

Commercial Item Determination, Pricing and Tina

WPI Webinar Series

Presenter – Jean Polka, WPI

December 16, 2015



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What we will Cover Today

- Benefits of Commercial Pricing
- Commercial Item Definition
- Commercial Item Support
- Commercial Item Pricing
- Impact of possible changes to the FAR

Benefits of Commercial Pricing

- Less Contract Clauses
- No Certified Cost & Pricing Data
- No Pre-award cost audit
- No Post award cost audit

Commercial Item Definition

“Commercial item” means --

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

(i) Has been sold, leased, or licensed to the general public; or,

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

Commercial Item Definition (cont)

- (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for --
 - (i) Modifications of a type customarily available in the commercial marketplace; or
 - (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. ***Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;***

Commercial Item Definition (cont)

- (4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;
- (5) Installation services, maintenance services, repair services, training services, and other services if--
 - (i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
 - (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

Commercial Item Definition (cont)

- . (6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—
- (i) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and
- (ii) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Commercial Item Definition (cont)

- (7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or
- (8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

COTS (Commercially Available Off-the-Shelf) Item

- Commercially available off-the-shelf (COTS) item--"
- (1) Means any item or supply (including construction material) that is—
 - (i) A commercial item (as defined in paragraph (1) of the definition in this section);
 - (ii) Sold in substantial quantities in the commercial marketplace; and
 - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

Commercial Item Contracts

- 12.101 -- Policy.
- Agencies **shall** --
- (a) Conduct market research to determine whether commercial items or non-developmental items are available that could meet the agency's requirements;
- (b) Acquire commercial items or non-developmental items when they are available to meet the needs of the agency; and
- (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or non-developmental items as components of items supplied to the agency.

15.403-1(c)(3)(i)

Who Determines if an item is Commercial?

- (3) *Commercial items.*
- (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**

Commercial Item Support – Government Marketing Techniques

- Contacting knowledgeable individuals in government and industry regarding market capabilities to meet government needs, successful acquisition strategies, industry best practices, pitfalls to be avoided, and incentives that motivate industry.
- Obtaining Source lists (Thomas Register, other contracting offices, state and local governments, trade associations, competition advocates home page)
- Reviewing the results of recent market research from similar acquisitions.
- Querying Government/commercial data bases (NASA, MAJCOMs, Dun and Bradstreet.
- Participating in interactive, on-line communication among industry, acquisition personnel, and customers.
- Publishing formal requests for information (in technical, scientific or business publications such as the Commerce Business Daily, as well as traditional synopses).
- Reviewing Catalogs/Product literature (especially on-line).
- Conducting interchange meetings or pre-solicitation conferences regularly
- (as a matter of course get industry involved as soon as possible)
- **Commercial Item Survey**

Possible Commercial Item Support

- Proof of a Commercial Sale
- Copy of Commercial Price List
- Its Part of a Commercial Family
- Combination (What changed – my item has _____ and _____ over and above or its this item less _____ and _____)
- Marketing Literature
 - Yours
 - Your Suppliers

FAR 12.209 -- Determination of Price Reasonableness.

- Commercial item prices are affected by factors that include, but are not limited to,
 - speed of delivery
 - length and extent of warranty
 - limitations of seller's liability
 - quantities ordered
 - length of the performance period
- and specific performance requirements.

15.403-3 Requiring Data Other Than Certified Cost or Pricing Data.

- (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.**

FAR 15.403-1(b)(1) and (2)

Prohibition on Obtaining Certified Cost or Pricing Data

- (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)—
- (1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards in paragraph (c)(1) of this subsection);
- (2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards in paragraph (c)(2) of this subsection);

FAR 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.
- (not required for commercial contracts)

Certificate of Current Cost or Pricing Data

- This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section [2.101](#) of the Federal Acquisition Regulation (FAR) and required under FAR subsection [15.403-4](#)) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of _____* are **accurate, complete, and current as of** _____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

• Firm _____

Signature _____

Name _____

Title _____

Date of execution*** _____

Proposed Change

- **Commonly requires the submission of certified cost or pricing data or pricing data other than certified cost or pricing data;**
- Replace FAR 52.215-20 in solicitations and contracts for which it is reasonably certain that certified cost or pricing data or pricing data other than certified cost or pricing data will be required; and
- Require offerors to obtain from their subcontractors information necessary to support price reasonableness determination, including cost data to support a commercial determination, cost realism analysis and a should-cost review.
- Written comments were due on 10/2/15.

Far 52.215-20 (Cont)

- **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.*
- (1) In lieu of submitting certified cost or pricing data, offerors may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.
- (i) *Identification of the law or regulation establishing the price offered.* If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.
- (ii) *Commercial item exception.* For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include –

Far 52.215-20 (Cont)

- (A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), *e.g.*, wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;
- (B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market;

Far 52.215-20 (Cont)

- (C) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.
- (2) The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. **For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.**
- (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, and 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.
 - (2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

Far 52.215-20 (cont)

- (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, and 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.
 - (2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

Questions?



Continuing Professional Education



CPE Certificate available, please contact:

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