**DFARS Case 2020-D008**

**Requiring Data Other than Certified Cost or Pricing Data**

**PGI Text**

**PGI 215 Contracting by Negotiation**

**\* \* \* \* \***

**PGI 215.4 Contract Pricing**

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**PGI 215.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306aand 41 U.S.C. chapter 35).**

(b) *Exceptions to certified cost or pricing data requirements*. Even if an exception to certified cost or pricing data applies, the contracting officer is still required to determine price reasonableness. In order to make this determination, the contracting officer may require data other than certified cost or pricing data, including data related to prices and cost data that would otherwise be defined as certified cost or pricing data if certified.

(c)(3) *Commercial items*. See the Department of Defense Guidebook for Acquiring Commercial Items, [Part B: Pricing Commercial Items](https://www.acq.osd.mil/dpap/cpic/cp/docs/Guidebook_Part_B_Commercial_Item_Pricing_20180126.pdf), for detailed guidance about techniques and approaches to pricing commercial products and services.

(4) *Waivers*.

(A) *Exceptional case TINA waiver*.

*(1)* In determining that an exceptional case TINA waiver is appropriate, the head of the contracting activity **[(HCA)]** must exercise care to ensure that the supplies or services could not be obtained without the waiver and that the determination is clearly documented. [See DPAP March 23, 2007, policy memorandum](https://www.acq.osd.mil/dpap/policy/policyvault/2007-0195-DPAP.pdf). The intent is not to relieve entities that normally perform Government contracts subject to TINA from an obligation to certify that cost or pricing data are accurate, complete, and current. Instead, waivers must be used judiciously, in situations where the Government could not otherwise obtain a needed item without a waiver. A prime example would be when a particular company offers an item that is essential to DoD’s mission but is not available from other sources, and the company refuses to submit certified cost or pricing data. In such cases, a waiver may be appropriate. However, the procuring agency should, in conjunction with the waiver, develop a strategy for procuring the item in the future that will not require such a waiver (e.g., develop a second source, develop an alternative product that satisfies the department’s needs, or have DoD produce the item).

*(2)* *Senior procurement executive coordination*. An exceptional case TINA waiver that exceeds $100 million shall be coordinated with the senior procurement executive prior to granting the waiver.

*(3)* *Waiver for part of a proposal*. The requirement for submission of certified cost or pricing data may be waived for part of an offeror’s proposed price when it is possible to clearly identify that part of the offeror’s cost proposal to which the waiver applies as separate and distinct from the balance of the proposal. In granting a partial waiver, in addition to complying with the requirements in DFARS [215.403-1](https://www.acq.osd.mil/dpap/dars/dfars/html/current/215_4.htm#215.403-1)(c)(4), the ~~head of the contracting activity~~ **[(HCA)]** must address why it is in the Government’s best interests to grant a partial waiver, given that the offeror has no objection to certifying to the balance of its cost proposal.

*(4)* *Waivers for unpriced supplies or services*. Because there is no price, unpriced supplies or services cannot be subject to cost or pricing data certification requirements. The Government cannot agree in advance to waive certification requirements for unpriced supplies or services, and may only consider a waiver at such time as an offeror proposes a price that would otherwise be subject to certification requirements.

(B) The annual report of waiver of TINA requirements shall include the following:

Title: Waiver of TINA Requirements

(1) Contract number, including modification number, if applicable, and program name.

(2) Contractor name.

(3) Contracting activity.

(4) Total dollar amount waived.

(5) Brief description of why the item(s) could not be obtained without a waiver. [See DPAP March 23, 2007, policy memorandum](https://www.acq.osd.mil/dpap/policy/policyvault/2007-0195-DPAP.pdf).

(6) Brief description of the specific steps taken to ensure price reasonableness.

(7) Brief description of the demonstrated benefits of granting the waiver.

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**PGI 215.403-3 Requiring data other than certified cost or pricing data.**

To the extent that certified cost or pricing data are not required by FAR 15.403-4 and there is no other means for the contracting officer to determine that prices are fair and reasonable, the offeror is required to submit “data other than certified cost or pricing data” (see definition at FAR 2.101). In accordance with FAR 15.403-3(a), the offeror must provide appropriate data on the prices at which the same or similar items have previously been sold, adequate for determining the reasonableness of the price. The following clarifies these requirements:

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(4) *~~Reliance on prior~~* **[*Analysis of historical]*** *prices paid by the Government*. ~~Before~~

**[(i) The contracting officer shall consider prices paid by the Government and commercial customers. The contracting officer shall not]** rely~~ing~~ **[solely]** on a prior price paid by the Government~~,~~ **[without further analysis (see FAR 15.404).**

**(A) T]**he contracting officer ~~must~~**[shall]** verify and document that sufficient analysis was performed on the prior price to determine that the prior pricewas fair and reasonable. Sometimes, due to exigent situations, supplies or services are purchased even though an adequate price or cost analysis could not be performed. The problem is exacerbated when other contracting officers assume these prices were adequately analyzed and determined to be fair and reasonable.

**[(B)]** The contracting officer also ~~must~~ **[shall investigate and document the following considerations:**

**(*1)*** **V]**~~v~~erify that the ~~prices previously paid were for~~ quantities ~~consistent with the current solicitation~~**[were similar for pricing purposes, making adjustments as necessary to ensure comparability with the current quantity requirement;**

**(*2*) Consider whether the historical purchases were recent enough to be relevant for the purpose of establishing price reasonableness of the current acquisition, and escalate or deflate the historical prices as appropriate to facilitate comparison to the current proposed price; and**

**(*3*) Validate that the terms and conditions associated with the historical purchases were comparable to the current terms and conditions, or adjust the historical prices in a manner that accounts for the materially differing terms and conditions]**.

