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June 22, 2007
CODSIA Case No. 6-07

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W.
Room 4035
Washington, DC 20405

ATTN: Laurieann Duarte

RE: Proposed Rule, FAR Case 2005-036, Definition of Cost or Pricing Data

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to submit comments on the proposed rule published in the Federal Register on April 23, 2007.

Formed in 1964 by the industry associations with common interests in the defense and space fields, CODSIA is currently comprised of seven associations representing over 4,000 member firms across the nation. Participation in CODSIA is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

CODSIA member associations have grave concerns about the changes incorporated into the proposed rule. Contrary to the Councils' stated intent of providing simplicity and consistency, we believe this proposed rule results in greater confusion and ambiguity over the requirements for the submission and evaluation of cost or pricing data as well as requirements for certification of cost or pricing data. In addition, we believe the proposed changes to the Federal Acquisition Regulations (FAR) conflict with the Truth in Negotiations Act ("TINA") (10 USC 2306a), the Federal Acquisition Streamlining Act of 1994 ("FASA") and the Federal Acquisition Re form Act ("FARA"), and result in the requirement for the submission of cost or pricing data in acquisitions previously exempt from such requirements – specifically acquisitions of commercial items. We also note that, in conflict with TINA, the proposed rule significantly re-prioritizes the Government's pricing policy as outlined in FAR Subparts 15.402 and 15.408. Finally, we note that the proposed rule provides expanded audit rights not contemplated by TINA.

We believe the proposed rule will generate more rather than less confusion on both sides of the contracting community when commercial items are being procured by putting contracting officers in a position where the only safe alternative will be to demand the maximum amount of

data from any offeror, thereby creating far more risk for offerors and contractors. The long-term net impact of this rule will be to make it more difficult for the Government to procure needed products and services in the commercial market place.

Background of TINA and Cost or Pricing Data Requirements

FASA provided authorities resulting in revisions to the FAR related to certain provisions of TINA. FAR cases 94-720 and 94–721[1] implemented Sections 1201 through 1210 and Sections 1251 and 1252 of FASA. When the term "information other than cost or pricing data" was initially created, we believe it was intended to do two things. First, it was intended to make a clear distinction between data that would eventually be required to be certified ("cost or pricing data"), and data that would never be required to be certified ("information other than cost or pricing data"). We believe the FAR Council took this approach because there were several defective pricing cases in the late 1980's and early 1990's where the intent of the parties was unclear with regard to whether or not the data that was submitted was intended to be certified. The FAR Council decided to clarify that distinction. Second, the Council implemented the FASA-driven changes to TINA and the creation of the commercial item acquisition authority. The term "information other than cost or pricing data" was used to make it clear that, for commercial items, the concept of "cost or pricing data" did not exist; for this reason another term needed to be established.

Two major changes were made by the FASA FAR Cases cited above that are relevant to changes being proposed by FAR Case 2005-036. The first change shifted the policy of FAR Part 15 with respect to determining price reasonableness by establishing a hierarchical policy preference for the types of information to be used in assessing reasonableness of price. The second major change provided clarification of the meaning of the term ''cost or pricing data.'' In the words of the FAR Council:

> 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

[1] FAR Cases 94-720 and 94-721, Federal Acquisition Regulation; Truth in Negotiation Act and Related Changes, FR vol. 60, No 180, Monday September 18, 1995, page 48208.

> 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.[2]

Under the public comments section in the Federal Register Notice for the 1995 FAR Case it was noted by the FAR Council that the hierarchical policy at FAR 15.802 was clarified to ensure that it is consistent with TINA and FASA. The only public comments related to the change in the definition of data was provided in the subsection "SF 1448 Proposed Cover Sheet/Cost or Pricing Data Not Required;" concern was expressed that, with the elimination of the SF 1412, "contracting officers might request submission of catalog or market price exception data on the new SF 1448... the SF 1448 was not properly designed for that purpose...the [FASA drafting] team modified the SF 1448 to eliminate the reference to cost related information. This preserves the bright line between "cost or pricing data" that can only be submitted on an SF 1411 and all other "information other than cost or pricing data" that may be submitted using the SF 1448."

