

# Commercial Products and Services Contracting

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# Overall Agenda

- **Session 1**

- Overview of Commercial Products and Services
- FAR 2.101 Definitions of Commercial Products and Services

- **Session 2**

- Basics and Procedures of Commercial Products and Services Contracting
- Commercial Item Determinations (CIDs)

- **Session 3**

- Commercial Terms and Conditions
- Supporting Price Reasonableness

- **Session 4**

- Other Commercial Products and Services Contracting Issues

# Session 3 Agenda

- Commercial Terms and Conditions
  - FAR 52.212-4, Contract Terms and Conditions – Commercial Products and Commercial Services
  - FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Products and Commercial Services
  - Mandatory FAR Flow Downs for Commercial Products and Services Subcontracts
  - Government Data Rights—Commercial Products and Services
  
- Supporting Price Reasonableness
  - Fair and Reasonable Pricing
  - Cost Analysis and Price Analysis Definitions
  - Cost Analysis
  - Price Analysis

# Course Instructors:

- Jason Workmaster, Miller & Chevalier
- Steven Brewer, Baker Tilly

# Polling Question

# Commercial Terms and Conditions

# Commercial Terms and Conditions

- FAR 52.212-4 – *Contract Terms and Conditions-Commercial Products and Commercial Services*
  - “As prescribed in [FAR] 12.301(b)(3), insert the following clause:”
- FAR 12.301(b)(3)
  - The clause at [FAR] 52.212-4, *Contract Terms and Conditions-Commercial Products and Commercial Services*. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference. Use this clause with its Alternate I when a time-and-materials or labor-hour contract will be awarded. The contracting officer may tailor this clause in accordance with 12.302.

# Commercial Terms and Conditions

- FAR 52.212-4 – *Contract Terms and Conditions-Commercial Items (selected items)*
  - (a) Inspection/Acceptance. Contractor shall only tender for acceptance items that conform to the requirements of the contract. Government has the right to inspect or test any supplies or services tendered for acceptance.
  - (c) Changes. Changes in the terms and conditions of this contract may be made only by agreement of the parties (i.e., by bilateral modification).
  - (d) Disputes. The contract is subject to *Contract Disputes* under 41 U.S.C. chapter 71.
  - (f) Excusable Delays. Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond reasonable control of the Contractor and without its fault or negligence (e.g., acts of God, epidemics, quarantine restrictions).
  - (l) Termination for the Gov't's Convenience. The Government can terminate the contract, or any part thereof, for its sole convenience.
  - (m) Termination for Cause. The government can terminate the contract, or any part thereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract T&Cs.
  - (o) Warranty. Contractor warrants and implies that delivered items are merchantable and fit for use for the particular purpose described in the contract.
  - (p) Limitation of Liability. Except as stated in an express warranty, contractor will not be liable to government for consequential damages resulting from defects or deficiencies in accepted items.
  - (q) Other Compliances. Contractor shall comply with all applicable laws applicable under this contract.



# Commercial Terms and Conditions

FAR 52.212-5 – Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Products and Commercial Services (Oct 2022)

- Section (a) - The contractor **shall comply** with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

# Commercial Terms and Conditions

## FAR 52.212-5 – FAR clauses incorporated by reference

- (1) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (as extended in continuing resolutions)).
- (2) 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Nov 2021) (Section 1634 of Pub. L. 115-91).
- (3) 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (Nov 2021) (Section 889(a)(1)(A) of Pub. L. 115-232).
- (4) 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations (Nov 2015).
- (5) 52.232-40, Providing Accelerated Payments to Small Business Subcontractors (Mar 2023) (31 U.S.C. 3903 and 10 U.S.C. 3801)
- (6) 52.233-3, Protest After Award (Aug 1996) (31 U.S.C. 3553).
- (7) 52.233-4, Applicable Law for Breach of Contract Claim (Oct 2004) (Public Laws 108-77 and 108-78 (19 U.S.C. 3805 note)).

# Commercial Terms and Conditions

- Section (b) – Contractor shall also comply with FAR clauses that the Contracting Officer has indicated as being incorporated in this contract:

(1) 52.203-13, Contractor Code of Business Ethics and Conduct (Nov 2021) (41 U.S.C. 3509)).

(2) 52.203-15, Whistleblower Protections under the American Recovery and Reinvestment Act of 2009 (Jun 2010) (Section 1553 of Pub. L. 111-5). (Applies to contracts funded by the American Recovery and Reinvestment Act of 2009.)

(3) 52.204-14, Service Contract Reporting Requirements (Oct 2016) (Pub. L. 111-117, section 743 of Div. C).

