COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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October 17, 2008

Mr. David Drabkin
Senior Procurement Executive
General Services Administration
1800 F Street, NW, Room 4140
Washington, D.C.

Dear Mr. Drabkin:

Per your request, a summary of the CODSIA representatives' October 7 remarks on FAR Case 2005-036, "Definition of Cost or Pricing Data", is attached. As you know, on September 8 CODSIA members sent a letter to the FAR Council asking that the next iteration of the rule on the definition of cost or pricing data be issued as a proposed rule, not an interim or final rule. In that letter, CODSIA representatives[1] asserted that the original proposed rule constitutes a major change in policy and that evolving circumstances justify republishing the rule as "proposed" with a request for comments. We thank you for following up at our regularly scheduled meeting with Mr. Haddad and you to allow us to expand on that view.

"Cost or pricing data" is a term that has been defined by regulation and by litigation over the more than 45 years of TINA history. Words matter in procurement policy. Changing the words in the regulations implementing the Truth in Negotiations Act poses a significant risk in and of itself. The rationale for such a rule change should be clear and unambiguous. That is not the case with this proposed rule change as published in the April 23, 2007 Federal Register.

The proposed rule is predicated on problems within the Department of Defense. The background accompanying the proposed rule cites the former DFARS Case 2004-D019, DoD IG Reports, the DAU Tanker Study and findings by the Air Force General Counsel as justification for the proposed changes. Our initial comments on the proposed rule addressed the information we had access to at the time. The heavily redacted DAU Tanker Study recently shared with industry is of little use in explaining how the study contributed to convincing evidence of a need for a change in TINA definitions. Furthermore, at that time the "Tanker Deal" was a lease agreement not a contract. The

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[1] CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), the Information Technology Association of America (ITAA) and the Chamber of Commerce of the United States of America. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

rules are different for leases and it is difficult to extrapolate the concerns with the tanker lease to TINA definitions for contracts.

DoD's concerns are being addressed through a number of policy changes initiated in 2007 that address the problems DoD asserts that it has with commercial item pricing. Many of the commercial items in question are spare parts. Others are commercial systems that have been modified for Defense use. With few exceptions, these are not the types of products that civilian agencies purchase with any great frequency.

The new DoD guidance stresses the need for more rigorous documentation of the commercial status of an item (a recommendation made by the IG); more stringent requirements for the use of TINA waivers; more emphasis on the need to establish the price reasonableness of a commercial item using cost or pricing data if necessary; and less emphasis on the need to perform market research and price analysis before resorting to a demand for cost or pricing data. Contracting officers are exhorted to be especially diligent with sole source commercial item acquisitions and acquisitions of commercial items that are "of a type" or that have undergone substantial modification for defense use. Finally, in May of 2007, the PGI for DFARS Part 215.4 was also rewritten to instruct contracting officers to obtain whatever data was necessary to establish the price reasonableness of commercial items. (A list of the specific policies is attached.) While it is too early to know if these new procedures will correct the perceived problem, it is clear that DoD is attempting to address its concerns internally.

The proposed rule changes the Federal Acquisition Regulation and as a result will apply to civilian agency procurements as well as defense acquisition. CODSIA member associations are not aware of any problems in the civilian contracting arena that would warrant a change in the cost or pricing data definitions in the FAR. The civilian agency need for this significant change in the TINA definitions has not been demonstrated. In instances where civilian agency contracting officers are doing DoD's business in the course of an assisted interagency acquisition, those contracting officers may be instructed by DoD to use DoD rules. Schedule purchases are for items that are by definition commercial items.

We respectfully submit that changes to the FAR regulations implementing TINA are unnecessary; if they are to be made, however, the words used should be clear and unambiguous. We don't believe that the proposed rule meets this standard. The changes to the definition of cost or pricing data made in the FASA and FARA era were made to clear up confusion surrounding the differences between "certified cost or pricing data" and "cost or pricing data." The FASA and FARA changes are undone by the proposed rule and it would recreate the same ambiguities that were in existence in the early 1990s.

We appreciate the opportunity to elaborate on our written request to the FAR Council to publish any TINA definition changes as another proposed rule. If you have any questions or need any addition information, please do not hesitate to contact Bettie McCarthy, the CODSIA Administrative officer, at 703-875-8059, or the CODSIA Project Officer, Trey Hodgkins, Vice President of Federal Government Programs, ITAA at 703-284-5310.