October 1, 1995 was the effective date for the changes to the FAR noted above. In the intervening years, both the Government and Industry have become accustomed to the terminology and have effectively applied it to distinguish data that is subject to TINA from data that is not subject to TINA. The currently existing definitions appear to be simple and easy to understand in comparison to the proposed changes in FAR Case 2005-036.

We believe the FAR Council is expressing through this proposed rule dissatisfaction with the ability of the acquisition workforce to do "price analysis" rather than the more familiar "cost analysis." If this is the underlying intent of the proposed changes, we recommend that changes to other parts of the FAR may be more appropriate than changing the critical and long-standing definitions of "cost or pricing data" and "information other than cost or pricing data."

In addition, the proposed rule's discussion of "cost estimates" and "cost or pricing data" to be used in the process of doing "price analysis" appears to reflect a fundamental misunderstanding of the difference between cost analysis and price analysis. In order for the changes to achieve their goals, the FAR Council apparently, and incorrectly, assumed that every business that sells to the Government is ready, willing and able to provide "cost or pricing data" to the depth and detail to which the Government is accustomed. This is certainly not the case, especially with regard to items offered by commercial entities. Unintended consequences of this change include driving commercial companies, selling state-of-the-art technology that has been developed without Government investment, to reconsider selling to the Government. In addition, this rule will unnecessarily complicate the procurement process by increasing acquisition lead-time when the acquisition workforce is undersized and unable to absorb the additional workload.

Background of FAR Case 2005-036

With this historical background on the development of the regulations that are subject to revision under FAR Case 2005-036, the FAR Council states its review of FAR 15.4 was in part stimulated by reports issued by the Department of Defense Inspector General (DoD IG), specifically, report D2001-129 dated May 30, 2001. The results of the report, expressed in the executive summary of the DODIG report, include the following:

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[2] See footnote 1.

1. Contracting officials lacked valid exceptions from obtaining certified cost or pricing data and failed to obtain required data in 32 percent of the actions reviewed.
2. Contracting officials did not challenge items categorized as commercial and accepted prices based on contractor catalogs and price list without analyses.
3. Contracting officials used questionable competition as a basis for accepting contractor prices and relied on unverified prices from prior contracts as the basis for determining that current prices were reasonable.
4. Problems contributing to poor price analysis included an atmosphere of urgency caused by a lack of planning, staffing shortages, the need for additional senior leadership oversight, and a generally perceived lack of emphasis on obtaining cost or pricing data.

The DoD IG made several recommendations including that the Under Secretary of Defense (AT&L):

1. Address acquisition staff and workload mismatches at contracting organizations.
2. Initiate price trend analyses for sole source and competitive acquisitions where only one offer is received.
3. Emphasize the proper process for dealing with contractors that refuse to provide needed data when requested by the contracting officer and that cost or pricing data be obtained when needed.

Additional recommendations were also provided to agency heads subject to the audit.

The Director of Defense Procurement responded to the DoD IG report agreeing that there is a need for a review of staffing requirements for contracting activities and that a workforce review had been initiated. The Director also stated that a contractor's refusal to provide data should be made a part of the overall past performance evaluation. There is no suggestion that the definitions of cost or pricing data or information other than cost or pricing data should be revised. It would appear the DoD IG is proposing adherence to the then current rules. As such, in relying on the DoD IG report as a basis for such radical change, the proposed rule clearly misinterpreted the IG's recommendations.

During the intervening time, there has been ample opportunity for the DoD to provide meaningful training in price analysis. In lieu of Government contracting officers being trained in appropriate techniques for conducting market research, price analysis, and reaching reasonable conclusions with regard to the price of an item, this proposed rule shifts the burden to the contractor to provide unnecessary and unjustified data.