(4) 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment. (Nov 2021)

(5) 52.219-6, Notice of Total Small Business Set-Aside (Nov 2020)

(6) 52.222-35, Equal Opportunity for Veterans (Jun 2020)

# Commercial Terms and Conditions

Examples continued...

(7) 52.223-11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons (Jun 2016) (E.O. 13693).

(8) 52.223-12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners (Jun 2016) (E.O. 13693).

(9) 52.223-18, Encouraging Contractor Policies to Ban Text Messaging While Driving (Jun 2020) (E.O. 13513).

(10) 52.224-3 Privacy Training (Jan 2017) (5 U.S.C. 552 a).

# Mandatory Flowdowns for Commercial Products and Commercial Services Subcontracts

- FAR 52.244-6(c)(1) requires that the following FAR clauses be included in commercial products or commercial services subcontracts:
  - 52.203-13 Contractor Code of Business Ethics and Conduct
  - 52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
  - 52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
  - 52.204-21 Basic Safeguarding of Covered Contractor Information Systems
  - 52.204-23 Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities
  - 52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
  - 52.204-27 Prohibition on a ByteDance Covered Application
  - 52.219-8 Utilization of Small Business Concerns
  - 52.222-21 Prohibition of Segregated Facilities
  - 52.222-26 Equal Opportunity
  - 52.222-35 Equal Opportunity for Veterans
  - 52.222-36 Equal Opportunity for Workers with Disabilities
  - 52.222-37 Employment Reports on Veterans
  - 52.222-40 Notification of Employee Rights Under the National Labor Relations Act
  - 52.222-50 Combating Trafficking in Persons
  - 52.222-55 Minimum Wages Under Executive Order 13658
  - 52.222-62 Paid Sick Leave Under Executive Order 13706
  - 52.224-3 Privacy Training
  - 52.225-26 Contractors Performing Private Security Functions Outside the United States
  - 52.232-40 Providing Accelerated Payments to Small Business Subcontractors
  - 52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels

# Polling Question

# Government Data Rights— Commercial Products and Services

# Government Data Rights

- FAR Part 27 – the government obtains rights in the data delivered by a contractor under a contract or subcontract.
- Government policy is to balance the contractor's rights in proprietary data with the government's need for data to perform its mission.
- Regulatory balance differs from commercial contracting in terms of:
  - Customer rights to use and distribute the data
  - Type and amount of data to be delivered
- Prime contractors responsible for securing the necessary rights from subcontractors on behalf of the government



# Government Data Rights

- **Data**: recorded information, regardless of form or media, including technical data and computer software
- **Technical data**: recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation and databases)
- **Computer software**: computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled
- **Commercial computer software**: software that meets the definition of commercial product or commercial service (FAR 2.101)

# Government Data Rights

- Data rights generally are **allocated** as follows:
  - Contractor keeps **title**
  - Government obtains **license rights**
- Government's license rights depend on **who paid for development**
  - Government obtains lesser rights in data developed at **private expense**
  - Government obtains greater rights in data developed with **mixed funding**
  - Government obtains greatest rights in data developed with **government funding**
- Rights are determined at the **lowest component level**: individual processes, features, functions, models, subroutines
- Contractor's failure to properly **mark** data can lead to relinquishment of greater rights in data.

# Government Data Rights

- **Restricted Rights (computer software):** software may be (a) used or copied for use with the computer(s) for which it was acquired; (b) used or copied for use with backup/replacement computers of safekeeping/recovery purposes; (c) modified, adapted, or combined with computer software; and (d) disclosed to and reproduced for use by support service contractors or their subcontractors
- **Limited Rights (technical data):** data may be reproduced and used by the government but cannot be used for manufacture nor disclosed outside the government without contractor's permission
- **Government Purpose Rights (DoD, technical data):** data may be (a) used, modified, reproduced, released, performed, displayed, or disclosed within the government without restriction; and (b) released or disclosed outside the government, including to service support contractors, for government purposes
- **Unlimited Rights:** use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

# Government Data Rights

- **Commercial computer software (a commercial product or service):**
  - Shall be acquired under licenses customarily provided to the public, provided it is consistent with federal law and satisfies the government's needs
  - Government may use the clause FAR 52.227-19 (Commercial Computer Software License) if unclear whether the government's needs are satisfied
  - Clause grants government **restricted rights** in the software
  - Government may seek greater or lesser rights than stated in FAR 52.227-19, to the extent appropriate

# Government Data Rights

The more the government funds development of a component, the greater its rights

No government funding

Mixed / exclusive  
government funding

Commercial  
License Rights

Limited /  
Restricted  
Rights

Government  
Purpose Rights  
(DoD)

Unlimited  
Rights

# Polling Question

# Supporting Price Reasonableness

*“Fair and Reasonable Pricing”*

# Contract Pricing

“Contracting officers shall . . . purchase supplies and services from **responsible** sources at **fair and reasonable** prices . . .”

