

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

2111 Wilson Boulevard, Suite 400

Arlington, VA 22201

www.codsia.org

(703) 247-9490

November 23, 1999

CODSIA Case No. 13-98

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVR)
1800 F Street, N. W.
Room 4035
Washington, DC 20405

Subject: Determination of Price Reasonableness and Commerciality (FAC 97-14,
FAR Case 98-300)

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the interim rule published in the Federal Register on September 24, 1999 (Vol. 64, No. 185). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The Civilian Agency Acquisition (CAA) and Defense Acquisition Regulation (DAR) Councils issued an interim rule to implement certain provisions of Section 803 and Section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Public Law 105-261). Specifically, the interim rule implements paragraphs (a)(2)(A) through (a)(2)(C) of Section 803 and Section 808. Paragraph (a)(2)(D) of Section 803, concerning the meaning and appropriate application of "purposes other than governmental purposes," is being considered by the CAA and DAR Councils under FAR Case 98-304. (CODSIA, in a separate reply [Case 13-98, dated 9/27/99], addressed industry concerns in regard to this particular issue.)

The interim rule basically amends guidance contained in FAR Subpart 15.4 on price analyses conducted in conjunction with the acquisition of commercial items. While we generally agree with the interim rule, we have concerns in two principal areas, which are discussed below (see also comments and suggested improvements in Attachment 1).

Commerciality. In two places the interim rule discusses the “commerciality” of a commercial item (FAR 15.403-1 and FAR 15.404-2). We do not believe that FAR Subpart 15.4 is the proper place to address this area. Whether or not an item meets the definition of “commercial item” is more appropriately discussed separately in FAR Part 12. We are concerned that reintroducing the term “commerciality” in FAR Subpart 15.4 on contract pricing will lead to the proportionate analyses previously conducted under the Standard Form 1412 method. As the Government knows, such analyses were subsequently prohibited by the Federal Acquisition Streamlining Act.

Field Pricing Assistance. We believe that the information requirements listed in FAR 15.404-2 far exceed what is required from the offeror under FAR 52.215-20 and FAR 52.215-21. The field pricing assistance should be restricted to verifying the information that has been submitted by the offeror, either as part of the initial offer or as later provided to the contracting officer. It should not be used as a means to obtain additional information, such as cost data, transactional data, or most favored customer data.

In closing, we appreciate the opportunity to comment on the interim rule. If you have any questions or need additional information, the CODSIA project officer for this case is Jim Serafin of EIA at (703) 907-7585.

Sincerely,

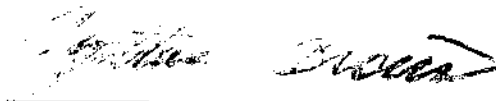
SEE CODSIA SIGNATORIES NEXT PAGE

Attachments

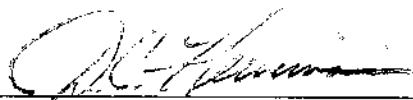
1. CODSIA Analysis of Changed Provisions FAR Case 98-300



Lorraine M. Lavet
Chief Operating Officer
American Electronics Association



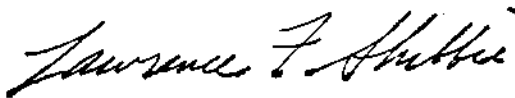
Cynthia Brown
President
American Shipbuilding Association



Dan C. Heinemeier
President, GEIA
Electronic Industries Alliance



Kenneth McLennan
President
Manufacturers Alliance/MAPI



Lawrence F. Skibbie
President
National Defense Industrial Association

Attachment 1
CODSIA Analysis of Changed Provisions
(FAR Case 98-300)

12.209 Determination of price reasonableness.

When contracting for commercial items, the contracting officer must establish price reasonableness in accordance with 13.106-3, 14.408-2, or Subpart 15.4, as applicable.

CODSIA Comment

CODSIA agrees with this portion of the interim rule.

☪

13.106-3 Award and documentation.

(a) Basis for award. Before making award, the contracting officer must determine that the proposed price is fair and reasonable.

...

(2) If only one response is received, include a statement of price reasonableness in the contract file. The contracting officer may base the statement on -

- (i) Market research;
- (ii) Comparison of the proposed price with prices found reasonable on previous purchases;
- (iii) Current price lists, catalogs, or advertisements. However, inclusion of a price in a price list, catalog, or advertisement does not, in and of itself, establish fairness and reasonableness of the price;
- (iv) A comparison with similar items in a related industry;
- (v) The contracting officer's personal knowledge of the item being purchased;
- (vi) Comparison to an independent Government estimate; or
- (vii) Any other reasonable basis.

CODSIA Comment

Although CODSIA agrees with portions of the interim rule, it is not clear why value analysis was eliminated (formerly at FAR 13.106-3(a)(2)(v)). The elimination of value analysis appears to be inconsistent with the interim rule changes made at FAR 15.404-1(b)(4).

☪

Attachment 1
CODSIA Analysis of Changed Provisions
(FAR Case 98-300)

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

...

(c)(3) Commercial items. Any acquisition for an item that meets the commercial item definition in 2.101, or any modification, as defined in paragraph (c)(1) or (2) of that definition, that does not change the item from a commercial item to a noncommercial item, is exempt from the requirement for 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~~ **Only when no other exception applies, and absent a waiver by proper authority, must the contracting officer** require submission of cost or pricing data.

CODSIA Comment

The interim rule is worded in a manner inconsistent with FAR 2.101. Literally interpreted, the interim rule suggests that a commercial item had to exist factually on the date of award or modification. The definition of "commercial item" is much broader than that.

