend section 52.248-1 by removing from the clause heading "(Feb 2000)" and adding "(Oct 2010)" in its place; and removing from paragraph (l) "\$100,000" and adding "\$150,000" in its place.

52.248-3 [Amended]

■ 77. Amend section 52.248-3 by removing from the clause heading "(Sep 2006)" and adding "(Oct 2010)" in its place; and removing from paragraph (h) "\$55,000" and adding "\$65,000" in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 12, 14, 15, 16, 19,
27, 30, 31, 32, 42, 44, 49, and 52

[FAC 2005-45; FAR Case 2005-036; Item
II; Docket 2007-0001, Sequence 15]

RIN 9000-AK74

Federal Acquisition Regulation; Definition of Cost or Pricing Data

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the distinction between "certified cost or pricing data" and "data other than certified cost or pricing data", and to clarify requirements for submission of cost or pricing data.

DATES: *Effective Date:* October 1, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-45, FAR case 2005-036.

SUPPLEMENTARY INFORMATION:

A. Background

Subpart 15.4 of the FAR describes the contracting officer's responsibility to purchase supplies and services at fair and reasonable prices and the use of data and information in meeting this requirement. This subpart incorporates the requirements of the Truth in Negotiations Act (TINA), 10 U.S.C. 2306a and 41 U.S.C. 254b, which address the requirements for the submission of cost or pricing data and the circumstances under which a contractor must certify to their accuracy, completeness, and currency.

The Councils believe that the implementation of TINA in FAR subpart 15.4 is not sufficiently clear. In particular, there is confusion regarding the right of the Government to request "data other than certified cost or pricing data," the obligation of the offeror to provide this data, and the definition of this term.

This lack of clarity is due, in large part, to definitions that overlap and are not identical to TINA. For example, the term "cost or pricing data" is defined in the FAR to mean certified cost or pricing data, whereas TINA does not make certification part of the definition of this term. This regulatory refinement has led to confusion regarding the level of information that a contracting officer may request to establish fair and reasonable pricing including a misunderstanding by some that the data elements that comprise cost or pricing data cannot be requested by the Government unless the data are required by law to be submitted to the contracting officer in a certified form. This confusion has been exacerbated by the FAR's use of the phrase "information other than cost or pricing data," which has made it difficult for contracting officers to understand the circumstances

when data other than certified cost or pricing data should be obtained to protect the Government from paying unreasonable prices.

Even the basic articulation of policy regarding the use of data to establish the fairness and reasonableness of offered prices in the introductory paragraph of FAR 15.402(a) has lacked a certain level of clarity that creates uncertainty. For many years, this paragraph has appropriately cautioned contracting officers not to obtain more information than is necessary—and the FAR must continue to do so. However this paragraph should also, but currently does not, expressly mention the underlying statutory authority to collect "data other than certified cost or pricing data." Because of this omission, some contracting officers may be under the misperception that there is a greater responsibility to avoid asking unnecessarily for the submission of cost or pricing data than there is, in the first instance, to determine whether and how much of this data may be required, in a given case, to establish price fairness and reasonableness. In fact, both responsibilities—*i.e.*, obtaining data that are adequate for evaluating the reasonableness of the price and taking appropriate care not to ask for more data than is necessary—are inextricably interrelated and equally important. As such, the FAR needs to communicate this message more clearly.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 20092, April 23, 2007, to revise the FAR definition of "cost or pricing data"; change the term "information other than cost or pricing data" to "data other than certified cost or pricing data"; add a definition of "certified cost or pricing data" to make the terms and definitions consistent with TINA and more understandable to the general reader; change terminology throughout the FAR; and clarify the need for contracting officers to obtain "data other than certified cost or pricing data" when there is no other means to determine fair and reasonable pricing during price analysis.

Based on comments received on the proposed rule, a public meeting held on November 1, 2007, and additional deliberations (which are all discussed in greater detail below), the Councils have adopted a final rule that—

- Clarifies terminology used in the FAR to make it consistent with TINA, resulting in (i) refinements to the regulatory definition of cost or pricing data, (ii) the addition of a definition for "certified cost or pricing data," (iii) the addition of a definition for "data other than certified cost or pricing data," and

(iv) deletion of the phrase “information other than cost or pricing data”;

- Clarifies responsibilities regarding the request for, and submission of, “data other than certified cost or pricing data” to establish fair and reasonable pricing, both in the case when “certified cost or pricing data” is required and is not required;

- Retains the current order of preference for determining the type of cost or pricing data required to establish fair and reasonable prices when certified cost or pricing data are not required;

- Retains and reinforces important statements to explain why contracting officers must not require, unnecessarily, the submission of “data other than certified cost or pricing data”;

- Clarifies the instructions for offerors preparing a contract pricing proposal when cost or pricing data are required so that such instructions are consistent with the clarified terminology and policies for determining the type and quantity of data necessary to establish a fair and reasonable price; and

- Supplements existing coverage to clarify current coverage and achieve greater understanding by contracting officers and contractors.

This rule neither expands nor diminishes the existing rights of contracting officers to request cost or pricing data (whether certified or other than certified) or other information, or the existing responsibilities of the offeror to submit such data or other information. Similarly, the rule does not require, encourage, or authorize contracting officers to obtain cost or pricing data or other information unless it is needed to determine that prices offered are fair and reasonable, which may include the request for such data in connection with a cost realism analysis. As the rule explains, requiring contractors to submit more data than what is needed can “lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources.”

Whether a contractor must submit “certified cost or pricing data” is based on the requirements of TINA and its stated exceptions. With respect to “data other than certified cost or pricing data,” the introductory policy statement in FAR 15.402(a) has been clarified to tie together the contracting officer’s longstanding statutory responsibility to request the data and information necessary to establish a fair and reasonable price—as stated in TINA at 10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)—with the caution that, in doing so, the contracting officer must

not request more data than is necessary. By doing so, the FAR will provide a more complete articulation of the policy underlying the use of “data other than certified cost or pricing data” in establishing price fairness and reasonableness, in furtherance of the contracting officer’s duty to serve as a responsible steward of the taxpayer’s resources.

B. Public Comments

The first comment period closed on June 22, 2007. Comments were received from 11 respondents. As a result of the comments received, a public meeting was scheduled with notice provided at 72 FR 61854 on November 1, 2007. The public meeting was held on November 15, 2007, and was followed by a one week period for submission of additional comments. Several respondents submitted additional comments. The public comments are addressed in the following analysis:

General Comments

Some respondents noted that the proposed changes should alleviate confusion. Others raised the following general concerns regarding various aspects of the proposed rule.

1. Some respondents were concerned that the proposed rule will result in contracting officers by-passing normal market research and pricing techniques and require contractors to submit full cost or pricing data as if the Truth in Negotiations Act (TINA) applied.

Response: The current FAR, as well as the proposed and final rule, protect against this practice. Contracting officers must generally follow the order of preference at FAR 15.402, and are required by that section to “obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary.” In theory, this could include all of the elements prescribed under FAR 15.408, Table 15–2. However, in most cases the data necessary for a contracting officer to determine cost fairness and reasonableness, or cost realism, will fall short of this level of data. The rule should not result in contracting officers requiring contractors to submit full cost or pricing data as if certification will be required when it is not necessary.

2. Public comments did point out an error where the proposed rule changed the FAR to require certified cost or pricing data “and” data other than certified cost or pricing data.

Response: The final rule corrects several instances where “and” was incorrectly used, replacing it with “or”. However, there are circumstances where

“and” is appropriate and those have been retained. The final rule recognizes that the contracting officer may need to request data other than certified cost or pricing data, in addition to certified cost or pricing data, to establish fair and reasonable pricing.

3. Some respondents were concerned about the broadening of the definition of “information other than cost or pricing data” by adding the words “and judgmental information.”

Response: Data used to support an offer will necessarily contain some information that is non-factual, *i.e.*, judgmental information. Due to its nature, judgmental information cannot be certified. Even in situations where “certified cost or pricing data” are required, judgmental information is not certified, and it is part of “data other than certified cost or pricing data” that supplements certified cost or pricing data. The final rule deletes the phrase “information other than cost or pricing data,” but includes “judgmental information” and “judgmental factors” in the definition of “data other than certified cost or pricing data.” The final rule also includes additional language to provide consistency with FAR 15.408, Table 15–2 (*i.e.*, any information reasonably required to explain the estimating process, including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and the nature and amount of any contingencies included in the proposed price). Aligning the definition of “data other than certified cost or pricing data” and the text of the language in FAR 15.408, Table 15–2, keeps the definition consistent with the current FAR requirements and TINA. The Councils note that the existence of a judgment is factual, but the nature and amount of the judgment are not.

4. Many respondents were concerned that the proposed rule inappropriately adds the phrase “data other than certified cost or pricing data” throughout the proposed rule when only certified cost or pricing data apply.

Response: The final rule deletes that addition in some instances. There are other instances where both phrases: “Certified cost or pricing data” and “data other than certified cost or pricing data” are applicable. See the response to General Comments number 2.

5. Several respondents were concerned that offerors of commercial items would be required to submit cost data in all instances.

Response: Such an outcome would be contrary to the intent of the rule, which does not alter the current intent of the

FAR regarding the type and quantity of data to determine if the price of a commercial item is fair and reasonable. FAR 15.403–1(c)(3) specifically exempts commercial items from certified cost or pricing data requirements, and this rule does not change that exception. Also, FAR 15.403–3(c)(2) sets limitations on the type of cost data or pricing data that can be requested regarding commercial items. When contracting officers determine that they can use price analysis to determine the price to be fair and reasonable, the order of preference at FAR 15.402 means cost data will generally not be obtained for pricing commercial items. Contracting officers are to obtain only that information needed to determine a fair and reasonable price, which, in some cases, may include contractor cost data (without certification) for commercial items.

Specific Comments

1. Comment: Add a definition of “cost data,” which is referenced at FAR 15.402(a)(2)(ii).

Response: We do not believe a separate definition is required. The revised definition of “data other than certified cost or pricing data” and the existing definition of “information other than cost or pricing data” both encompass cost data and pricing data depending on what is needed by the contracting officer, using the order of preference at FAR 15.402(a). The definition simply breaks out various aspects of “data other than certified cost or pricing data.” The cost data refers to data related to a contractor’s costs.

2. Comment: Separate enumeration of “cost or pricing data” in FAR 4.803(a)(17)(i) “Content of Contract Files” is unnecessary because it is repetitive with existing definitions in FAR 2.101.