(FAR 15.402)



# What is Fair?

- **To the Buyer:**

- Fair market value
- Total allowable cost that would have been incurred by a well managed responsible firm using reasonably efficient and economical methods of performance plus a reasonable profit

- **To the Seller:**

- A price must be realistic in terms of the seller's ability to satisfy the terms and conditions of the contract

# What is Reasonable?

- A reasonable price is a price that a prudent and competent buyer would be willing to pay, considering market conditions, such as:
  - Supply and Demand
  - General Economic Conditions
  - Competition

# Cost Analysis and Price Analysis - Definitions

# What is Cost Analysis?

- **“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.”

(FAR 15.404-1(c)(1))

# What is Price Analysis?

- **Price analysis**
  - is the process of examining and evaluating a proposed price
  - without evaluating its separate cost elements and proposed profit.”

(FAR 15.404-1(b))

# The Cost Price Equation

$$\text{PRICE} = \text{COST} + \text{PROFIT}$$



*Price Analysis*



*Cost Analysis*

# Use of Cost vs. Price Analysis

“**Cost analysis** shall be used to evaluate the reasonableness of individual cost elements when **certified cost or pricing data** are required.”

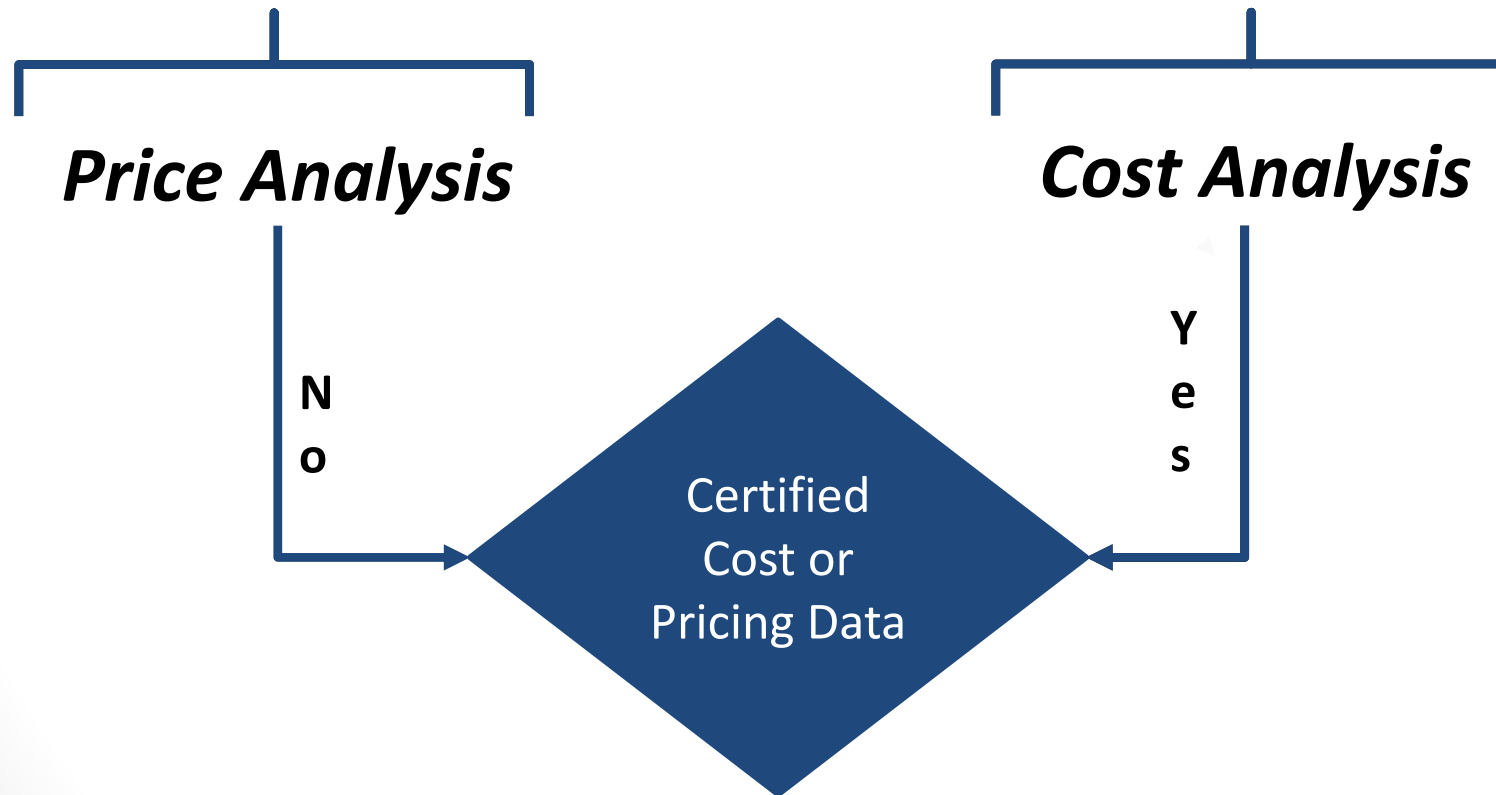
(FAR 15.404-1(a)(3))