Sincerely,

Trey Hodgkins, III
Vice President of Federal Government Programs
Information Technology Association of America

Alan Chvotkin
Executive Vice President & Counsel
Professional Services Council

Elaine Guth
Acting Vice President, Acquisition Policy
Aerospace Industries Association

Richard L. Corrigan
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American Council of Engineering Companies

Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

R. Bruce Josten
Executive Vice President,
Government Affairs
U.S. Chamber of Commerce

Attachments

CC: FAR Council Members

ATTACHMENT A

EXECUTIVE SUMMARY

REMARKS MADE BY CODSIA REPRESENTATIVES IN SUPPORT OF THE CODSIA REQUEST TO ISSUE ANY CHANGES TO FAR CASE 2005-036 AS A PROPOSED RULE

OCTOBER 7, 2008

- FAR Case appears to respond to a narrow set of identified problems, primarily in DoD:
  - DFARS Case 2004-D019
  - DoD IG Report No. D2001-129
  - DAU Tanker Study
  - Air Force General Counsel

- Case materials and oral testimony provided by Government officials in the public meeting identified the problem to be related to procurement of major weapons systems and spare parts as sole source commercial items.
- Proposed changes would affect all procurement, including commercial items, in all agencies and not be limited to the identified problem areas.
- Not all commercial contractors will be able to comply with requests for cost or pricing data of the type and form familiar to government contracting officers.
- Government contracting officers can be expected to request the types of data they are familiar with; in the form they are familiar with and hence tarnish the business climate for commercial companies.
- Primary goal identified by the drafters is to "resolve confusion" and provide the "necessary **clarification**" (emphasis added) that contracting officers have the authority to request, obtain and evaluate whatever pricing or cost information is needed to support price reasonableness.
- Proposed definitions are inconsistent with the current statutory definitions in TINA (10 U.S.C 2306a) and the CAS exemption at 9903.201-1(b)(15).
- Proposed rule creates inherent conflict between the policy guidance to obtain only the data necessary (FAR 15.402(a)) and the all-encompassing disclosure requirements of the newly created cost or pricing data definition.
- Existing FAR and supporting agency guidance, including the Contract Pricing Reference Guide (already cited in FAR PART 15) currently provides guidance on obtaining supporting cost data.
- Going from two defined terms to three and changing the definition of an existing term is more likely to increase confusion than reduce it.
- We believe that an approach of updating guidance in FAR Part 15 to emphasize the already existing authorities, supplemented by revised agency guidance and training materials is more likely to achieve the intended result. For example, the

  proposed changes to FAR 15.402(a)(2)(ii) and FAR 15.403-3(c) appear to be all that is necessary to accomplish the intended purpose.

ATTACHMENT A

BACKGROUND MATERIALS

Summary of portions of The Truth in Negotiations Act – TINA (excerpts)

Requirement for submission of Cost or Pricing Data:

" (a) Required **Cost or Pricing Data and Certification**. --(1) The head of an agency shall require offerors, contractors, and subcontractors to make **cost or pricing data** available as follows:

(A) An offeror for a prime contract *[subcontract]* under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract *[subcontract]* if--

(i) in the case of a prime contract entered into after December 5, 1990, the price of the contract to the United States is expected to exceed $500,000; and

(ii) in the case of a prime contract entered into on or before December 5, 1990, the price of the contract to the United States is expected to exceed $100,000."

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Requirement for certification of Cost or Pricing data

" (2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) shall be required to **certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.**

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a **certification required to be submitted under paragraph (2), shall be submitted--**

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor."

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Requirement for submission of Other Information

(d) Submission of other information

(1) Authority to require submission

When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of **data other than certified cost or pricing**

data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A) of this section, **the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.**

(2) Limitations on authority

The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial items.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

Current FAR Definitions

"Cost or pricing data" (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) means all facts that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are data requiring certification in accordance with 15.406-2. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data 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. They also include such factors as—

(1) Vendor quotations;
(2) Nonrecurring costs;
(3) Information on changes in production methods and in production or purchasing volume;
(4) Data supporting projections of business prospects and objectives and related operations costs;
(5) Unit-cost trends such as those associated with labor efficiency;
(6) Make-or-buy decisions;
(7) Estimated resources to attain business goals; and
(8) Information on management decisions that could have a significant bearing on costs.