Response: The final rule revises FAR 4.803(a)(17)(i) to read “certified cost or pricing data” consistent with the revised definition. The requirement at FAR 4.803(a)(17) is for documenting the contract file for the contracting officer’s determination of a fair and reasonable price, and lists the types of data that should be maintained. “Certified cost or pricing data” includes all data that conforms to FAR 15.408, Table 15–2, while “data other than certified cost or pricing data” includes only the level of data the contracting officer needs to determine the price fair and reasonable. Whichever is required to be submitted, this section makes it clear that it shall be documented in the contract file.

3. Comment: FAR 13.106–3(a)(2)(iii) contradicts FAR 15.404–1(b)(2)(iv) as FAR 13.106–3(a)(2)(iii) appears to

indicate non-acceptability of price lists and catalogs as a price analysis stand alone technique.

Response: Neither of the referenced texts is part of this rulemaking. Nonetheless, we note that the references do not conflict. Both references list various techniques and types of information the contracting officer may use, either individually or collectively. The type and extent of data needed is based on the contracting officer’s business judgment. FAR 13.106–3(a)(2)(iii) simply adds a cautionary note when using catalog prices.

4. Comment: Change language in the proposed FAR 15.403–3(a)(1)(ii) from “If the contracting officer cannot obtain adequate data from sources other than the offeror, the contracting officer shall require” to “If the contracting officer determines that adequate data from sources other than the offeror is not available, the contracting officer shall require.”

Response: We concur that the contracting officer should determine when adequate data is not available and have clarified the final rule accordingly. However, “data” is plural and requires the verb “are available” rather than “is available”.

5. Comment: The new language at FAR 15.404–1(b) confuses the difference between cost analysis and price analysis when it states that “Price analysis may include evaluating data other than certified cost or pricing data obtained from the offeror or contractor when there is no other means for determining a fair and reasonable price.” Price analysis should only be applied to sales data obtained from the offeror.

Response: The referenced paragraph is a discussion of “price” analysis. The referenced text simply points out that in performing price analysis, the contracting officer may require data other than certified cost or pricing data. Price analysis is not limited to sales data.

6. Comment: Language at FAR 15.404–1(b)(2)(ii) needs clarification.

Response: Changes have been made to FAR 15.404–1(b)(2)(ii) to clarify the text.

7. Comment: In reference to FAR 15.408, Table 15–2, changing the word “information” to the phrase “data other than certified cost or pricing data” means that the contractor does not have to certify all the cost or pricing data. Changing these terms is changing the requirement under TINA.

Response: The final rule utilizes the term “information” in a few instances, not as a term of art as it had been used in FAR part 15 prior to this revision, but generically. The requirements under TINA have not been changed.

8. Comment: The proposed language that adds “certified cost or pricing data and data other than certified cost or pricing data” at FAR 15.408, Table 15–2, means that the offeror could withhold disclosure or certification of cost or pricing data related to its subcontractors, in cases when the subcontractor is not required to certify.

Response: When “certified cost or pricing data” is required, the prime contractor is responsible for certifying the completeness of all cost or pricing data, which includes subcontractor price quotes and cost data when the subcontractor is not required to certify to its data. The requirement for the prime contractor to certify that it has submitted all of the facts regarding subcontractor cost data or pricing data, even if the subcontractor is not required to submit “certified cost or pricing data,” is implicitly in the certification language at FAR 15.406–2(a).

9. Comment: Throughout the proposed rule, including the clauses, change “required certified cost or pricing data and data other than certified cost or pricing data” back to “required certified cost or pricing data, or data other than certified cost or pricing data.”

Response: The phrases “certified cost or pricing data” and “data other than certified cost or pricing data” are joined with “and” when they are used to refer to both types of data collectively. The phrases are joined with “or” when the phrases are used to refer to either one or the other type of data. See the response to General Comments number 2.

10. Comment: FAR 52.214–26, Audit and Records—Sealed Bidding, expand the Government’s rights by allowing the Government to audit and review the contractor’s records when certified cost or pricing data are not required. There is no authority to do this.

Response: This change was in error and the final rule deletes that addition.

11. Comment: The proposed rule inappropriately adds the phrase “data other than certified cost or pricing data” to clauses and FAR 15.408, Table 15–2, when only certified cost or pricing data apply.

Response: The final rule adds clarifying language to indicate that, when certified cost or pricing data is required, data other than certified cost or pricing data may also be required. See the responses to General Comments numbers 2 and 4, and Specific Comments number 9.

12. Comment: Why is Alternate I of FAR 52.215–21(b) marked reserved? It shouldn’t be.

Response: The final rule retains Alternate I.

13. *Comment:* The Councils are inappropriately prescribing the use of FAR 15.408, Table 15–2, for both “certified cost or pricing data” and “data other than certified cost or pricing data”. By doing so, the Councils are advocating cost analysis on commercial items.

Response: This comment is similar to the Specific Comments numbers 7 and 9. The language in the table and clauses is revised in the final rule. FAR 15.408, Table 15–2, applies only when certified cost or pricing data are required. However, when certified cost or pricing data are required, data other than certified cost or pricing data may also be required. Additionally, cost analysis can be used when an item that was thought initially to be commercial is found not to have sufficient sales data or other information for determining the price to be fair and reasonable. In each situation, and in accordance with FAR 1.602–2, the contracting officer must exercise business judgment as to the level and type of data needed to determine that prices are fair and reasonable following the order of preference at FAR 15.402(a). See the responses to General Comments numbers 2 and 4, and to Specific Comments numbers 7 and 9.

14. *Comment:* The rule will not address situations when a contracting officer inappropriately determines an item to be commercial.

Response: Commercial item determinations are beyond the scope of this rule. This rule is to clarify what data are needed to determine whether prices are fair and reasonable as required by FAR part 15. The procedures for making the determination under FAR part 12 are outside the scope of this rule about the definitions of phrases associated with cost or pricing data, and the requirements for their submission.

15. *Comment:* Cost data should only be used when there are no other means to determine whether price is fair and reasonable.

Response: The order of preference at FAR 15.402(a) has been restructured, but is essentially unchanged. Certified cost or pricing data must be obtained when required by TINA. When certified cost or pricing data are not required, the order of preference at FAR 15.402(a) must generally be followed.

16. *Comment:* Contracting officers should never have to rely on cost data from the offeror to determine if the price for a commercial item is fair and reasonable.

Response: The contracting officer retains the authority to request cost data where other information, including

pricing data, is either unavailable or inadequate to establish that prices offered for a commercial item are fair and reasonable. However, the FAR policy is to only require submission of “data other than certified cost or pricing data,” and only to the extent necessary to support the contracting officer’s determination of a fair and reasonable price.

17. *Comment:* The proposed rule demands that the contracting officer obtains additional data (and “all facts”) regardless of needs and reverses the presumption of the present FAR, which asserts that the contracting officer should not obtain more information than needed. The proposed rule requires greatly increased amounts of information even where certified cost or pricing data is not required. This is contrary to the language of the statute (TINA).

Response: The language in FAR 15.402(a); FAR 15.408, FAR Table 15–2; and the clauses are revised in the final rule. When certified cost or pricing data are required, data other than certified cost or pricing data may also be required. The contracting officer is cautioned to obtain data other than certified cost or pricing as necessary to establish a fair and reasonable price. See section A, Background; see also the responses to the Specific Comments numbers 7, 9, and 16.

18. *Comment:* The proposed FAR 15.403–3(c)(1) implies that contractors face vague and unbounded disclosure obligations (*i.e.*, “cost data, or any other information the contracting officer requires” and “at a minimum, appropriate data on * * * prices”) that likely will be highly varied in application to different procurements. This costly burden is unnecessary—certainly where it applies to exempt procurements, *e.g.*, commercial items. Proposed changes conflict with TINA.

Response: TINA and the existing FAR permit a contracting officer to obtain all data that is needed, in the contracting officer’s discretion (which may vary among contracting officers), to determine the price to be fair and reasonable. See the order of preference at FAR 15.402(a), Pricing Policy. The present rule does not change that. The intent is to leave latitude for contracting officers to exercise business judgment (FAR 1.602–2) in obtaining whatever data are required in order to be able to determine a price fair and reasonable, following the order of preference at FAR 15.402(a). No negotiated procurements, including procurements of commercial items, are “exempt” from a contracting officer requiring submission of data other than certified cost or pricing data

when it is needed to determine a fair and reasonable price. The proposed rule is consistent with the existing FAR, the requirements of TINA, the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355), and the Clinger Cohen Act of 1996 (Pub. L. 104–106). It does not add any requirements that do not already exist in the statutes and FAR. See the response to Specific Comments number 16.

19. *Comment:* The proposed rule adds the requirement that price be “fair” and “reasonable” in circumstances where the previous FAR required only demonstration of price “reasonableness.”

Response: Under the existing FAR, the contracting officer must determine prices to be fair and reasonable (see FAR 15.402(a)). The final rule makes no changes to this basic policy.

20. *Comment:* The proposed rule also obligates the contracting officer to require submission of “data other than certified cost or pricing data.” This is a profound change because the contractor must submit both certified cost or pricing data and something else.

Response: See section A, Background. Also, see responses to Specific Comments numbers 7, 9, and 11.

21. *Comment:* The proposed rule at FAR 15.404–1(b)(1) adds a new term, “price or cost data.” What is “price or cost data?”

Response: The language has been removed. The final rule clarifies the language at FAR 15.404–1(b) to correct “price or cost data” to “data other than certified cost or pricing data”.

22. *Comment:* What is “commercial item analysis” at FAR 15.404–1(b)?

Response: The phrase has been deleted.

23. *Comment:* The proposed rule at FAR 15.404–1(b)(2)(ii) creates extensive additional disclosure requirements, which affect the eligibility for the “commercial item” exemption. These include very particular demands concerning “prior price,” “terms and conditions,” “market and economic factors,” “differences between the similar item and the item being procured” and encouragement to use expert technical advice to evaluate “minor modifications.” The effect of these requirements is to reduce the availability and utility of the “commercial item” exemption and to create, again, a whole class of “surrogate” data that is uncertified but nevertheless burdensome and expensive to produce.

Response: The contracting officer must be able to determine that the price is fair and reasonable. The fair and reasonable price can be the commercial

price. To the extent there are sufficient commercial sales of the item being procured for the same or similar quantities, both the validity of the comparison and the reasonableness of the previous prices can be established, and the company shares that commercial sales data with the contracting officer when it cannot be obtained by the Government through normal market research, so that the contracting officer can determine a fair and reasonable price, obtaining further "data other than certified cost or pricing data" will not be necessary. See section A, Background, and the responses to Specific Comments numbers 7, 9, and 11.

