

Changes to “Cost or Pricing Data” Federal Acquisition Rules

Written by Administrator

Wednesday, 01 September 2010 00:00

Federal Acquisition Circular (FAC) 2005-45 was published in the Federal Register on August 30, 2010. Among the several FAR revisions was the final rule implementing FAR Case 2005-036, Definition of Cost or Pricing Data. As the FAC Introduction states—

This final rule amends the FAR by redefining ‘cost or pricing data,’ adding a definition of ‘certified cost or pricing data,’ and changing the term ‘information other than cost or pricing data’ to ‘data other than certified cost or pricing data.’ The rule clarifies the existing authority for contracting officers to require certified cost or pricing data or data other than certified cost or pricing data, and the existing requirements for submission of the various types of pricing data. The rule is required to eliminate confusion and misunderstanding, especially regarding the authority of the contracting officer to request data other than certified cost or pricing data when there is no other means to determine that proposed prices are fair and reasonable. Most significantly, the rule clarifies that data other than certified cost or pricing data may include the identical types of data as certified cost or pricing data but without the certification. Because the rule clarifies existing requirements, it will have only minimal impact on the Government, offerors, and automated systems.

Currently, definitions of “cost or pricing data” and “information other than cost or pricing data” are found in FAR 2.101, Definitions. The rules that tell Contracting Officers when to obtain the data in support of their cost and/or cost realism

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analyses, is found at FAR 15.4, Contract Pricing. This FAR subpart implements the [Truth in Negotiations Act](#) (TINA). (We note that another FAR Case implemented in the FAC raised the TINA threshold from \$650,000 to \$700,000.)

The rules in this area are complex and, generally, poorly understood by both Government and contractor. Here is the current policy, as set forth in FAR 15.402—

Contracting officers must—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by [15.403-4](#), the contracting officer must generally use the following order of preference in determining the type of information required:

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(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by [15.403-3](#) (b).

(2) Information other than cost or pricing data:

(i) Information related to prices (*e.g.*, established catalog or market prices or previous contract prices), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under [15.403-1](#)

(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, that does not meet the definition of cost or pricing data at [2.101](#)

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(3) *Cost or pricing data.* The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources. ...

Given the complexity of the current regulatory scheme, it is unsurprising that the revisions are complex as well. Despite the name of the FAR Case, the major revisions seem to focus on “information other than cost or pricing data” rather than “cost or pricing data”. Here’s [a link](#) to the official Federal Register notice setting forth the various revisions. You should review it carefully. Here are some of the points that we noticed—

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A new definition of “certified cost or pricing data” has been added, to emphasize the need to submit a Certificate of Current Cost or Pricing Data.

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The current definition of “cost or pricing data” has been “refined” to emphasize that it encompasses “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.”

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The phrase “information other than cost or pricing data” (which covers information submitted by offerors that are not cost or pricing data) has been renamed “data other than certified cost or pricing data”.

The new definition of “data other than certified cost or pricing data” includes the following—

... 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—

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- (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.

For comparison purposes, we show the revised FAR 15.4 below—

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

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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.

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We notice that the prohibition on obtaining cost or pricing data when certain conditions (e.g., adequate competition) are found has been de-emphasized in favor of a more detailed discussion of the types of data the contracting officer should obtain. This appears to represent a return to a pre-Federal Acquisition Streamlining Act (FASA) pricing environment, which may add to contractors' proposal costs— meaning that, ultimately, the Government may end up paying more for the goods and services it, acquires.

There is quite a bit to absorb in the new rule(s). Some of the language seems favorable. Although we don't necessarily like the revised emphasis on obtaining cost or pricing data (certified or not), we believe contractors should be able to navigate through the rocks and shoals, if they take the time to understand the revised requirements.