☞

15.403-3 Requiring information other than cost or pricing data.

(a) General.

(1) The contracting officer is responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism, but the contracting officer should not obtain more information than is necessary (see 15.402(a)). If the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data from the offeror that is adequate to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)). Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer must require that the information submitted by the offeror include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. To determine the information an offeror should be required to submit, the contracting officer should consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7).

(2) The contractor's format for submitting the information should be used (see 15.403-5(b)(2)).

(3) The contracting officer must ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists. ***Such data shall not be certified in accordance with 15.406-2.***

~~recommended deletion~~/**recommended addition**

Attachment 1
CODSIA Analysis of Changed Provisions
(FAR Case 98-300)

(4) As specified in Section 808 of Public Law 105-261, an offeror who does not comply with a requirement to submit information 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.

...

(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 information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis (see 15.403-3(a)(1)).

(2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

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

(iii) The Government must not disclose outside the Government information 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)).

CODSIA Comment

CODSIA recommends that the provision regarding certification be reinstated, as its removal will likely be misinterpreted. CODSIA further notes that some agencies do not presently comply with this provision, specifically the GSA and VA who treat price analysis information as having been constructively certified by the offeror.

380

Attachment 1
CODSIA Analysis of Changed Provisions
(FAR Case 98-300)

15.404-1 Proposal analysis techniques.

...

(b) Price analysis.

(1) Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.

(2) The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price. Examples of such techniques include, but are not limited to the following:

(i) Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition established price reasonableness (see 15.403-1(c)(1)).

(ii) Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

(iii) Use of parametric estimating methods/application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.

(iv) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

(v) Comparison of proposed prices with independent Government cost estimates.

(vi) Comparison of proposed prices with prices obtained through market research for the same or similar items.

(vii) Analysis of pricing information provided by the offeror.

~~(3) The first two techniques at 15.404-1(b)(2) are the preferred techniques. However, if the contracting officer determines that information on competitive proposed prices or previous contract prices is not available or is insufficient to determine that the price is fair and reasonable, the contracting officer may use any of the remaining techniques as appropriate to the circumstances applicable to the acquisition.~~

(4) (3) Value analysis can give insight into the relative worth of a product and the Government may use it in conjunction with the price analysis techniques listed in paragraph (b)(2) of this section.

CODSIA Comment

CODSIA disagrees with establishing a preference for the first two techniques for conducting a price analysis. This section describes how to perform a price analysis, and no method should be given an expressed preference over another. The preference already established for sources of information at FAR 15.402 is adequate.

The guidance on value analysis is unclear, especially in view of the changes made at FAR 13.106-3(a)(2) which removed value analysis.

0380

~~recommended deletion~~/*recommended addition*

Attachment 1
CODSIA Analysis of Changed Provisions
(FAR Case 98-300)

15.404-2 Information to support proposal analysis.

(a) Field pricing assistance.

(1) The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The contracting officer must tailor requests to reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis.

(2) The contracting officer must tailor the type of information and level of detail requested in accordance with the specialized resources available at the buying activity and the magnitude and complexity of the required analysis. Field pricing assistance is generally available to provide -

(i) Technical, audit, and special reports associated with the cost elements of a proposal, including subcontracts;

(ii) Information on related pricing practices and history;

(iii) Information to help contracting officers determine ~~commerciality and~~ price reasonableness, including -

(A) Verifying ~~sales history~~ **information submitted by the offeror on the prices at which same or similar items have been sold previously** to source documents;

(B) ~~Identifying~~ **Verifying** special terms and conditions **identified by the offeror**;

(C) ~~Identifying~~ **Verifying** ~~customarily granted or offered~~ discounts **policies** for the item;

(D) Verifying the item to an existing catalog or price list;

~~(E) Verifying historical data for an item previously not determined commercial that the offeror is now trying to qualify as a commercial item; and~~

~~(F)~~ **(E)** Identifying general market conditions affecting ~~determinations of commerciality and~~ price reasonableness.

(iv) Information relative to the business, technical, production, or other capabilities and practices of an offeror.

(3) When field pricing assistance is requested, contracting officers are encouraged to team with appropriate field experts throughout the acquisition process, including negotiations. Early communication with these experts will assist in determining the extent of assistance required, the specific areas for which assistance is needed, a realistic review schedule, and the information necessary to perform the review.

(4) When requesting field pricing assistance on a contractor's request for equitable adjustment, the contracting officer shall provide the information listed in 43.204(b)(5).

Attachment 1
CODSIA Analysis of Changed Provisions
(FAR Case 98-300)

(5) Field pricing information and other reports may include proprietary or source selection information (see 3.104-4 (j) and (k)). Such information shall be appropriately identified and protected accordingly.

CODSIA Comment

CODSIA believes that the information requirements listed in FAR 15.404-2(a)(2)(iii) far exceed what is required from the offeror under FAR 52.215-20 and FAR 52.215-21. The field pricing assistance should be restricted to verifying the information that has been submitted by the offeror. It should not be used as a means to obtain other information, such as cost data, commercial contract data, or most favored customer data.

CODSIA is also concerned with the Government's reintroduction of the term "commerciality" in performing price analyses. Whether or not an item meets the definition of "commercial item" is more appropriately discussed separately in FAR Part 12. CODSIA is fearful that reintroducing the term "commerciality" in FAR Subpart 15.4 on contract pricing will lead to the proportionate analyses previously conducted under the Standard Form 1412 method. As the Government knows, such analyses were subsequently prohibited by the Federal Acquisition Streamlining Act.

38