24. Comment: The rule will create confusion when commercial items are being procured by putting contracting officers in a position where the only safe alternative will be to demand the maximum amount of data from an offeror.

Response: There is no fundamental change from the existing requirements that contracting officers: "shall not obtain more data or information than necessary." To the extent there are sufficient commercial sales of the item for the same or similar quantities, both the validity of the comparison and the reasonableness of the previous price can be established, and the company shares that information with the contracting officer when it cannot be obtained by the Government through normal market research, so that the contracting officer can determine a fair and reasonable price, additional data requests will not be required. This is not a departure from the existing FAR requirement. See section A, Background.

25. Comment: We believe the FAR Council is expressing dissatisfaction with the ability of the acquisition workforce to do price analysis rather than the more familiar cost analysis and recommend providing adequate training rather than making significant changes to established regulations.

Response: See section A, Background, and the Background section of the proposed rule **Federal Register** notice (72 FR 20092, April 23, 2007), concerning the confusion over the current FAR language, and further expressed in these public comments about existing FAR requirements. Training of our acquisition workforce in all types of proposal analysis is an ongoing effort. The workforce needs the cooperation of contractors to submit required data so that contracting officers can ensure a fair and reasonable price. We believe this final rule helps clarify requirements for submitting data consistent with the existing FAR. The

Councils anticipate the development of training to help the workforce understand and apply the rule.

26. Comment: Recommend Councils conduct a public meeting.

Response: A public meeting was held on November 15, 2007, to ensure that all interested parties had an opportunity to provide additional input. The public meeting was followed by the opportunity for interested parties to submit comments.

27. Comment: Existing regulations delineate that data provided in support of proposals fall into two distinct categories: "cost or pricing data" and "information other than cost or pricing data." The primary differentiator between cost or pricing data and information other than cost or pricing data is that the former requires certification in accordance with FAR 15.406-2, while the latter is any type of information that does not require certification per FAR 15.406-2. The existing regulations clearly state that "information other than cost or pricing data" is "any type of information that is not required to be certified" and that the definition "includes cost or pricing data for which certification is determined inapplicable after submission." As a result, there is no ambiguity as to the type of data that can be requested or obtained through the submission of "information other than cost or pricing data." The Councils have changed the type of non-certifiable data to include "cost data" rather than what was previously referred to as "cost information." The FAR Council's intent to clarify that the two terms result in underlying data that is the same, appears to be in direct conflict with the statutory definition. That statute does not eliminate the possibility that the data may be the same but it provides a different standard for "other information." Accordingly, there are two different types of data defined in TINA, "cost or pricing data" that is required to be certified and "other information" that is not required to be certified.

Response: We believe this comment demonstrates the confusion reported to the Councils. TINA and FAR 15.402(a) require that the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price. We agree with the respondent's comment that the definition of "information other than cost or pricing data", in effect prior to this final rule, included cost or pricing data for which certification is determined inapplicable after submission. The contracting officer must obtain whatever level of data is

needed to determine price reasonableness, but cannot require certification of cost or pricing data (should cost or pricing data be needed) if the certification requirement of TINA does not apply. However, some contractors incorrectly believed that the FAR definition of "information other than cost or pricing data" in effect prior to this final rule, precluded the contracting officer from obtaining uncertified cost or pricing data.

Section 2306a(h) of Title 10, as well as section 254b(h) of Title 41 of the U.S. Code, define both "cost or pricing data" and the circumstances under which that data must be certified. When the data must be certified, that data becomes "certified cost or pricing data." If, after submittal, no certification is required, the data becomes "data other than certified cost or pricing data." Sections 2306a(d)(1) and 254b(d)(1) state: "When certified cost or pricing data are not required * * * the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price * * * the contracting officer shall require that the data submitted include, at a minimum, appropriate information on prices at which the same or similar items have previously been sold. * * *" The statutory requirement is to obtain data necessary to determine the reasonableness of the price. The contracting officer cannot require certification of the data submitted if TINA does not require it to be certified. If the contracting officer has no other means to determine the reasonableness of the price (the main requirement of TINA), then the contracting officer shall require the submission of the necessary data needed to make that determination, including, at a minimum, prices at which the same or similar items have been previously sold. TINA does not prohibit obtaining cost or pricing data when "certified cost or pricing data" is not required to be obtained, but TINA (10 U.S.C. 2306(d)), as well as the FAR, provide requirements to ensure the contracting officer does not require more data than is necessary to determine that the prices are fair and reasonable.

28. Comment: The proposed rule would lead contracting officers to expect offerors to maintain traditional Government cost accounting data for commercial items.

Response: There is no requirement for anything more than the type of commercial data customarily maintained. See FAR 15.403-3(a)(2), FAR 15.403-3(c)(2), and FAR 15.403-5(b)(2).

29. *Comment:* Use of the word “claimed” at FAR 15.403–1(c)(3)(i) reveals a great deal about the underlying philosophy that is perpetuated throughout the proposed rule.

Response: The word “claimed” in FAR 15.403–1(c)(3)(i) is not new; it is part of the existing language. There is no inference of intent on the use of the word. The intent of the rule is to make it clear that contracting officers must obtain the level of data needed in order to meet the requirements of TINA (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)), which states that “* * * the contracting officer shall require submission of data * * * necessary to determine the reasonableness of the price * * *.”

30. *Comment:* FAR subpart 15.4 should not be used to determine whether or not an item being offered is a commercial item.

Response: FAR subpart 15.4 is not used to determine whether or not an item is a commercial item. However, it is appropriate in FAR subpart 15.4 to require contracting officers to affirmatively decide if an item being offered meets the definition of “commercial item” before asking a contractor to provide cost or pricing data, if cost analysis is the contracting officer’s only means to determine the price to be fair and reasonable.

31. *Comment:* The proposed change to FAR 15.403–3(c), Commercial Items, states that even if an offeror provides catalog or market pricing, the contracting officer cannot assume that such information would be sufficient to establish a fair and reasonable price, and therefore, the contracting officer “shall require” the offeror to submit data other than certified cost or pricing data to support further analysis.

Response: There was no substantive change in the language in question; it is essentially the existing language. The language gives no mention to “market pricing.” Considering FAR subpart 15.4 in its entirety, if there is adequate market pricing, the contracting officer is prohibited from requiring data from the contractor (FAR 15.402(a) and FAR 15.403–3(a)). The current language and revised language in this final rule only requires submission of data other than certified cost or pricing data in accordance with the order of preference at FAR 15.402(a), and then only to the level of detail needed to support a determination of a fair and reasonable price.

32. *Comment:* The proposed change to FAR 52.215–20, illustrates the tremendous confusion the proposed rule will cause and the onerous nature of the pricing requirements for commercial

items. The proposed rule would “require” contracting officers to demand that offerors proposing commercial items submit “data other than certified cost or pricing data” if the contracting officer believes it is necessary to determine prices fair and reasonable. Proposed paragraph (b) of FAR 52.215–20 then states that if the offeror is not granted an exception from TINA, then the offeror shall submit “data other than certified cost or pricing data.”

Response: FAR 52.215–20 clause requires offerors to submit “data other than certified cost or pricing data” if the contracting officer believes it is necessary to determine prices to be fair and reasonable. The final rule clarifies in paragraph (b) of the contract clause FAR 52.215–20 that the data required under Table 15–2 includes “data other than certified cost or pricing data” as well as “certified cost or pricing data”.

33. *Comment:* Within the proposed rule, the Councils have made significant changes that result in the reprioritizing of the Government’s pricing policy as detailed at FAR 15.402.

Response: In response to comments, the final rule reorganizes the FAR 15.402(a) to clarify the policy, but the policy remains essentially unchanged. See section A, Background.

34. *Comment:* The proposed rule revisions at FAR 15.402(a) suggests that the “data other than certified cost or pricing data” is preferred over “certified cost or pricing data”, even when certification is required by FAR 15.403–4.

Response: In response to comments, the final rule reorganizes FAR 15.402(a) to emphasize that certified cost or pricing data shall be obtained when required by TINA. When certified cost or pricing data are not required, the order of preference at FAR 15.402(a)(2) should generally be followed.

35. *Comment:* The DoD-specific issues cited in the proposed rule and at the public meeting have been adequately addressed by the Director of Defense Procurement and Acquisition Policy through recent policy memos, policy guidance, and contract pricing training. These actions should be given a chance to work before further regulatory changes are made that would impede the U.S. Government’s access to the commercial marketplace.

Response: The purpose of the FAR rulemaking is to eliminate confusion throughout the Government and to clarify for all agencies and their contractors definitions and associated responsibilities for the request and submission of certified cost or pricing data and data other than certified cost or pricing data. While DoD guidance is

helpful to the DoD acquisition workforce, years of experiences throughout Government show that the current FAR language is causing confusion over what a contractor is required to submit to support prices. This confusion leads to inefficient procurement processes and sometimes leads to the Government paying unreasonable prices. The revised language clarifies the regulation, and is consistent with TINA, by requiring the contracting officer to obtain only the data necessary to determine the fairness and reasonableness of the price.

36. *Comment:* The current FAR rules, when properly exercised, are already capable of achieving fair and reasonable prices and, in this respondent’s opinion, the definitions are clear and unambiguous, and contracting officers have significant latitude under current regulations to acquire data from contractors to support price reasonableness of commercial items.

Response: See section A, Background, and also the responses to Specific Comments numbers 7, 9, 11, and 23.

37. *Comment:* There are no proposed changes to make contracting officers aware that cost data from commercial companies will most likely not be in a form that complies with their expectations, training, or experience. Cost data from commercial companies will not comply with Cost Accounting Standards, FAR part 31, and are not generally suitable for certification under the Truth in Negotiations Act. The FAR council should not use terminology that is part of a cost-based contracting process.

Response: Current regulations and TINA already require contractors to provide certified cost or pricing data, and data other than certified cost or pricing data as necessary, that will enable the contracting officer to determine fair and reasonable prices. The rule clarifies the regulations by using language consistent with TINA more precisely. The rule does not expand the contracting officer’s authority to request data from commercial companies when needed for the determination that prices are fair and reasonable. The challenge the comment reflects may be real, but it is not affected by the rule.

38. *Comment:* The proposed rule would revise the order of preference of data at FAR 15.402(a) and would eliminate the distinction between “cost or pricing data” and “information other than cost or pricing data.”