**[(ii)]**  Not verifying that a previous analysis was performed, or the consistencies in quantities, has been a recurring issue on sole source commercial items reported by oversight organizations. Sole source commercial items require extra attention to verify that previous prices paid on Government contracts were sufficiently analyzed and determined to be fair and reasonable.

**[(iii)]** At a minimum, a contracting officer reviewing price history shall discuss the basis of previous prices paid with the contracting organization that previously bought the item. These discussions shall be documented in the contract file.

(5) *Canadian Commercial Corporation*\* \* \*

(6) *Reporting requirements*.

(i) All contracting officers are required to document, collect, and provide a report **[in the standard digital format (see paragraph (ii) of this section)]** to the ~~head of the contracting activity~~ **[(HCA)]** of all denials of contracting officer requests to offerors/contractors for data other than certified cost or pricing data that are not resolved through the elevation process at [PGI 215.404-1](https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/PGI215_4.htm#215.404-1)(a)(i)(A) and, therefore, require a determination by the ~~head of the contracting activity~~**[HCA]** in accordance with FAR 15.403-3(a)(4).

(ii) The ~~head of the contracting activity~~ **[(HCA)]** shall consolidate and validate this information **[for all impacted contracts and modifications regardless of dollar value]** and ~~forward~~ **[submit the information]** ~~it~~ in the standard digital format available at [~~https://www.acq.osd.mil/dpap/index.html~~](https://www.acq.osd.mil/dpap/dars/pgi/docs/Denials_Template.xlsx)**[*https://www.acq.osd.mil/dpap/dars/pgi/docs/Denials\_Template\_1-24-21*.]** **[A completed report or note of no findings is required]** to fulfill the reporting requirement to the **[Principal]** Director, Defense Pricing and Contracting (DPC). ~~The first quarter for reporting will be April 1 - June 30, 2019, with the reports due to DPC by July 30, 2019, and~~**[Reports are due to DPC]** 30 days after the end of each quarterly reporting period ~~thereafter~~. Transmit reports electronically to DPC at [~~osd.pentagon.ousd-a-s.mbx.dpc-pci@mail.mil~~](mailto:osd.pentagon.ousd-a-s.mbx.dpc-pci@mail.mil)**[*osd.pentagon.ousd-a-s.mbx.dpc-pcf@mail.mil*]**.

~~(iii) The report shall contain the following information for each reported occurrence:~~

~~(A) Contracting activity/DOD Activity Address Code.~~

~~(B) Name, email address, and telephone number of the procuring contracting officer (PCO) that requested the data.~~

~~(C) Name of the offeror/contractor that denied the request.~~

~~(D) Commercial and Government Entity (CAGE) code.~~

~~(E) Contract number.~~

~~(F) Part number and national stock number.~~

~~(G) Whether the offeror/contractor is an exclusive dealer for the Original Equipment Manufacturer.~~

~~(H) Date of initial request.~~

~~(I) Type of data requested.~~

~~(J) Number of requests made.~~

~~(K) Number of denials received.~~

~~(L) Date of final request.~~

~~(M) Reason for denial.~~

~~(N) Reason data is needed.~~

~~(O) HCA determination that it is in the best interests of DoD to purchase from the supplier.~~

~~(P) Plan for avoiding situation in future.~~

~~(iv) DPC will establish a team of functional experts from the military departments and defense agencies to analyze the data reported as a result of this requirement. The team of functional experts will—~~

~~(A) Assess parts and offerors/contractors deemed to be at high risk for unreasonable pricing and identify trends; and~~

~~(B) Perform price analysis and cost analysis of high-risk parts to identify lower cost alternatives or fair and reasonable pricing for future procurements.~~

**[(7) *Delegation.* The HCA may delegate, no lower than one level above the contracting officer, the authority to determine whether it is in the best interest of the Government to issue an award in accordance with DFARS 215.403-3(a)(4). This designee may be the individual responsible for approval of the prenegotiation objective (see DFARS 215.406-1), unless that individual is the contacting officer.]**

**PGI 215.404 Proposal analysis.**

**PGI 215.404-1 Proposal analysis techniques**

(a) *General*.

(i) The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable.

(A) \* \* \*

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*(vi)* Consistent with the requirements at FAR 15.304 and 42.1502 and the DoD Guide to Collection and Use of Past Performance Information, Version 3, dated May 2003, the contracting officer shall**[, unless exempted by the HCA,]** provide input into the past performance system, noting the offeror’s refusal to provide the requested information.

(B) In some cases, supplies or services that are not subject to TINA may require a cost analysis (see paragraph ~~(b)(iv)~~**[(c)]** of this section). This will occur when a price analysis is not sufficient for determining prices to be fair and reasonable. In such cases, the contracting officer should consider the need for a Defense Contract Audit Agency audit of the cost data.

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(b) *Price analysis for commercial and noncommercial items*.

(i) See the Department of Defense Guidebook for Acquiring Commercial Items, [Part B: Pricing Commercial Items](https://www.acq.osd.mil/dpap/cpic/cp/docs/Guidebook_Part_B_Commercial_Item_Pricing_20180126.pdf), for detailed guidance about techniques and approaches to pricing commercial products and services.

(v) Contracting officers must obtain and document sufficient data to confirm that previous prices paid by the Government were based on a thorough price and/or cost analysis. For example, it would not be sufficient to use price(s) from a database paid by another contracting officer without understanding the type of analysis that was performed to determine the **[reasonableness of the]** price(s), and without verifying that the quantities were similar for pricing purposes. This does not necessarily need to be another analysis, but there should becoordination with the other office that acknowledges an analysis was performed previously.

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