“**Price analysis** shall be used when certified cost or pricing data are not required . . . Price analysis should be used to verify that the overall price offered is fair and reasonable.”

(FAR 15.404-1(a)(2)&(3))

# Cost vs. Price Analysis

$$\text{PRICE} = \text{COST} + \text{PROFIT}$$





# Cost Analysis

# When Cost Analysis is Required

## Two Basic Questions

1. What is “certified cost or pricing data”?
2. When is it required?

# Background to Truthful Cost or Pricing Data

- Due to Congressional concerns over lack of government visibility into contractor's estimated costs, PL 87-653 was enacted in 1962
  - "Truth in Negotiations Act" or TINA
  - Requires (1) submission of "cost or pricing data" by contractors in support of certain bids, and (2) certification by contractors that the "cost or pricing data" is **current, accurate, and complete** as of the **date of price agreement**
  - Allows unilateral price adjustment for contractor's failure to comply with requirements
  - 41 U.S.C. 35 revised the name from "Truth In Negotiations Act" to "Truthful Cost or Pricing Data"

# Certified Cost or Pricing Data Defined in FAR 2.101

- **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 is 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. 35).

# Cost or Pricing Data FAR Definition – FAR 2.101

- **Cost or pricing data –**
  - means all facts that, as of the date of price agreement . . . prudent buyers and sellers would reasonably expect to affect price negotiations significantly
  - are factual, not judgmental, and are verifiable
- **Cost or pricing data –**
  - do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, but they do include the data forming the basis for that judgment
  - 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

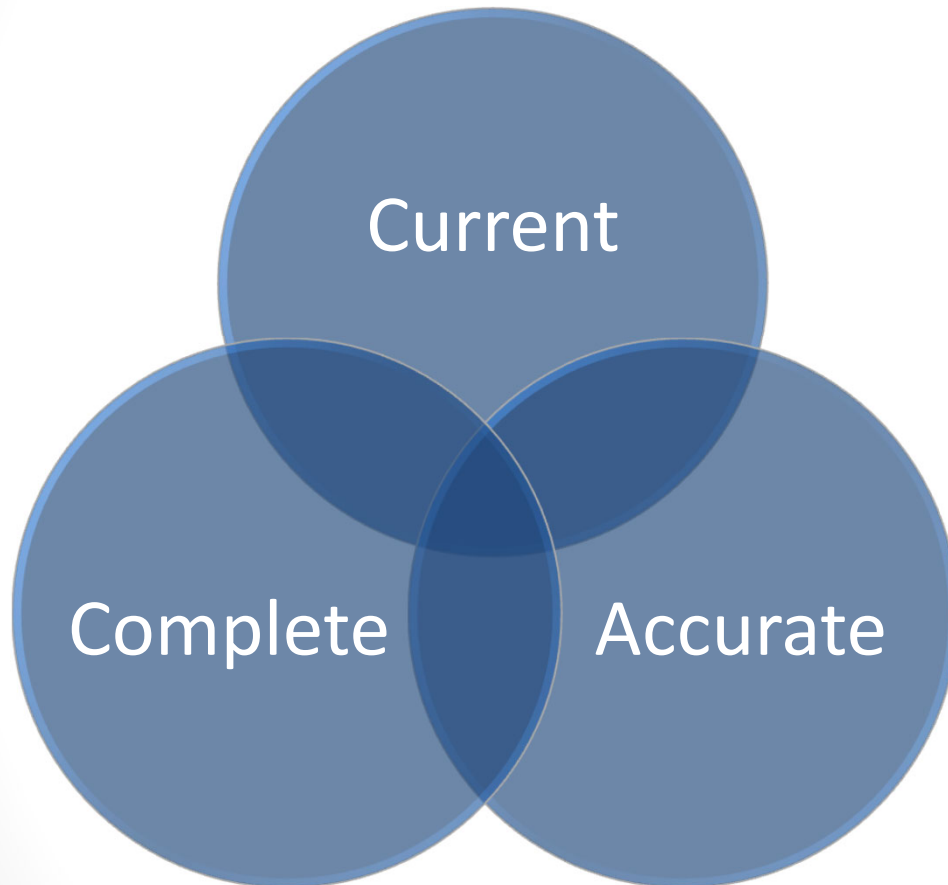
# Cost or Pricing Data FAR Definition – FAR 2.101