Response: The order of preference is not changed. By eliminating the ambiguous phrase “information other than cost or pricing data,” the rule

clarifies and maintains the distinction between “certified cost or pricing data” and “data other than certified cost or pricing data,” tracking the statutory distinctions. As stated in other responses herein, the revised definitions clearly describe what is required by TINA and intended by this rule. TINA defines “cost or pricing data,” and then prescribes when such data shall be certified. The nature and extent of “cost or pricing data” is the same regardless of whether it is certified or not. The statute also prescribes when a contractor must provide “data other than certified cost or pricing data” (which includes “cost or pricing data” and judgmental information) without being required to certify it. Under the current law and regulations, a contracting officer is empowered to obtain all the data and judgmental information needed to determine a fair and reasonable price, but is restricted as to which data, and when that data, must be certified.

39. Comment: By eliminating the term “information” and substituting the term “data” the rule would add ambiguity as to the legal status of the submission by commercial companies that cannot provide FAR compliant cost data.

Response: The use of the term “data” is consistent with the statute and with the Government’s need to obtain factual information to be used as a basis for reasoning, discussion, or calculation. The rule does not change the existing strong limitations in the FAR on the circumstances under which a contracting officer can obtain certified cost or pricing data from commercial sources. It does not change the current restrictions on the amount of data a contracting officer can obtain (*i.e.*, only that data to the extent necessary to determine fair and reasonable prices.) The rule also retains the existing flexibility to use contractor data formats.

40. Comment: The “of a type” language in the proposed rule at FAR 15.404–1(b)(2)(i) and FAR 15.401(b)(ii)(C) introduces ambiguity as to the meaning of a commercial item. It is recommended that the “of a type” language be deleted from the proposed rule as it seems to add no clarity to the definition of a commercial item or how commercial items are to be priced.

Response: We believe the respondent meant FAR 15.404–1(b)(2)(ii) and FAR 15.404–1(b)(2)(ii)(C). The references in the comment either do not have the “of a type” text, or the reference is erroneous. These subparagraphs of the FAR provide requirements for price analysis and appropriately directs contracting officers to consider price comparisons even in situations when the proposed item is “of a type” that is

customarily used by the general public or non-governmental entities for purposes other than governmental purposes, a term used consistently in the definition of commercial item at FAR 2.101. This section also appropriately directs contracting officers to obtain technical assistance.

41. Comment: The proposed rule fails to address the confusion in pricing noncompetitive (sole-source) commercial items and guides the contracting officer to perform price analysis of previous DoD (Government) prices to determine price reasonableness.

Response: The intent of the rule is for contracting officers to follow the order of preference, which includes price analysis (including price analysis of previous Government and non-Government sales). The Councils recognize, however, that there has been confusion over the type and amount of data that can be required by a contracting officer, particularly in non-competitive (sole-source) acquisitions of commercial items. Accordingly, for the sake of clarification, changes were made at FAR 15.402(a)(2)(ii)(A), FAR 15.403–1(c)(3)(i), and FAR 15.403–3(c) to emphasize the need for the contracting officer to review the history of sales to non-governmental and governmental entities, determine whether an item is a commercial item, and decide whether certified cost or pricing data are required. The changes to FAR 15.402(a) provide sufficient flexibility to the contracting officer to address the specific contracting situation. As revised, this rule clarifies that TINA authorizes a contracting officer to obtain data other than certified cost or pricing data to the extent necessary to establish a fair and reasonable price, even when the acquisition is for a commercial item. Therefore, the rule sets forth appropriate guidance for determining fair and reasonable prices.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not expand or diminish the existing rights of the contracting officer

to obtain cost data or pricing data. Further, most acquisitions involving small entities are under the threshold for the submission of certified cost or pricing data of \$700,000, the new TINA threshold (see FAR Case 2008–024, Item I of this FAC). Finally, this rule will benefit all entities, both large and small, by clarifying the requirements for the submission of “certified cost or pricing data” and “data other than certified cost or pricing data.”

D. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0013.

List of Subjects in 48 CFR Parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52

Government procurement.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by—

■ a. Adding, in alphabetical order, the definition “Certified cost or pricing data”;

■ b. Revising the introductory text of the definition “Cost or pricing data”;

■ c. Adding, in alphabetical order, the definition “Data other than certified cost or pricing data”; and

■ d. Removing the definition “Information other than cost or pricing data”.

The added and revised text reads as follows:

2.101 Definitions

* * * * *

(b) * * *

(2) * * *

Certified cost or pricing data means “cost or pricing data” that were required to be submitted in accordance with FAR 15.403–4 and 15.403–5 and have been certified, or are 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 (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

Cost or pricing data (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) means all facts that, 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 on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they 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. Cost or pricing data are 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. They also include, but are not limited to, such factors as—

* * * * *

Data other than certified cost or pricing data 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 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 estimating 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 price.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

4.704 [Amended]

■ 3. Amend section 4.704 in paragraph (b) by removing “for cost” and adding “for certified cost” in its place.

■ 4. Amend section 4.803 by revising paragraphs (a)(17) and (b)(4) to read as follows:

4.803 Contents of contract files.

* * * * *

(a) * * *

(17) Data and information related to the contracting officer's determination of a fair and reasonable price. This may include—

(i) Certified cost or pricing data;

(ii) Data other than certified cost or pricing data;

(iii) Justification for waiver from the requirement to submit certified cost or pricing data; or

(iv) Certificates of Current Cost or Pricing Data.

* * * * *

(b) * * *

(4) Certified cost or pricing data, Certificates of Current Cost or Pricing Data, or data other than certified cost or pricing data; cost or price analysis; and other documentation supporting contractual actions executed by the contract administration office.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

■ 5. Amend section 12.102 in paragraph (f)(2)(ii) by removing “Cost or pricing” and adding “Certified cost or pricing” in its place.

12.504 [Amended]

■ 6. Amend section 12.504 in paragraph (a)(7) by removing “provide cost” and adding “provide certified cost” in its place.

PART 14—SEALED BIDDING

■ 7. Amend section 14.201–7 by removing from paragraph (a)(1)(ii) “of cost” and adding “of certified cost” in its place; and by revising paragraphs (b)(1) and (c)(1) to read as follows:

14.201–7 Contract clauses.

* * * * *

(b)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214–27, Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at 15.403–4(a)(1).

* * * * *

(c)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed

the threshold for submission of certified cost or pricing data at 15.403–4(a)(1).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 8. Amend section 15.204–5 by revising paragraph (b)(5) to read as follows:

15.204–5 Part IV—Representations and Instructions.

* * * * *

(b) * * *

(5) Certified cost or pricing data (see Table 15–2 of 15.408) or data other than certified cost or pricing data.

* * * * *

■ 9. Amend section 15.402 by revising the introductory text and paragraph (a) to read as follows:

15.402 Pricing policy.

Contracting officers shall—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer—

(1) Shall obtain certified cost or pricing data when required by 15.403–4, along with data other than certified cost or pricing data as necessary to establish a fair and reasonable price; or

(2) When certified cost or pricing data are not required by 15.403–4, obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price, generally using the following order of preference in determining the type of data required:

(i) No additional data from the offeror, if the price is based on adequate price competition, except as provided by 15.403–3(b).

(ii) Data other than certified cost or pricing data such as—

(A) Data related to prices (*e.g.*, established catalog or market prices, sales to non-governmental and governmental entities), relying first on data available within the Government; second, on data obtained from sources other than the offeror; and, if necessary, on data obtained from the offeror. When obtaining data from the offeror is necessary, unless an exception under 15.403–1(b)(1) or (2) applies, such data submitted by the offeror shall include, at a minimum, appropriate data on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(B) Cost data to the extent necessary for the contracting officer to determine a fair and reasonable price.

(3) Obtain the type and quantity of data necessary to establish a fair and

reasonable price, but not more data than is necessary. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources. Use techniques such as, but not limited to, price analysis, cost analysis, and/or cost realism analysis to establish a fair and reasonable price. If a fair and reasonable price cannot be established by the contracting officer from the analyses of the data obtained or submitted to date, the contracting officer shall require the submission of additional data sufficient for the contracting officer to support the determination of the fair and reasonable price.

* * * * *

■ 10. Amend section 15.403 by revising the section heading to read as follows:

15.403 Obtaining certified cost or pricing data.

* * * * *

■ 11. Amend section 15.403–1 by—

■ a. Revising the section heading, paragraph (a), the introductory text of paragraph (b), the heading to paragraph (c) introductory text, and paragraph (c)(3)(i);

■ b. Removing from paragraph (c)(3)(iii)(A) “of cost” and adding “of certified cost” in its place;

■ c. Revising paragraphs (c)(3)(iii)(B) and (c)(3)(iii)(C);

■ d. Removing from paragraph (c)(3)(iv) “for cost” and adding “for certified cost” in its place; and

■ e. Revising the introductory text of paragraph (c)(4).

The revised text reads as follows:

15.403–1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

(a) Certified cost or pricing data shall not be obtained for acquisitions at or below the simplified acquisition threshold.

(b) *Exceptions to certified cost or pricing data requirements.* The contracting officer shall not require certified cost or pricing data to support any action (contracts, subcontracts, or modifications) (but may require data other than certified cost or pricing data as defined in FAR 2.101 to support a determination of a fair and reasonable price or cost realism)—

* * * * *

(c) *Standards for exceptions from certified cost or pricing data requirements—** * *

(3) * * *

(i) Any acquisition of an item that the contracting officer determines meets the commercial item definition in 2.101, or

any modification, as defined in paragraph (3)(i) of that definition, that does not change the item from a commercial item to a noncommercial item, is exempt from the requirement for certified cost or pricing data. If the contracting officer determines that an item claimed to be commercial is, in fact, not commercial and that no other exception or waiver applies, (e.g. the acquisition is not based on adequate price competition; the acquisition is not based on prices set by law or regulation; and the acquisition exceeds the threshold for the submission of certified cost or pricing data at 15.403–4(a)(1)) the contracting officer shall require submission of certified cost or pricing data.

* * * * *

(iii) * * *

(B) For acquisitions funded by DoD, NASA, or Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of certified cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining certified cost or pricing data in 15.403–4 or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or Coast Guard such modifications of a commercial item are not exempt from the requirement for submission of certified cost or pricing data on the basis of the exemption provided for at 15.403–1(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining certified cost or pricing data in 15.403–4 or 5 percent of the total price of the contract at the time of contract award.