"Information other than cost or pricing data" means any type of information that is not required to be certified in accordance with 15.406-2 and is necessary to determine price reasonableness or cost realism. For example, such information may include pricing, sales, or cost information, and includes cost or pricing data for which certification is determined inapplicable after submission.

Proposed NEW FAR Definitions (FAR CASE 2005-36)

Certified cost or pricing data means ``cost or pricing data" that has been required to be submitted and has 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 is accurate, complete, and current as of a date certain before contract award. Cost or pricing data is required to be certified in certain procurements (10 U.S.C. 2306a and 41 U.S.C. 254b). See FAR 15.403-4.

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Cost or pricing data (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) means all facts that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data 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. They also include, but are not limited to, such factors as--

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Data other than certified cost or pricing data means any data, including cost or pricing data and judgmental information necessary for the contracting officer to determine a fair and reasonable price or cost realism, where certification is not required in accordance with 15.406-2. For example, such data may include pricing, sales, or cost data, and includes cost or pricing data for which certification is determined inapplicable after submission.

* * * * *

Why was FAR Changed in 1995 to revise the definitions?

Prior to the FASA regulatory implementations, the FAR then used terms inconsistently, in some places "certified cost or pricing data," and in others "cost or pricing data".

Prior to 1995 when FASA changes were implemented into the FAR, there was confusion as to what data was certified and what data was not certified. Auditors could not physically distinguish between data provided for the purpose of certification and data not intended to be certified.

The results of the FASA era regulatory implementations produced a binary decision process – either data was required to be certified or data was not to be certified.

Such a process is fully in conformance with TINA, which as noted above has two classes of data: cost or pricing data that will be certified, and other information that will not be certified.

The 1995 FAR Council reported in FAR Cases 94-720 and 94-721 the following:

> Currently, the FAR uses the term inconsistently. In some places, "certified cost or pricing data" is used and in other locations, it states "cost or pricing data." In the new coverage, the term has been clarified in the definition to mean that, among other things, "cost or pricing data" is required to be certified in accordance with TINA and FAR 15.804–4, and means all facts that as of the date of agreement on price (or other mutually agreeable date) prudent buyers and sellers would reasonably expect to affect the price negotiations significantly.
>
> Since a bright-line test for "cost or pricing data" has now been established, it is also possible to craft a second category of data—"information other than cost or pricing data"—that may be required by the contracting officer in order to establish cost realism or price reasonableness. This information can include limited cost information, sales data or pricing information. The intent is also clear with respect to this category of information. Because it is not "cost or pricing data," certification shall not be required and approval to obtain this information is vested in the contracting officer.

The 1995 FAR Council apparently intended for the changes to provide a clear distinction between the types of data submitted and the rights and remedies of the Government for each type of data. This approach appears to be in compliance and consistent with TINA.

Analysis of the changes proposed by the current FAR Council

The changes proposed, contrary to the stated purpose, do not more fully conform to the TINA statute.

The statute defines two types of data: **cost or pricing data** that is to be certified and other information that is not certified. TINA does not define three types of data as proposed by the current FAR Council.

Other information is data not required to be certified. The statute further defines other information as: **data other than certified cost or pricing data**.

TINA never uses the term **cost or pricing data** in the context of data that is not certified. The proposed FAR definition would be in direct contradiction to the statutory usage.

The proposed rule introduces new potential ambiguity and confusion. There is an inherent and unresolved conflict between the pricing policy delineated at 15.402(a) "...the contracting officer shall not obtain more data or information than is necessary" and the proposed new definition of cost or pricing data that includes "all facts as of the date of price agreement..." No guidance is provided in the rule to clarify how much data should be provided.

Driving force behind the change

The wording of the FAR Case, testimony at the public hearing on the proposed rule from the Do DIG and the President of DAU, appear to reflect frustration with a rather narrow segment of acquisitions. These acquisitions can be roughly defined as sole source commercial items/spares.