- **Cost and Pricing Data also include, but are not limited to such factors as –**
  - Vendor quotations
  - Nonrecurring costs
  - Information on changes in production methods or purchasing volume
  - Data supporting projections of business prospects and related operations costs
- **Include such factors as –**
  - Unit cost trends
  - Make buy decisions
  - Estimated resources to attain business goals
  - Information on management decisions that could have a significant bearing on costs

# Cost or Pricing Data FAR Definition – FAR 2.101

- ***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.

# Certification of Cost or Pricing Data



- **Defective Pricing** occurs when certified cost or pricing data are subsequently discovered to be inaccurate, incomplete or non-current
- Government bears burden of proof on most elements, but once Government proves non-disclosure, rebuttable presumption of \$ for \$ impact



# Defective Pricing – Price Adjustments

- “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.”
- “In arriving at a price adjustment, the contracting officer shall consider . . . the extent to which the Government relied upon the defective data.”
  - Note: Price Negotiation Memoranda (PNM) almost always state that the “Government relied” on the data
- (FAR 15.407-1(b)(1) & (2))

# FAR Part 15.4 - Contract Pricing

## Defective Pricing – Price Adjustments

### - Key Points

- The Government's right to a price adjustment is not affected by either of the following circumstances:
  - The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured; or
  - Certified cost or pricing data were required, however a Certificate was not submitted
- In addition to the price adjustment, the Government is entitled to recovery of any overpayment **plus interest** on the overpayment from the date payment was made.

# FAR Part 15.4 - Contract Pricing

## Defective Pricing – Price Adjustments

### Offsets

- The contracting officer shall allow offsets for any understated cost or pricing data submitted up to the amount of the Government's claim for overstated pricing data arising out of the same pricing action
  - An offset shall **not** be allowed if:
    - The understated data were known by the contractor to be understated before the "as of" date; or
    - The Government proves that the price would not have increased in the amount to be offset even if the data had been submitted before the "as of" date

# Government “Post Award” Audit Reviews for Compliance with TINA

- Broad Government audit rights and subpoena power
  - Contractor must make records available until 3 years after final payment
- Generally performed by DCAA on annual “selection” criteria or at direction of Contracting Officer
  - DCAA Selection Criteria =
    - Proposal Review Findings +
    - Review of CO Negotiation Memorandum +
    - Knowledge of Contractor Operations gained from:
      - Progress Payment Reviews
      - Incurred Cost Audits
      - Forward Pricing Rate Reviews
      - Other Reviews
- Records retention is critical both before and after award

# Cost Analysis

## Two Basic Questions

1. What is “certified cost or pricing data”?
2. When is it required?

# FAR Part 15.403 - Certified Cost Or Pricing Data Requirements

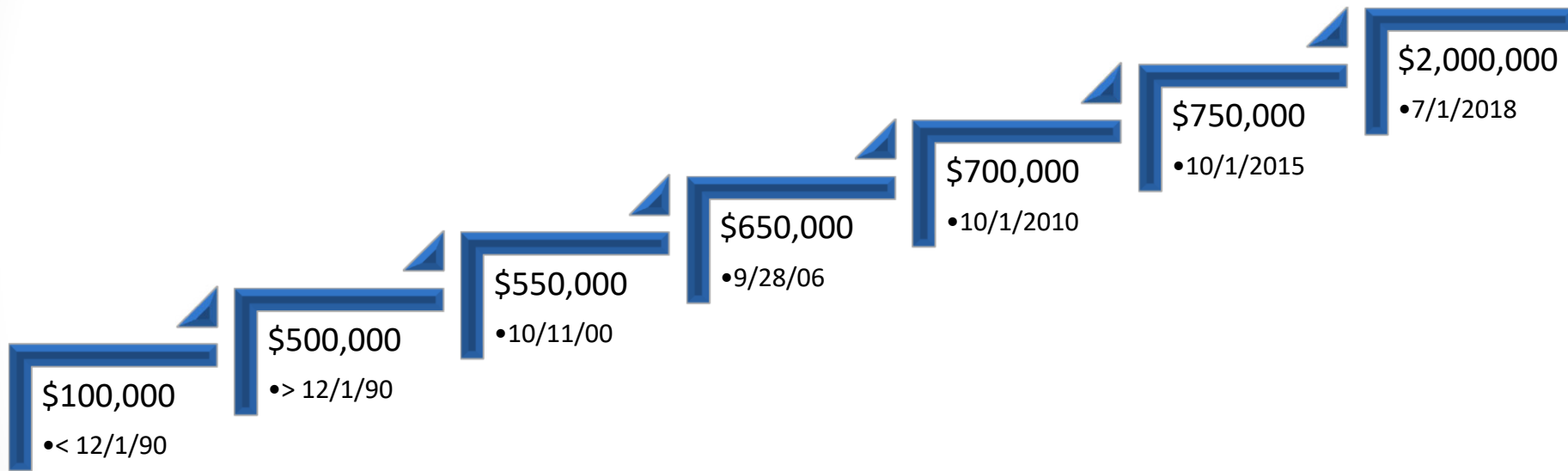
- Unless below statutory threshold<sup>1</sup> or otherwise exempt (see next slide), certified cost or pricing data is required for:
  - Award of any negotiated contract (except for undefinitized actions such as letter contracts)
  - Award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to submit certified cost or pricing data
  - Modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract as described above