* * * * *

(4) *Waivers.* The head of the contracting activity (HCA) may, without power of delegation, waive the requirement for submission of certified cost or pricing data in exceptional cases. The authorization for the waiver and the supporting rationale shall be in writing. The HCA may consider waiving the requirement if the price can be determined to be fair and reasonable without submission of certified cost or pricing data. For example, if certified cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated data, a waiver may be granted. If the HCA has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver

relates shall be considered as having been required to provide certified cost or pricing data. Consequently, award of any lower-tier subcontract expected to exceed the certified cost or pricing data threshold requires the submission of certified cost or pricing data unless—

* * * * *

■ 12. Revise section 15.403–2 to read as follows:

15.403–2 Other circumstances where certified cost or pricing data are not required.

(a) The exercise of an option at the price established at contract award or initial negotiation does not require submission of certified cost or pricing data.

(b) Certified cost or pricing data are not required for proposals used solely for overrun funding or interim billing price adjustments.

■ 13. Revise section 15.403–3 to read as follows:

15.403–3 Requiring data other than certified cost or pricing data.

(a)(1) In those acquisitions that do not require certified cost or pricing data, the contracting officer shall—

(i) Obtain whatever data are available from Government or other secondary sources and use that data in determining a fair and reasonable price;

(ii) Require submission of data other than certified cost or pricing data, as defined in 2.101, from the offeror to the extent necessary to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)) if the contracting officer determines that adequate data from sources other than the offeror are not available. This includes requiring data from an offeror to support a cost realism analysis;

(iii) Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;

(iv) 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, adequate for determining the reasonableness of the price unless an exception under 15.403–1(b)(1) or (2) applies; and

(v) Consider the guidance in section 3.3, chapter 3, volume I, of the Contract Pricing Reference Guide cited at 15.404–1(a)(7) to determine the data an offeror shall be required to submit.

(2) The contractor’s format for submitting the data should be used (see 15.403–5(b)(2)).

(3) The contracting officer shall ensure that data used to support price negotiations are sufficiently current to

permit negotiation of a fair and reasonable price. Requests for updated offeror data should be limited to data that affect the adequacy of the proposal for negotiations, such as changes in price lists.

(4) As specified in section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261), an offeror who does not comply with a requirement to submit data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

(i) The effort made to obtain the data.

(ii) The need for the item or service.

(iii) Increased cost or significant harm to the Government if award is not made.

(b) *Adequate price competition.* When adequate price competition exists (see 15.403-1(c)(1)), generally no additional data are necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional data are necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional data from sources other than the offeror. In addition, the contracting officer should request data to determine the cost realism of competing offers or to evaluate competing approaches.

(c) *Commercial items.* (1) At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see 15.404-1(b)). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional data from sources other than the offeror, then the contracting officer shall require the offeror to submit data other than certified cost or pricing data to support further analysis (see 15.404-1). This data may include history of sales to non-governmental and governmental entities, cost data, or any other information the contracting officer requires to determine the price is fair and reasonable. Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer shall 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, adequate for determining the reasonableness of the price.

(2) *Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)(2)).* (i) The contracting officer shall limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.

(ii) The contracting officer shall, to the maximum extent practicable, limit the scope of the request for data relating to commercial items to include only data that are in the form regularly maintained by the offeror as part of its commercial operations.

(iii) The Government shall not disclose outside the Government data obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).

(3) For 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, see 15.403-1(c)(3)(ii).

14. Amend section 15.403-4 by revising the section heading, and paragraphs (a), (b), and (c) to read as follows:

15.403-4 Requiring certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

(a)(1) The contracting officer shall obtain certified cost or pricing data only if the contracting officer concludes that none of the exceptions in 15.403-1(b) applies. However, if the contracting officer has reason to believe exceptional circumstances exist and has sufficient data available to determine a fair and reasonable price, then the contracting officer should consider requesting a waiver under the exception at 15.403-1(b)(4). The threshold for obtaining certified cost or pricing data is \$700,000. Unless an exception applies, certified cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the contract:

(i) The award of any negotiated contract (except for undefinitized actions such as letter contracts).

(ii) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to furnish certified cost or pricing data (but see waivers at 15.403-1(c)(4)).

(iii) The modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract covered by paragraph (a)(1)(ii) of this subsection. Price adjustment amounts

must consider both increases and decreases (e.g., a \$200,000 modification resulting from a reduction of \$500,000 and an increase of \$300,000 is a pricing adjustment exceeding \$700,000). This requirement does not apply when unrelated and separately priced changes for which certified cost or pricing data would not otherwise be required are included for administrative convenience in the same modification. Negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring certified cost or pricing data if—

(A) The total final price agreement for such settlements or agreements exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection; or

(B) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection (see 49.105(c)(15)).

(2) Unless prohibited because an exception at 15.403-1(b) applies, the head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain certified cost or pricing data for pricing actions below the pertinent threshold in paragraph (a)(1) of this subsection, provided the action exceeds the simplified acquisition threshold. The head of the contracting activity shall justify the requirement for certified cost or pricing data. The documentation shall include a written finding that certified cost or pricing data are necessary to determine whether the price is fair and reasonable and the facts supporting that finding.

(b) When certified cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:

(1) The certified cost or pricing data and data other than certified cost or pricing data required by the contracting officer to determine that the price is fair and reasonable.

(2) A Certificate of Current Cost or Pricing Data, in the format specified in 15.406-2, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, an earlier date agreed upon between the parties that is

as close as practicable to the date of agreement on price.

(c) If certified cost or pricing data are requested and submitted by an offeror, but an exception is later found to apply, the data must not be considered certified cost or pricing data as defined in 2.101 and must not be certified in accordance with 15.406–2.

* * * * *

■ 15. Revise section 15.403–5 to read as follows:

15.403–5 Instructions for submission of certified cost or pricing data and data other than certified cost or pricing data.

(a) Taking into consideration the policy at 15.402, the contracting officer shall specify in the solicitation (see 15.408 (l) and (m))—

(1) Whether certified cost or pricing data are required;

(2) That, in lieu of submitting certified cost or pricing data, the offeror may submit a request for exception from the requirement to submit certified cost or pricing data;

(3) Any requirement for data other than certified cost or pricing data; and

(4) The requirement for necessary preaward or postaward access to offeror's records.

(b)(1) *Format for submission of certified cost or pricing data.* When certification is required, the contracting officer may require submission of certified cost or pricing data in the format indicated in Table 15–2 of 15.408, specify an alternative format, or permit submission in the contractor's format (See 15.408(l)(1)), unless the data are required to be submitted on one of the termination forms specified in subpart 49.6.

(2) *Format for submission of data other than certified cost or pricing data.* When required by the contracting officer, data other than certified cost or pricing data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the solicitation.

(3) *Format for submission of data supporting forward pricing rate agreements.* Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a form acceptable to the contracting officer.

■ 16. Amend section 15.404–1 by—

■ a. Removing from paragraphs (a)(2) and (a)(3) “when cost” and adding “when certified cost” in its place;

■ b. Revising paragraph (a)(4) and the second sentence of paragraph (a)(6);

■ c. Revising the heading of paragraph (b);

■ d. Adding three sentences to the end of paragraph (b)(1);

■ e. Revising the second sentence of paragraph (b)(2)(i), and paragraphs (b)(2)(ii) and (b)(2)(vii);

■ f. Revising paragraph (c)(1);

■ g. Removing from the introductory text of paragraph (c)(2)(i) “cost or” and adding “cost data or” in its place;

■ h. Revising paragraph (c)(2)(v);

■ i. Removing from paragraph (d)(3) “contractors” and adding “contractors,” in its place;

■ j. Removing from paragraph (e)(1) “may” and adding “should” in its place, and removing “equipment, real” and adding “equipment or real” in its place;

■ k. Adding paragraph (e)(3); and

■ l. Removing from the third sentence of paragraph (f)(2) “may” and adding “should” in its place.

The revised and added text reads as follows:

15.404–1 Proposal analysis techniques.

(a) * * *

(4) Cost analysis may also be used to evaluate data other than certified cost or pricing data to determine cost reasonableness or cost realism when a fair and reasonable price cannot be determined through price analysis alone for commercial or non-commercial items.

* * * * *

(6) * * * Any discrepancy or mistake of fact (such as duplications, omissions, and errors in computation) contained in the certified cost or pricing data or data other than certified cost or pricing data submitted in support of a proposal shall be brought to the contracting officer's attention for appropriate action.

* * * * *

(b) *Price analysis for commercial and non-commercial items.* (1) * * * Unless an exception from the requirement to obtain certified cost or pricing data applies under 15.403–1(b)(1) or (b)(2), at a minimum, the contracting officer shall obtain appropriate data, without certification, on the prices at which the same or similar items have previously been sold and determine if the data is adequate for evaluating the reasonableness of the price. Price analysis may include evaluating data other than certified cost or pricing data obtained from the offeror or contractor when there is no other means for determining a fair and reasonable price. Contracting officers shall obtain data other than certified cost or pricing data from the offeror or contractor for all acquisitions (including commercial item acquisitions), if that is the contracting

officer's only means to determine the price to be fair and reasonable.

(2) * * *

(i) * * * Normally, adequate price competition establishes a fair and reasonable price (see 15.403–1(c)(1)).

(ii) 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 method may be used for commercial items including those “of a type” or requiring minor modifications.

(A) The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is uncertain, then the prior price may not be a valid basis for comparison.

(B) The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, the contracting officer must also adjust the prior price to account for material differences between the similar item and the item being procured.

(C) Expert technical advice should be obtained when analyzing similar items, or commercial items that are “of a type” or requiring minor modifications, to ascertain the magnitude of changes required and to assist in pricing the required changes.

* * * * *

(vii) Analysis of data other than certified cost or pricing data (as defined at 2.101) provided by the offeror.

* * * * *

(c) * * * (1) Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price or to determine cost realism, and 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.

* * * * *

(2) * * *

(v) Review to determine whether any cost data or pricing data, necessary to make the offeror's proposal suitable for negotiation, have not been either submitted or identified in writing by the offeror. If there are such data, the contracting officer shall attempt to obtain and use them in the negotiations or make satisfactory allowance for the incomplete data.

* * * * *

(e) * * *

(3) The contracting officer should request technical assistance in evaluating pricing related to items that are "similar to" items being purchased, or commercial items that are "of a type" or requiring minor modifications, to ascertain the magnitude of changes required and to assist in pricing the required changes.

* * * * *

- 17. Amend section 15.404-2 by—
- a. Revising the section heading;
- b. Removing from the second sentence in paragraph (a)(1) and the introductory text of paragraph (a)(2) "must" and adding "shall" in its place;
- c. Revising the introductory text of paragraph (a)(2)(iii) and paragraph (a)(2)(iii)(F); and
- d. Removing from the introductory text of paragraph (c)(1) "may" and adding "should" in its place.