One partially redacted recommendation of the DAU Tanker Lease study was that "The contracting officer shall have the authority to require the offeror to provide data other than certified cost or pricing data as necessary to determine that an offered price is fair and reasonable. Such information may contain cost information that would otherwise meet the definition of cost or pricing data at FAR2.101, except for certification in accordance with FAR 15.406-2." The FAR Case however appears to recognize that this authority already exists but needs clarification.

The best indication of the concerns of those listed above is taken directly from the proposed rule: "The DoD IG briefed the Councils on recent findings related to reviews of sole source commercial item pricing and specifically about confusion over the contracting officer's ability to obtain cost or pricing data (uncertified), sales information, and other data necessary to determine prices to be fair and reasonable."

Further clarification of the driving force behind these proposed changes again comes from the wording in the proposed rule: "The DoD IG suggested a need to have a separate section of the FAR for the pricing of sole source commercial items (not based on adequate price competition."

Existing Authority and Agency Guidance

The current definition of Information Other than Cost or Pricing Data at FAR 2.101 explicitly includes cost data. The Commercial Item Handbook (November 2001) includes the following statement: "the contracting officer may require the offeror to submit cost information to support further analysis". Similarly the section of the Contract Pricing Reference Guide specifically cited at FAR 15.404-1 Proposal Analysis Techniques states in part "You may require an offeror /contractor to provide cost information other than cost or pricing data to support your analysis of price reasonableness or cost realism." FAR 15.402(a)(2) Information Other Than Cost or Pricing Data provides for the submission of two types of data – information related to prices and **cost information** that does not meet the definition of cost or pricing data.

Conclusions

The CODSIA letter requested the FAR Council delay issuance of a final or interim rule until the public was given another opportunity to review the final text as a proposed rule.

The changes proposed are designed to impact a small segment of acquisitions as noted above by emphasizing the need to gather enough information from suppliers to determine the price is fair and reasonable. However, the rule would apply to all acquisition regardless if prior problems have been encountered in getting enough information to make the necessary determination. .

The changes that would be imposed if the proposed rule were to become effective would create a new classification of data – cost or pricing data (uncertified) that has not been used in the past and is not in the TINA statute. The use of this new term will create confusion and ambiguity for an extended period.

It is the opinion of most in industry that the binary decision process, the creation of a bright line between certified data and uncertified data has worked well in the years since the changes were made.

ATTACHMENT B

Benefits of Commercial Item Acquisition

The last two decades have brought a significant amount of statutory and regulatory change to the acquisition of products and services for Government use, including the enactment of laws such as the Federal Acquisition Streamlining Act of 1994(FASA), the Federal Acquisition Reform Act of 1996 (FARA), and the Services Acquisition Reform Act (SARA). The main thrust of these statutes and other broad acquisition reform initiatives has been to transition the federal acquisition system from one based on acquiring Government unique requirements under design or performance specifications to one expressing a preference for the acquisition of commercial items whenever and wherever practicable to meet the Government's needs. The regulatory implementation is in Federal Acquisition Regulation, Part 12. This background and the benefits of commercial item acquisition are summarized in greater detail in the Services Acquisition Reform Act (SARA) Panel Report issued in January 2007.

Over time, the resulting regulatory changes and procedural framework established in FAR Part 12 have been completely integrated within both the Government acquisition community and the business sector. This has resulted in an efficient, timely and cost effective system of acquiring commercial products and services to meet the Government's unique requirements.

Although many reports documenting the benefits of the use of commercial item contracting have been issued over the years by the GAO and other Government and academic sources since FAR Part 12 came into effect, issues have also been identified. Even in such cases, however, the benefits are still recognized as being important. In its most recent report on commercial contracting, the DOD IG has succinctly cited the benefits. In its audit report D-2206-115, Commercial Contracting for the Acquisition of Defense Systems, September 29, 2006, the DoD IG, lists the importance and benefits of commercial item acquisition to DoD as including:

- Access to state-of-the art technology and products
- Savings on limited financial resources for research and development
- Establishment of a market price as a price analysis tool
- Integration of the defense and commercial industrial bases to benefit the Nation's security and economy
- Reduced economic risk associated with developing new items
- More rapid deployment of state-of-the art technologies and items
- Benefiting from access to proven technological capabilities
- Benefiting from increased competition

Industry considers that these enumerated benefits are enormously important, particularly with the global war on terror, the need for rapid deployment of the latest technologies, and the demands on program funding. In addition, the systemic benefits to the procurement system, such as process improvement from the use of simplified acquisition techniques, increased acquisition processing speed, built-up commercial item expertise in the acquisition community, and enhanced flexibility in managing a stressed acquisition workforce are also major contributors to a successful acquisition result. For

these reasons, it is important to target changes in a manner that does not limit DoD's access to the commercial marketplace while addressing the identified weaknesses.