*<sup>1</sup>Current threshold for obtaining certified cost or pricing data is \$2,000,000*

# Prohibition on Obtaining Certified Cost or Pricing Data – FAR 15.403-1

- For acquisitions at or below the simplified acquisition threshold, currently \$250,000
- When the contracting officer determines that prices agreed upon are based on adequate price competition
- When the contracting officer determines that prices agreed upon are based on prices set by law or regulation
- ***When a commercial product or service is being acquired***
- When a waiver has been granted
- ***When modifying a contract or subcontract for commercial products or services***

# TINA Thresholds





# Contract Pricing - FAR Part 15.402

- 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, shall 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:
    - No additional data from the offeror, if the price is based on adequate price competition . . .
    - Data other than certified cost or pricing data . . .
  - (3) Obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary.

# Polling Question

# Price Analysis

# Price Analysis

- “**Price analysis** is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit...” (FAR 15.404-1(b))
- “**Price analysis** shall be used when certified cost or pricing data are not required . . . Price analysis should be used to verify that the overall price offered is fair and reasonable.” (FAR 15.404-1(a)(2)&(3))

# Commercial Item Pricing Considerations

- CO shall limit requests for sales data to data for the same or similar items during a relevant time period (FAR 15.403-3(c)(2))
  - Scope should be limited to data in form regularly maintained as part of the company's commercial operations
- For commercial services that are "of a type," CO must determine that offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services (FAR 15.403-1(c)(3)(ii)(A))
  - If determined information is not sufficient, CO may require "other relevant information" regarding the basis for price or cost, including information re labor costs, material costs, and overhead rates

# Commercial Item Pricing Considerations

- Contractors bear risk on proving costs are fair and reasonable
  - Continued pressure on price reasonableness, including for commercial items
  - DOD IG Audit Report, DODIG-2014-088, Defense Logistics Aviation Potentially Overpaid Bell Helicopter for Sole-Source Commercial Spare Parts, July 3, 2014
    - Determined that DLA CO did not perform adequate price analysis and should have obtained cost data to perform cost analysis; as a result, opined that DLA may have overpaid \$9M (for which it should seek a voluntary refund)

# Price Analysis Techniques (FAR 15.404-1(b)(2))

1. **Comparison of proposed prices received in response to the solicitation\***
2. Comparison of proposed prices to historical prices, whether by the government or other than the government, for the same or similar items\*
3. Use of parametric estimating techniques
4. Comparison with competitive published price lists
5. Comparison with independent cost estimates
6. Comparison of proposed prices with prices obtained through market research for the same or similar items
7. Analysis of data other than certified cost or pricing data provided by the offeror

*\* Preferred price analysis techniques (FAR 15.404-1(b)(3))*

# Comparability

- Comparability = the quality or state of being comparable – therefore, any two things can be compared.
- However, for purposes of price analysis, the products or services being compared must have enough similar characteristics or qualities to make the comparison useful.



# Comparison of Proposed Prices Received

- Generally considered one of the best bases for price analysis, because all offers were submitted to meet the same requirement during the same time period. (FAR 15.404-1(b)(2)(i))
- Any proposed price used as a basis for price analysis must meet the following general requirements:
  - The price must be from a responsible firm.
  - The price must be submitted by a firm competing independently for contract award.
  - The price must be part of an offer that meets Buyer requirements.