The revised text reads as follows:

15.404-2 Data to support proposal analysis.

- (a) * * *
- (2) * * *

(iii) Information to help contracting officers determine commerciality and a fair and reasonable price, including—

* * * * *

(F) Identifying general market conditions affecting determinations of commerciality and a fair and reasonable price.

* * * * *

- 18. Amend section 15.404-3 by—
- a. Revising paragraphs (a) and (b)(3);
- b. Revising the introductory text of paragraph (c);
- c. Removing from the introductory text of paragraph (c)(1) "subcontractor(s), cost" and adding "subcontractor(s), certified cost" in its place;
- d. Removing from paragraph (c)(1)(ii) "pertinent cost" and adding "pertinent certified cost" in its place;
- e. Revising paragraph (c)(2);
- f. Removing from paragraphs (c)(3) and (c)(4) "Subcontractor cost" and adding "Subcontractor certified cost" in its place; and
- g. Removing from paragraph (c)(5) "Government cost" and adding "Government certified cost" in its place.

The revised text reads as follows:

15.404-3 Subcontract pricing considerations.

(a) The contracting officer is responsible for the determination of a fair and reasonable price for the prime contract, including subcontracting costs. The contracting officer should consider whether a contractor or subcontractor has an approved purchasing system, has

performed cost or price analysis of proposed subcontractor prices, or has negotiated the subcontract prices before negotiation of the prime contract, in determining the reasonableness of the prime contract price. This does not relieve the contracting officer from the responsibility to analyze the contractor's submission, including subcontractor's certified cost or pricing data.

(b) * * *

(3) When required by paragraph (c) of this subsection, submit subcontractor certified cost or pricing data to the Government as part of its own certified cost or pricing data.

(c) Any contractor or subcontractor that is required to submit certified cost or pricing data also shall obtain and analyze certified cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed the certified cost or pricing data threshold, unless an exception in 15.403-1(b) applies to that action.

* * * * *

(2) The contracting officer should require the contractor or subcontractor to submit to the Government (or cause submission of) subcontractor certified cost or pricing data below the thresholds in paragraph (c)(1) of this subsection and data other than certified cost or pricing data that the contracting officer considers necessary for adequately pricing the prime contract.

* * * * *

- 19. Amend section 15.406-2 by revising the introductory text of paragraph (a), and paragraph (e) to read as follows:

15.406-2 Certificate of current cost or pricing data.

(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.

* * * * *

(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.

- 20. Amend section 15.406-3 by revising paragraphs (a)(5) and (a)(6), and the second and third sentences of paragraph (a)(7) to read as follows:

15.406-3 Documenting the negotiation.

(a) * * *

(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) * * * 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.

* * * * *

- 21. Amend section 15.407-1 by—
- a. Revising the section heading;
- b. Removing from the first sentence in paragraph (a) "any cost" and adding "any certified cost" in its place;
- c. Revising paragraph (b)(1);
- d. Removing from paragraphs (b)(2) and (b)(3)(i) "the cost" and adding "the certified cost" in its place;
- e. Revising paragraph (b)(3)(iv);
- f. Removing from paragraph (b)(4) "understated cost" and adding "understated certified cost" in its place;
- g. Removing from paragraph (b)(5)(ii) "the cost" and adding "the certified cost" in its place;
- h. Removing from the first sentence in paragraph (b)(7)(iii) "defective cost" and adding "defective certified cost" in its place;
- i. Removing from the first sentence in paragraph (e) "Defective Cost" each time it appears (twice) and adding "Defective Certified Cost" in its place; and
- j. Removing from the first sentence in the introductory text of paragraph (f) and the first sentence of paragraph (f)(2) "subcontractor cost" and adding "subcontractor certified cost" in its place.

The revised text reads as follows:

15.407-1 Defective certified cost or pricing data.

* * * * *

(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.

* * * * *

(3) * * *

(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.

* * * * *

15.407-2 [Amended]

■ 22. Amend section 15.407-2 in paragraph (c)(1) by removing “requiring cost” and adding “requiring certified cost” in its place.

■ 23. Amend section 15.407-3 by revising paragraph (a) to read as follows:

15.407-3 Forward pricing rate agreements.

(a) When certified cost or pricing data are required, offerors are required to describe any forward pricing rate agreements (FPRAs) in each specific pricing proposal to which the rates apply and to identify the latest cost or pricing data already submitted in accordance with the FPRA. All data submitted in connection with the FPRA, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification. (See the Certificate of Current Cost or Pricing Data at 15.406-2.)

* * * * *

■ 24. Amend section 15.408 by—

■ a. Revising paragraphs (b), (c), (d), (e), and (g);

■ b. Removing from paragraph (j) “that cost” and adding “that certified cost” in its place;

■ c. Revising paragraph (k), the introductory text of paragraph (l), and paragraphs (l)(1), (l)(4), and (m); and

■ d. In Table 15-2, which follows paragraph (n), by—

■ 1. Revising the table heading, the introductory text, and Notes 1 and 2;

■ 2. Revising the first sentence of paragraph B., and paragraph C. of the *I. General Instructions*; and

■ 3. Revising the introductory text of paragraph A. and paragraph A.(2) of the *II. Cost Elements*.

The revised text reads as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

(b) *Price Reduction for Defective Certified Cost or Pricing Data*. The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data, in solicitations and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor (see 15.403-4).

(c) *Price Reduction for Defective Certified Cost or Pricing Data—Modifications*. The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications, in solicitations and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor (see 15.403-4) for the pricing of contract modifications, and the clause prescribed in paragraph (b) of this section has not been included.

(d) *Subcontractor Certified Cost or Pricing Data*. The contracting officer shall insert the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, in solicitations and contracts when the clause prescribed in paragraph (b) of this section is included.

(e) *Subcontractor Certified Cost or Pricing Data—Modifications*. The contracting officer shall insert the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included.

* * * * *

(g) *Pension Adjustments and Asset Reversions*. The contracting officer shall insert the clause at 52.215-15, Pension Adjustments and Asset Reversions, in solicitations and contracts for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31.

* * * * *

(k) *Notification of Ownership Changes*. The contracting officer shall insert the clause at 52.215-19, Notification of Ownership Changes, in solicitations and contracts for which it is contemplated that certified cost or pricing data will be required or for which any preaward or postaward cost determination will be subject to subpart 31.2.

(l) *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data*.

Considering the hierarchy at 15.402, the contracting officer shall insert the provision at 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in solicitations if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required. This provision also provides instructions to offerors on how to request an exception from the requirement to submit certified cost or pricing data. The contracting officer shall—

(1) Use the provision with its Alternate I to specify a format for certified cost or pricing data other than the format required by Table 15-2 of this section;

* * * * *

(4) Replace the basic provision with its Alternate IV if certified cost or pricing data are not expected to be required because an exception may apply, but data other than certified cost or pricing data will be required as described in 15.403-3.

(m) *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications*.

Considering the hierarchy at 15.402, the contracting officer shall insert the clause at 52.215-21, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications, in solicitations and contracts if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required for modifications. This clause also provides instructions to contractors on how to request an exception from the requirement to submit certified cost or pricing data. The contracting officer shall—

(1) Use the clause with its Alternate I to specify a format for certified cost or pricing data other than the format required by Table 15-2 of this section;

(2) Use the clause with its Alternate II if copies of the proposal are to be sent to the ACO and contract auditor;

(3) Use the clause with its Alternate III if submission via electronic media is required; and

(4) Replace the basic clause with its Alternate IV if certified cost or pricing data are not expected to be required because an exception may apply, but data other than certified cost or pricing data will be required as described in 15.403-3.

* * * * *

Table 15-2—Instructions for Submitting Cost/Price Proposals When Certified Cost or Pricing Data Are Required

This document provides instructions for preparing a contract pricing proposal when certified cost or pricing data are required.

Note 1: There is a clear distinction between submitting certified cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of certified cost or pricing data is met when all accurate certified cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the Contracting Officer or an authorized representative. As later data come into your possession, it should be submitted promptly to the Contracting Officer in a manner that clearly shows how the data relate to the offeror's price proposal. The requirement for submission of certified cost or pricing data continues up to the time of agreement on price, or an earlier date agreed upon between the parties if applicable.

Note 2: By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual data (regardless of form or whether the data are specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

I. General Instructions

* * * * *

B. In submitting your proposal, you must include an index, appropriately referenced, of all the certified cost or pricing data and information accompanying or identified in the proposal. * * *

C. As part of the specific information required, you must submit, with your proposal—

(1) Certified cost or pricing data (as defined at FAR 2.101). You must clearly identify on your cover sheet that certified cost or pricing data are included as part of the proposal.

(2) Information reasonably required to explain your estimating process, including—

(i) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(ii) The nature and amount of any contingencies included in the proposed price.

* * * * *

II. Cost Elements

* * * * *

A. *Materials and services.* Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price. Conduct price analyses of all subcontractor proposals. Conduct cost analyses for all subcontracts when certified cost or pricing data are submitted by the subcontractor. Include these analyses as part of your own certified cost or pricing data submissions for subcontracts expected to exceed the appropriate threshold in FAR 15.403-4. Submit the subcontractor certified cost or pricing data and data other than certified cost or pricing data as part of your own certified cost or pricing data as required in paragraph IIA(2) of this table. These requirements also apply to all subcontractors if required to submit certified cost or pricing data.

* * * * *

(2) *All Other.* Obtain certified cost or pricing data from prospective sources for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding the threshold set forth in FAR 15.403-4 and not otherwise exempt, in accordance with FAR 15.403-1(b) (i.e., adequate price competition, commercial items, prices set by law or regulation or waiver). Also provide data showing the basis for establishing source and reasonableness of price. In addition, provide a summary of your cost analysis and a copy of certified cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is the lower of either \$12.5 million or more, or both more than the pertinent certified cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price. Also submit any information reasonably required to explain your estimating process (including the judgmental factors applied and the mathematical or other methods used in the estimate, including

those used in projecting from known data, and the nature and amount of any contingencies included in the price). The Contracting Officer may require you to submit cost or pricing data in support of proposals in lower amounts. Subcontractor certified cost or pricing data must be accurate, complete and current as of the date of final price agreement, or an earlier date agreed upon by the parties, given on the prime contractor's Certificate of Current Cost or Pricing Data. The prime contractor is responsible for updating a prospective subcontractor's data. For standard commercial items fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown, if priced based on cost. For interorganizational transfers priced at cost, provide a separate breakdown of cost elements. Analyze the certified cost or pricing data and submit the results of your analysis of the prospective source's proposal. When submission of a prospective source's certified cost or pricing data is required as described in this paragraph, it must be included as part of your own certified cost or pricing data. You must also submit any data other than certified cost or pricing data obtained from a subcontractor, either actually or by specific identification, along with the results of any analysis performed on that data.