Recent Legislative and Regulatory Improvements

Congress and DoD have provided a number of additional oversight tools for commercial item acquisition in the past couple years covering commercial item determinations, price reasonableness determinations and exemptions to TINA. This is a brief summary of these changes in order to provide a framework for what has already been done.

Major Systems and Commercial Items. Section 803 of the FY2006 DoD Authorization Act added additional requirements before any major weapon system could be considered a commercial item. It not only had to meet the definition of commercial item, there also had to be a determination that it was in the interest of national security to make that determination. Congressional notification is also required. This was implemented by DoD as an interim rule on October 4, 2006, and as a final rule on September 6, 2007. The Air Force also issued additional guidance in September 2007 clarifying what is required for such a determination, including how the use of commercial practices will increase competition; improve access to commercial markets; and lead to better prices and/or new market entrants or technologies.

TINA Exceptional Circumstances Waiver Justifications. DoD also issued guidance dated March 23, 2007 (2007-0195-DPAP) on the use of exceptional circumstances waivers to TINA. Congress added a requirement in Section 817 of the FY2003 DoD Authorization Act that added three requirements to justify exceptional case TINA waivers. The most onerous requirement was the requirement to determine that the property or services could not reasonably be obtained without the waiver. This greatly restricted the situations in which price based acquisition could be used. DoD implemented this verbatim, and very few of these waivers are now granted.

Written Documentation of Commercial Item Determinations. The Director of the Defense Procurement and Acquisition Policy office (DPAP) issued written guidance on March 2, 2007 requiring written determinations for all Part 12 acquisitions over $1 million, included in contract files, with market research and rationale. It also emphasized that particular care needs to be taken for modifications of a type customary in the marketplace as well as for items offered for sale but not yet actually sold. Finally it reminds contracting officers that when such items lack sufficient market pricing histories, contracting officers must use additional diligence to fulfill the obligation to assure prices are fair and reasonable as required by FAR Subpart 15.4.

Guidance on Obtaining Additional Information Necessary to Determine Price Reasonableness. DoD issued Policy Letter 2007-0883-DPAP and a revision to the PGI - Procedures, Guidance and Instruction No. 215.4 dated May 31, 2007. This emphasizes the requirement for contracting officers to obtain cost or pricing data if TINA applies, and if not, to obtain "whatever information or data is necessary to determine a fair and reasonable price." It also includes procedures and guidance on TINA waivers and procedures and guidance on when to perform price, cost and technical analyses. In addition, the DPAP has been conducting Contract Pricing

Workshops at numerous locations across the country to emphasize these requirements.

Quarterly Meetings on TINA Waivers. To further assure the proper use of TINA waiver authority, DoD will hold quarterly meetings with the senior procurement executives of the military departments, led by the DPAP office. This office has recently been expanded with two additional hires to better support implementation of these polices and the sharing of best practices.

Annual DOD Reports to Congress on Commercial Item and Exceptional Circumstances TINA Waivers. DoD also is now required to submit these reports annually so both DoD and Congress have great visibility and opportunity for oversight.

Annual DoD Reports to Congress on Price Trends of Exempt Commercial Items. DoD also is required to submit these reports annually so both DoD and Congress have greater visibility and opportunity for oversight.

DoD IG Audit Findings and DoD Corrective Actions

The DoD IG audit report lists examples of various areas of concern with the implementation and oversight of commercial item acquisition by DoD for contracts awarded in FY2003-04. These contracts were entered into and performed before the implementation the numerous legislative and regulatory changes described above that were adopted since 2004. The primary focus of the report is on the failure to document commercial item determinations (CID) and price reasonableness determinations (PRD) in the file. The IG report attempts to draw a conclusion that the government did not benefit from commercial item acquisition, but in fact did not actually find that any items were unreasonably priced or that the items were not commercial items. They only concluded that because of the lack of documentation, the benefit could not be proven. The following provides a summary of the specific findings as well as the corrective actions that have already been taken.