# Comparison of Proposed Prices Received

- Less reliance should be placed on this technique when:
  - The solicitation was made under conditions that unreasonably denied one or more known and qualified offerors an opportunity to compete.
  - The apparent successful offeror has such a decided advantage that it is practically immune from competition.
  - Another price comparison, cost analysis, or a cost realism analysis indicates that the apparent successful offer may be unreasonable (too high or too low).
  - Buyer requirements permit offerors to propose widely different technical approaches to contract performance.
  - All offerors are expected receive contract awards. In such cases, there may not be sufficient competitive pressure to foster fair and reasonable pricing.

# Price Analysis Techniques (FAR 15.404-1(b)(2))

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*\* Preferred price analysis techniques (FAR 15.404-1(b)(3))*

# Historical Price Comparison

- When using historical prices to analyze price reasonableness, get good answers to the following questions:
  - Has the product been purchased before?
  - Has there been a significant time-lapse from the previous purchase?
  - Are the terms and conditions significantly different?
  - Is the reasonableness of the historical price uncertain?
  - What was the historical price?
  - Is the comparison valid?
- **Do we have adequate supporting documentation that the historical price was F&R (valid basis of analysis)?**

# Factors That May Affect Comparability

1. Market conditions
2. Quantity or size
3. Geographic location
4. Purchasing power of the dollar
5. Extent of competition
6. Any unique requirements

# Factors That May Affect Comparability

## 1. Market conditions

- Generally, most recent is best; however, similar conditions must be noted particularly in cyclical industries
  - Incurred Cost Submissions in December
- Market conditions change significantly over time – supply, demand, technology, product designs, pricing strategies, laws and regulations, etc.

## 2. Quantity or size

- Generally, bigger is better, however economies of scale don't always apply
  - Increases in order size beyond a certain point may tax a supplier's capacity and result in higher prices.

# Factors That May Affect Comparability

## 3. Geographic location

- Geography can have a range of effects on comparability – prices for many nationally advertised products will not vary much from place to place.

## 4. Purchasing power of the dollar

- Inflation undermines comparability by eroding the real value of money
- Use price index numbers to adjust for changing value of the dollar over time

# Factors That May Affect Comparability

## 5. Extent of competition

- Competitive environment has direct bearing on historical prices
  - Last year's non-competitive procurement may not be a good price comparison if today's procurement will be made in a competitive environment

## 6. Any unique requirements

- Government versus commercial
- Engineering & design changes versus historical build



# Price Analysis Techniques (FAR 15.404-1(b)(2))

1. Comparison of proposed prices received in response to the solicitation\*
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7. Analysis of data other than certified cost or pricing data provided by the offeror

- \* Preferred price analysis techniques (FAR 15.404-1(b)(3))

# Parametric Estimating Techniques

- Cost estimating relationships (CERs) are used to develop parametric estimates or rough yardstick estimates.
- A parametric CER is a method for estimating prices based on the relationship of past prices with one or more product physical or performance characteristics (e.g., dollars per pound, dollars per horsepower, or other units).
- Whenever you can relate item price with the value of one or more physical or performance characteristics, you can use the relationship to estimate the price of a similar product.

(FAR 15.404-1(b)(2))

# Parametric Estimating Techniques

## Examples of Product-to-Cost CERs

Product	Independent Variable
Building Construction	Floor space, roof surface area, wall surface
Trucks	Empty weight, gross weight, horsepower, number of driving axles, loaded cruising speed
Passenger Car	Curb weight, wheel base, passenger space, horsepower
Sheet Metal	Net weight, percent of scrap, number of holes drilled, number of rivets placed, inches of welding, volume of envelope
Aircraft	Empty weight, speed, useful load, wing area, power, landing speed

# Price Analysis Techniques (FAR 15.404-1(b)(2))

1. Comparison of proposed prices received in response to the solicitation\*
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- \* Preferred price analysis techniques (FAR 15.404-1(b)(3))

# Comparison With Competitive Published Price Lists

- Can be very useful in evaluating “commercial item” pricing (FAR Part 12)
- Three levels of comparison



# Comparison With Competitive Published Price Lists

1. **Published price lists** -- prices taken from a catalog, price list, schedule, or other verifiable and established record that is regularly maintained by a manufacturer or vendor and is published or otherwise available for customer inspection (from the firm submitting the offer and/or published pricing information from other firms offering similar products).

“The fact that a price is included in a catalog does not, in and of itself, make it fair able.”

FAR 15.403-3(c)

# Comparison With Competitive Published Price Lists

- 2. Market prices** -- prices established in the course of ordinary and usual trade between buyers and sellers free to bargain that can be substantiated from sources independent of the offeror.
- 3. Other Sources** -- an offeror might provide information on the prices charged commercial customers over a period of time; such a record would not qualify as a published price list or market price, but it would provide a good record of the firm's commercial pricing practices.