* * * * *

PART 16—TYPES OF CONTRACTS

16.202-2 [Amended]

■ 25. Amend section 16.202-2 by removing from paragraph (b) "valid cost" and adding "valid certified cost" in its place.

■ 26. Amend section 16.203-2 by revising paragraph (b) to read as follows:

16.203-2 Application.

* * * * *

(b) In contracts that do not require submission of certified cost or pricing data, the contracting officer shall obtain adequate data to establish the base level from which adjustment will be made and may require verification of data submitted.

■ 27. Amend section 16.603-2 by revising the first sentence of paragraph (c) to read as follows:

16.603-2 Application.

* * * * *

(c) Each letter contract shall, as required by the clause at 52.216-25, Contract Definitization, contain a negotiated definitization schedule including (1) dates for submission of the contractor's price proposal, required certified cost or pricing data and data

other than certified cost or pricing data; and, if required, make-or-buy and subcontracting plans, (2) a date for the start of negotiations, and (3) a target date for definitization, which shall be the earliest practicable date for definitization. * * *

* * * * *

■ 28. Amend section 16.603–4 by revising the second sentence of paragraph (b)(3) to read as follows:

16.603–4 Contract clauses.

* * * * *

(b) * * *

(3) * * * If at the time of entering into the letter contract, the contracting officer knows that the definitive contract will be based on adequate price competition or will otherwise meet the criteria of 15.403–1 for not requiring submission of certified cost or pricing data, the words “and certified cost or pricing data in accordance with FAR 15.408, Table 15–2 supporting its proposal” may be deleted from paragraph (a) of the clause. * * *

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 29. Amend section 19.705–4 by—
■ a. Removing from the introductory text and paragraph (a) introductory text “must” and adding “shall” in its place; and
■ b. Revising paragraph (d)(3) to read as follows:

19.705–4 Reviewing the subcontracting plan.

* * * * *

(d) * * *

(3) Ensure that the subcontracting goals are consistent with the offeror’s certified cost or pricing data or data other than certified cost or pricing data.

* * * * *

■ 30. Amend section 19.806 by revising the second and third sentences of paragraph (a) to read as follows:

19.806 Pricing the 8(a) contract.

(a) * * * If required by subpart 15.4, the SBA shall obtain certified cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the proposed price to be fair and reasonable in a sole source acquisition, the contracting activity shall furnish it to the extent it is available.

* * * * *

19.807 [Amended]

■ 31. Amend section 19.807 by removing from paragraph (b) “including

cost” and adding “including certified cost” in its place.

PART 27—PATENTS, DATA, AND COPYRIGHTS

27.202–5 [Amended]

■ 32. Amend section 27.202–5 by removing from paragraph (a)(1)(i) “which cost” and adding “which certified cost” in its place.

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

30.201–5 [Amended]

■ 33. Amend section 30.201–5 in paragraph (c)(6) by removing “Whether cost” and adding “Whether certified cost” in its place.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.205–6 [Amended]

■ 34. Amend section 31.205–6 in paragraph (j)(3)(i)(B), the second sentence of paragraph (j)(3)(ii), and the second sentence of paragraph (o)(5) by removing “which cost” and adding “which certified cost” in its place.

PART 32—CONTRACT FINANCING

32.601 [Amended]

■ 35. Amend section 32.601 in paragraph (b)(2) by removing “defective cost” and adding “defective certified cost” in its place.

32.607–2 [Amended]

■ 36. Amend section 32.607–2 in paragraph (g)(3) by removing “Defective Cost” and adding “Defective Certified Cost” in its place.

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.207 [Amended]

■ 37. Amend section 33.207 in paragraph (d) by removing “regarding cost” and adding “regarding certified cost” in its place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 38. Amend section 36.214 by—
■ a. Revising the introductory text of paragraph (b); and
■ b. Removing from paragraph (b)(1) “of cost” and adding “of certified cost” in its place.
■ The revised text reads as follows:

36.214 Special procedures for price negotiation in construction contracting.

* * * * *

(b) The contracting officer shall evaluate proposals and associated

certified cost or pricing data and data other than certified cost or pricing data and shall compare them to the Government estimate.

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.705–1 [Amended]

■ 39. Amend section 42.705–1 in paragraph (b)(5)(iii) by giving separate indentation to paragraphs (b)(5)(iii)(A), (B), (C), and (D) and by removing from (b)(5)(iii)(D) “of cost” and adding “of certified cost” in its place.

■ 40. Amend section 42.1304 by revising paragraph (d) to read as follows:

42.1304 Government delay of work.

* * * * *

(d) The contracting officer shall retain in the file a record of all negotiations leading to any adjustment made under the clause, and related certified cost or pricing data, or data other than certified cost or pricing data.

■ 41. Amend section 42.1701 by—
■ a. In paragraph (b), revising the first sentence, and removing the last sentence; and
■ b. Revising the second sentence of paragraph (c). The revised text reads as follows:

42.1701 Procedures.

* * * * *

(b) The ACO shall obtain the contractor’s forward pricing rate proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission (but see 15.407–3(c)). * * *

(c) * * * The agreement shall provide for cancellation at the option of either party and shall require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data used to support the FPRA.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 42. Amend section 44.202–2 by revising paragraph (a)(8) to read as follows:

44.202–2 Considerations.

(a) * * *

(8) Has the contractor performed adequate cost or price analysis or price comparisons and obtained certified cost or pricing data and data other than certified cost or pricing data?

* * * * *

■ 43. Amend section 44.303 by revising paragraph (c) to read as follows:

44.303 Extent of review.

* * * * *

(c) Pricing policies and techniques, including methods of obtaining certified cost or pricing data, and data other than certified cost or pricing data;

* * * * *

44.305-3 [Amended]

■ 44. Amend section 44.305-3 in paragraph (a)(1) by removing “Cost” and adding “Certified cost” in its place.

PART 45—GOVERNMENT PROPERTY

45.104 [Amended]

■ 45. Amend section 45.104 by removing from paragraph (a)(4) “of cost” and adding “of certified cost” in its place.

PART 49—TERMINATION OF CONTRACTS

49.603-1 [Amended]

■ 46. Amend section 49.603-1 in paragraph (b)(7)(x) of the agreement by removing “defective cost” and adding “defective certified cost” in its place.

49.603-2 [Amended]

■ 47. Amend section 49.603-2 in paragraph (b)(8)(vii) of the agreement by removing “defective cost” and adding “defective certified cost” in its place.

49.603-3 [Amended]

■ 48. Amend section 49.603-3 in paragraph (b)(7)(xv) of the agreement by removing “defective cost” and adding “defective certified cost” in its place.

49.603-4 [Amended]

■ 49. Amend section 49.603-4 in paragraph (b)(4)(viii) of the agreement by removing “defective cost” and adding “defective certified cost” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 50. Amend section 52.214-26 by—
■ a. Revising the date of the clause;
■ b. Revising the introductory text of paragraph (b); and
■ c. Removing from paragraph (e) “of cost” and adding “of certified cost” in its place.

The revised text reads as follows:

52.214-26 Audit and Records—Sealed Bidding.

* * * * *

Audit and Records—Sealed Bidding (Oct 2010)

* * * * *

(b) *Certified cost or pricing data.* If the Contractor has been required to submit certified cost or pricing data in connection with the pricing of any modification to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor’s records, including computations and projections, related to—

* * * * *

■ 51. Amend section 52.214-27 by—

- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Removing from paragraph (a) “of cost” and adding “of certified cost” in its place;
- d. Removing from paragraph (b) “furnished cost” and adding “furnished certified cost” in its place; removing “Contractor cost” and adding “Contractor certified cost” in its place; and removing “(a) above” and adding “(a) of this clause” in its place;
- e. Removing from paragraph (c) “(b) above” and adding “(b) of this clause” in its place, and removing “defective cost” and adding “defective certified cost” in its place;
- f. Removing from paragraph (d)(1)(i) “current cost” and adding “current certified cost” in its place; and removing from paragraph (d)(1)(ii) “the cost” and adding “the certified cost” in its place;
- g. Removing from paragraph (d)(2)(i)(B) “the cost” and adding “the certified cost” in its place; and
- h. Removing from paragraph (e)(2) “submitted cost” and adding “submitted certified cost” in its place;

The revised text reads as follows:

52.214-27 Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding.

* * * * *

Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding (Oct 2010)

* * * * *

■ 52. Amend section 52.214-28 by—

- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Giving separate indention to paragraphs (a)(1) and (2) and by removing from paragraph (a)(1) “of cost” and adding “of certified cost” in its place;
- d. Revising paragraph (b); and
- e. Removing from paragraph (d) “of cost” and adding “of certified cost” in its place.

The revised text reads as follows:

52.214-28 Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding (Oct 2010)

* * * * *

(b) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4(a)(1), on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modifications involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4(a)(1), the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor’s proposal in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor’s estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1(b) applies.

* * * * *

■ 53. Amend section 52.215-2 by—

- a. Revising the date of the clause;
- b. Revising the introductory text of paragraph (c); and
- c. Removing from introductory text of paragraph (g) “paragraph (a)” and adding “paragraph (g)” in its place; and removing from paragraph (g)(2) “which cost” and adding “which certified cost” in its place.

The revised text reads as follows:

52.215-2 Audit and Records-Negotiation.

* * * * *

Audit and Records—Negotiation (Oct 2010)

* * * * *

(c) *Certified cost or pricing data.* If the Contractor has been required to submit certified cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor’s records, including computations and projections, related to—

* * * * *

■ 54. Amend section 52.215-9 by—

- a. Revising the date of *Alternate I* and paragraph (d)(1); and
- b. Revising the date of *Alternate II* and paragraph (d)(1).

The revised text reads as follows:

52.215-9 Changes or Additions to Make-or-Buy Program.

* * * * *

Alternate I (Oct 2010). * * *

(d) * * *

(1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408, Table 15-2 when required by FAR 15.403, and data other than certified cost or pricing data, to permit evaluation; and

* * * * *

Alternate II (Oct 2010). * * *

(d) * * *

(1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408, Table 15-2, when required by FAR 15.403, and data other than certified cost or pricing data, to permit evaluation; and

* * * * *

- 55. Amend section 52.215-10 by—
- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Removing from paragraph (a)(1) “furnished cost” and adding “furnished certified cost” in its place, and removing from paragraph (a)(2) “Contractor cost” and adding “Contractor certified cost” in its place;
- d. Revising paragraph (b);
- e. Removing from paragraph (c)(1)(i) “current cost” and adding “current certified cost” in its place, and removing from paragraphs (c)(1)(ii) and (c)(2)(i)(B) “the cost” and adding “the certified cost” in its place; and
- f. Removing from paragraph (d)(2) “submitted cost” and adding “submitted certified cost” in its place.