CID Documentation - DoD Policy Memo Issued 3/2/07. The IG report stated that 18 of 35 commercial item determinations lacked written documentation, citing the best practice recommended in the DoD 2001 Handbook on Commercial Item Acquisition. One example listed was an E-10A aircraft that was a derivative of the 767-400ER. DoD responded that there was no such requirement, but agreed to issue guidance. The Director of DPAP issued guidance on March 2, 2007 requiring written determinations for all Part 12 acquisitions over $1 million, included in contract files, with market research and rationale. It also emphasizes that particular care needs to be taken for modifications of a type customarily available in the marketplace as well as for items offered for sale but not yet actually sold. Finally it reminds contracting officers that when such items lack sufficient market pricing histories, contracting officers must use additional diligence to fulfill the obligation to assure prices are fair and reasonable as required by FAR Subpart 15.4.

Price Reasonableness Determination - DoD Policy Guidance Issued 5/31/07. The IG report noted one case (C-40 aircraft, 737-700 derivative) in which there was no evidence of price reasonableness or evidence of sales to the general public. The only information the contracting officer cited as aircraft prices published on the

contractor's web site for 737 aircraft. DoD issued Policy Letter 2007-0883-DPAP and a revision to the PGI - Procedures, Guidance and Instruction No. 215.4 dated May 31, 2007. This emphasizes the requirement for contracting officers to obtain cost or pricing data if TINA applies, and if not, to obtain "whatever information or data is necessary to determine a fair and reasonable price." It also includes procedures and guidance on TINA waivers and procedures and guidance on when to perform price, cost and technical analyses. In addition, the DPAP has been conducting Contract Pricing Workshops at numerous locations across the country to emphasize these requirements.

"Of a type" Commercial Items - DoD Policy Guidance Issued 3/2/07 and 5/31/07. The IG report cited one instance of lack of documentation of the rationale for an aircraft engine for the V-22 not being "of a type". The contracting officer argued that the engine was 90 percent common with a commercial engine, but there was no analysis that the 10 percent difference was accurate or whether the 10 percent difference affected the nature or cost of the item materially. The DoD policy memos listed in the first two items above both provide additional guidance in this area.

Offered for Sale - DoD Policy Guidance Issued 3/2/07 and 5/31/07. The IG report cited one example (JPATS) where the only evidence of availability in the commercial marketplace were drawings and specs for a commercial aircraft, without any information establishing interest from the commercial market for such a system. The IG report also referenced the HMMWV (High Mobility Multi-purpose Wheeled Vehicle) as not being commercial because it was sold to the Army before the Hummer was sold in the commercial marketplace. The IG noted that there were differences between the two in terms of the roof, doors, windows, air conditioning and heat and sound installation - even though such differences were common among commercially available vehicles and much of the vehicle technology was from the contractor's commercial technologies. The DoD policy memos listed in the first two items address these concerns.

Minor Modifications - Legislation and Regulations Issued. The IG listed one example of a lack of documentation assessing the whether commercial item modifications were minor, thus leaving the item as a commercial item. These additions were made to a C-40 (737-700 business jet derivative) - enhanced communications systems, removal of some seats, modification of the tail to provide more room for the crew to rest. The DoD policy memos on documentation and on price reasonableness help with this kind of issue. In addition, Congress added section 818 to the FY20 05 National Defense Authorization Act (P.L. 108-375), "Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items". This provides a numerical limit on what can be considered a "minor mod", to no more than $500,000 or 5 percent of the total contract price, whichever is greater. This is effective on contracts and contract modifications entered into after June 1, 2005. This provision was implemented in the DoD regulations.

Inadequate Commercial Item Justification - DoD Policy Guidance Issued. There were several cases that apparently indicated a lack of understanding of the commercial item requirements, but were isolated instances easily cured by the DoD policy guidance issued and additional training. These included treating an item as a

commercial item based on its function versus its being a commercial item (Wideband Gapfiller Satellite); justifying logistics services as being commercial based on erroneous conclusion that the underlying item was commercial (C-130J); and concluding a total system was a commercial item because it contained several commercial items (internet servers, switches and routers) in a theatre deployable communication system.