# Price Analysis Techniques (FAR 15.404-1(b)(2))

1. Comparison of proposed prices received in response to the solicitation\*
2. Comparison of proposed prices to historical prices, whether by the government or other than the government, for the same or similar items\*
3. Use of parametric estimating techniques
4. Comparison with competitive published price lists
5. **Comparison with independent cost estimates**
6. Comparison of proposed prices with prices obtained through market research for the same or similar items
7. Analysis of data other than certified cost or pricing data provided by the offeror

- \* Preferred price analysis techniques (FAR 15.404-1(b)(3))



# Independent Cost Estimates (ICE)

- When using an ICE to determine price reasonableness, get good answers to the following questions:
  - How was the estimate made?
  - What assumptions were made?
  - What information and tools were used?
  - Where was the information obtained?
  - How did previous estimates compare with prices paid?

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# Market Research – FAR 2.101

“Market Research” means collecting and analyzing information about capabilities within the market to satisfy needs.

# FAR Part 10 Market Research

Techniques for conducting market research may include any or all of the following:

- (i) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.
- (ii) Reviewing the results of recent market research undertaken to meet similar or identical requirements.
- (iii) Publishing formal requests for information in appropriate technical or scientific journals or business publications.
- (iv) Querying the Government wide database of contracts and other procurement instruments intended for use by multiple agencies available at <https://www.contractdirectory.gov/contractdirectory/> and other Government and commercial databases that provide information relevant to agency acquisitions.

# Market Research (cont'd)

(v) Participating in interactive, on-line communication among industry, acquisition personnel, and customers.

(vi) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.

(vii) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line.

(viii) Conducting interchange meetings or holding pre-solicitation conferences to involve potential offerors early in the acquisition process.

# Market Research – FAR 2.101

- **Considerations:**

- Requests for Information
- Market Surveys from Reputable Third Parties
- Independent Research
- Price Indexes

# Polling Question

# Price Analysis Techniques (FAR 15.404-1(b)(2))

1. Comparison of proposed prices received in response to the solicitation\*
2. Comparison of proposed prices to historical prices, whether by the government or other than the government, for the same or similar items\*
3. Use of parametric estimating techniques
4. Comparison with competitive published price lists
5. Comparison with independent cost estimates
6. Comparison of proposed prices with prices obtained through market research for the same or similar items
7. **Analysis of data other than certified cost or pricing data provided by the offeror**

- \* Preferred price analysis techniques (FAR 15.404-1(b)(3))



# Data Other Than Certified Cost Or Pricing Data - FAR 2.101

- 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.

# Data Other Than Certified Cost Or Pricing Data - FAR 2.101

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

### (c) *Commercial products and commercial services.*

“(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 product or service (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.*”

# Data Other Than Certified Cost Or Pricing Data - FAR 2.101

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

### - (c) *Commercial products and commercial services.*

- “(2) *Limitations relating to commercial products and commercial services (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 3505(b)).*

(i) The contracting officer shall limit requests for sales data relating to commercial products or commercial services 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 products or commercial services to include only data that are in the form regularly maintained by the offeror as part of its commercial operations.

(iii) The Government must 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).”

# Documentation

The Buyer is responsible for obtaining sufficient data from the prospective sources to adequately perform and document the Price Analysis.

The Price Analysis must convince a 3<sup>rd</sup> party that the price is in fact fair and reasonable.

# Consequences for Failure to Perform and Document Adequate Price Analysis

# Risk of Inadequate Price Analysis

Buyer pays too much -

- Program Overruns
- Dissatisfied Customers
- Affect future contracts based on unsatisfactory past performance
- Estimating System Implications for contractors
  - Future estimates may be too high to win future work
- Invalid basis for future price analysis

Buyer doesn't pay enough - Can this happen?

- Program at risk
  - Quality, late Delivery, Unanticipated pricing modifications, etc.
- Invalid basis for future price analysis
- Estimating System Implications
  - Future estimates may be too low

# Risk of Inadequate Price Analysis

- Disapproved purchasing system:
  - Elevates Advance Notification and Consent to subcontract requirements which may cause delivery / performance delays
  - Impacts your competitive position - both writing to approved business systems and your overall evaluated price in proposals
  - Influences Government-wide notification (CBARS) & resultant reaction by procuring agency customers (e.g. no flexibly priced CLINs/TOs)
  - Capable of causing an overall negative perception across your business systems leading to further DCAA/DCMA oversight
  - Payment withholds affecting cash flow under DFARS Business System Rules

# Discussion/Questions?



# Contact Information

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