The revised text reads as follows:

52.215-10 Price Reduction for Defective Certified Cost or Pricing Data.

* * * * *

Price Reduction for Defective Certified Cost or Pricing Data (Oct 2010)

* * * * *

(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

* * * * *

- 56. Amend section 52.215-11 by—
- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Removing from paragraph (a) “of cost” and adding “of certified cost” in its place;
- d. Removing from paragraph (b) “furnished cost” and adding “furnished

certified cost” in its place; and removing “Contractor cost” and adding “Contractor certified cost” in its place;

- e. Revising paragraph (c);
- f. Removing from paragraph (d)(1)(i) “current cost” and adding “current certified cost” in its place; and removing from paragraphs (d)(1)(ii) and (d)(2)(i)(B) “the cost” and adding “the certified cost” in its place; and
- g. Removing from paragraph (e)(2) “submitted cost” and adding “submitted certified cost” in its place.

The revised text reads as follows:

52.215-11 Price Reduction for Defective Certified Cost or Pricing Data—Modifications.

* * * * *

Price Reduction for Defective Certified Cost or Pricing Data—Modifications (Oct 2010)

* * * * *

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

* * * * *

- 57. Amend section 52.215-12 by—
- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Revising paragraph (a);
- d. Removing from the introductory text of paragraph (c) and paragraph (c)(1) “of cost” and adding “of certified cost” in its place; and
- e. Removing from paragraph (c)(2) “Subcontractor Cost” and adding “Subcontractor Certified Cost” in its place.

The revised text reads as follows:

52.215-12 Subcontractor Certified Cost or Pricing Data.

* * * * *

Subcontractor Certified Cost or Pricing Data (Oct 2010)

* * * * *

(a) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4, on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4, the Contractor shall require the subcontractor to submit certified cost or

pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor’s estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1 applies.

* * * * *

- 58. Amend section 52.215-13 by—
- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Removing from paragraph (a)(1) “of cost” and adding “of certified cost” in its place;
- d. Revising paragraph (b); and
- e. Removing from paragraph (d) “of cost” and adding “of certified cost” in its place;

The revised text reads as follows:

52.215-13 Subcontractor Certified Cost or Pricing Data—Modifications.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications (Oct 2010)

* * * * *

(b) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4, on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor’s estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1 applies.

* * * * *

52.215-14 [Amended]

- 59. Amend section 52.215-14 by—
- a. Revising the date of the clause to read “(Oct 2010)”; and
- b. Removing from the last sentence of paragraph (a) “of cost” and adding “of certified cost” in its place.

52.215-15 [Amended]

- 60. Amend section 52.215-15 by revising the date of the clause to read “(Oct 2010)”; and removing from paragraph (b)(2) and the second sentence of paragraph (c) “which cost”

and adding “which certified cost” in its place.

- 61. Amend section 52.215–20 by—
 - a. Revising the section heading;
 - b. Revising the provision heading and date of the provision;
 - c. Revising the introductory text of paragraph (a); and removing from the first sentence of paragraph (a)(1) “submitting cost” and adding “submitting certified cost” in its place;
 - d. Revising the introductory text of paragraph (b) and paragraph (b)(1);
 - e. Revising *Alternate I*; and
 - f. Revising the date of *Alternate IV* and paragraphs (a) and (b).

The revised text reads as follows:

52.215–20 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (Oct 2010)

(a) *Exceptions from certified cost or pricing data.*

* * * * *

(b) *Requirements for certified cost or pricing data.* If the offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The offeror shall prepare and submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15–2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15–2 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use *Alternate I*.

* * * * *

Alternate I (Oct 2010). As prescribed in 15.408(1) (and see 15.403–5(b)(1)), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic provision:

(b)(1) The offeror shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in the following format: *[Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408, Table 15–2, Note 2. The description may be inserted at the time of issuing the solicitation, or the Contracting Officer may specify that the offeror’s format will be acceptable, or the description may be inserted as the result of negotiations.]*

* * * * *

Alternate IV (Oct 2010). * * *

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data and the format that*

are required, including the access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.403–3.]

- 62. Amend section 52.215–21 by—
 - a. Revising the section heading;
 - b. Revising the clause heading and date of the clause;
 - c. Revising the introductory text of paragraph (a); and removing from the introductory text of paragraph (a)(1) “submitting cost” and adding “submitting certified cost” in its place;
 - d. Removing from paragraph (a)(1)(ii)(A)(1) “from cost” and adding “from certified cost” in its place;
 - e. Revising the introductory text of paragraph (b) and paragraph (b)(1);
 - f. Revising *Alternate I*; and
 - g. Revising the date of *Alternate IV* and paragraphs (a) and (b).
- The revised text reads as follows:

52.215–21 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications (Oct 2010)

(a) *Exceptions from certified cost or pricing data.*

* * * * *

(b) *Requirements for certified cost or pricing data.* If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Contractor shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15–2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15–2 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use *Alternate I*.

* * * * *

Alternate I (Oct 2010). As prescribed in 15.408(m) and 15.403–5(b)(1), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic clause.

(b)(1) The Contractor shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments prepared in the following format: *[Insert description of the data and format that are required and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408, Table 15–2, Note 2. The description may be inserted at the time of issuing the solicitation, or the Contracting Officer may specify that the offeror’s format*

will be acceptable, or the description may be inserted as the result of negotiations.]

* * * * *

Alternate IV (Oct 2010). * * *

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data and the format that are required, including the access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.403–3.]*

- 63. Amend section 52.216–25 by—
 - a. Revising the date of the clause;
 - b. Revising paragraph (a); and
 - c. Removing from the paragraph (b) “and cost” and adding “and certified cost” in its place.

The revised text reads as follows:

52.216–25 Contract Definition.

* * * * *

Contract Definition (Oct 2010)

(a) A ____ *[insert specific type of contract]* definitive contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the letter contract, (2) all clauses required by law on the date of execution of the definitive contract, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a ____ *[insert specific type of proposal (e.g., fixed-price or cost-and-fee)]* proposal, including data other than certified cost or pricing data, and certified cost or pricing data, in accordance with FAR 15.408, Table 15–2, supporting its proposal.

* * * * *

52.230–2 [Amended]

- 64. Amend section 52.230–2 by revising the date of the clause to read “(Oct 2010)”; and removing from the first sentences of paragraphs (a)(3) and (d) “submitted cost” and adding “submitted certified cost” in its place.

52.230–5 [Amended]

- 65. Amend section 52.230–5 by revising the date of the clause to read “(Oct 2010)”; and removing from the first sentence of paragraph (a)(3) and the introductory text of paragraph (d) “submitted cost” and adding “submitted certified cost” in its place.

52.232–17 [Amended]

- 66. Amend section 52.232–17 by revising the date of the clause to read “(Oct 2010)”; and removing from the first sentence of paragraph (a) “Defective Cost” and adding “Defective Certified Cost” in its place.

52.244–2 [Amended]

- 67. Amend section 52.244–2 by—

- a. Revising the date of the clause to read “(Oct 2010)”;
- b. Removing from paragraph (e)(1)(v) “accurate cost” and adding “accurate certified cost” in its place;
- c. Removing from paragraph (e)(1)(vii)(C) “reason cost” and adding “reason certified cost” in its place; and
- d. Removing from paragraphs (e)(1)(vii)(D) and (e)(1)(vii)(E) “subcontractor’s cost” and adding “subcontractor’s certified cost” in its place.

[FR Doc. 2010–21026 Filed 8–27–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 25, and 52

[FAC 2005–45; FAR Case 2009–008; Item III; Docket 2009–0008, Sequence 1]

RIN 9000–AL22

Federal Acquisition Regulation; American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to the “Buy American—Recovery Act” provision, section 1605 in Division A.

DATES: *Effective Date:* October 1, 2010.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the appropriate FAR clause for future work, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for award of any work that uses Recovery Act funds.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–45, FAR case 2009–008.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule implements the unique “Buy American—Recovery Act” provision, section 1605 of the Recovery Act, by revising FAR subpart 25.6, and related provisions and clauses at FAR part 52, with conforming changes to FAR subparts 2.1, 5.2, 25.0, and 25.11. An interim rule was published in the *Federal Register* at 74 FR 14623, March 31, 2009. The public comment period ended June 1, 2009.

As required by section 1605, the final rule makes it clear that there will be full compliance with U.S. obligations under all international trade agreements when undertaking construction covered by such agreements with Recovery Act funds. The new required provisions and clauses implement U.S. obligations under our trade agreements in the same way as they are currently implemented in non-Recovery Act construction contracts. The Caribbean Basin countries are excluded from the definition of “Recovery Act designated country,” because the treatment provided to them is not as a result of a U.S. international obligation.

B. Discussion and Analysis

The Regulatory Secretariat received 35 responses, but 2 responses lacked attached comments and 1 response appeared unrelated to the case. The responses included multiple comments on a wide range of issues addressed in the interim rule. Each issue is discussed by topic in the following sections.

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1. Comments on Section 1605 of the Recovery Act

Comments: Although the respondents expressed general support for the goals of the Recovery Act to stimulate the U.S. economy, many were concerned about the Recovery Act Buy American restrictions of section 1605. For example:

Several entities representing other countries objected to the potential restrictions on trade. They alleged that the Recovery Act Buy American requirement in section 1605 is not in conformity with the U.S. pledge to refrain from raising new barriers in the framework of the Summit on Financial Markets and the World Economy, November 2008, and the G20 pledge, April 2009. They alleged that it will have a negative impact on the world trade and economy. One respondent stated that it is not rational for the U.S. to take trade protection actions such as the “Buy American—Recovery Act” provision, because it will not be useful for the American and global economy in promoting recovery from the current downturn. Another respondent stated that, to the extent 1605 imposes more restrictive requirements than previously existed, it represents a new barrier to trade in goods between the United States and Canada. One respondent found several aspects of section 1605 problematic because of their “inherent lack of clarity.”

Some United States industry associations also had concerns about section 1605. One objected that the real-life burdens of complying with these country-of-origin requirements cannot be overstated. This respondent concluded that, where the U.S. Government places a premium on