The FAR Council also based the proposed changes on a Defense Acquisition University (DAU) study on the Tanker Lease Program -- Acquisition Lessons Learned (Tanker Study) – that purports to question the consistency of the definition and usage of the term "cost or pricing data" in the FAR, DFARS, and the statute. Notwithstanding a Freedom of Information Act (FOIA) request previously submitted by the Information Technology Association of America (ITAA) to obtain a copy of this Tanker Study, the study remains unavailable to industry for review and

analysis. Accordingly, it is impossible to understand the context or validity of the above comments raised by the Tanker Study and its reported applicability to the current FAR Case.

The FAR Council also refers to an "Air Force defective pricing case" that is related to defining judgmental factors as cost or pricing data. It is reasonable to assume that the "defective pricing case" referred to above is the SAIC Case. According to a well-recognized expert in TINA:

> Although not mentioned in the Federal Register notice, the defective pricing case was actually a False Claims Act case (FCA), U.S. ex. rel. Woodlee v. SAIC, in which a qui tam relator alleged that SAIC violated the FCA and TINA by failing to disclose that its proposed labor hours included a judgmental risk factor based on the company's "quantitative risk analysis." While the case was pending, the Air Force sent out two widely publicized notices, which asserted, among other things, that TINA requires contractors to submit with their proposals "any information reasonably required" to explain your estimating process, including – (1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in the projecting from known data; and (2) The nature and amount of contingencies included in the proposed price.
>
> During the rulemaking process, the Air Force urged the Councils to revise the FAR to make it clear that the data in Table 15-2 are required to be submitted when TINA applies. Instead, consistent with the industry view, the Councils determined that information regarding judgmental factors, which is currently required by Table 15-2, is not cost or pricing data. However, the proposed rule would authorize and require contracting officers to request, obtain, and evaluate whatever pricing or cost information is needed to make a determination that prices are fair and reasonable, including detailed cost estimates and supporting judgment.[3]

It is worth nothing that, in the case above, the Government also sought documents evidencing internal contractor deliberations and reviews, as well as estimated profitability analyses – all under the guise that such information was required in order for the Government to determine whether the proposed price was fair and reasonable.

Moreover, with respect to the Air Force's (and DOJ's) demands for the disclosure of judgmental data, experience has shown the risk inherent in employing within regulatory provisions terminology that is ill-defined and unbounded. In contrast to the well-understood concept of "cost or pricing data," whether certified or not, the Government's view of which judgments or estimates must be disclosed because they may have a bearing on the reasonableness of a proposed price is completely undefined. In practice, it has included any document whatsoever (unclear whether thought processes not committed to paper would be included) that memorializes a potential action or event that causes a price estimator to factor that potential eventuality into the proposed price. For a major procurement, there could be literally hundreds, if not thousands, of such factors. What, then, is the consequence of disclosing some, but not all, of such judgments or estimates? The fact that there will not be defective pricing liability may be of small comfort if it is still necessary to defend a False Claims Act case, no matter how lacking

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[3] Contract Costs, Pricing & Accounting Report, May 2007, page 16, Developments by Karen Manos.

in merit such a case might be. Therefore, the proposal to mandate disclosure of "judgments" and "estimates" is a radical reversal of decades of well-settled law; even defining those terms and putting limits on what is being required creates unacceptable ambiguity and risk for both government officials and contractors.

The FAR Council also states that Congress is concerned that FAR regulations are ambiguous, especially in the definition of cost or pricing data in FAR 2.101 and the discussion of cost or pricing data in Table 15-2. Unfortunately, the FAR Council did not provide any reference to the manner in which Congress reportedly expressed its concerns. As with the Tanker Study, it is impossible to understand the context or validity of the comments raised by Congress and their applicability to the current FAR Case.

As a result of these items, the FAR Councils initiated a review of FAR Subpart 15.4 citing "identified confusion concerning when cost or pricing data can and should be obtained" based on several "events." In the proposed rule, the Councils state these events "identified confusion over the difference between 'cost or pricing data' and 'information other than cost or pricing data.'" In addition, the Councils state the events identified confusion over the requirement to obtain "information other than cost or pricing data," and the requirement to submit "cost or pricing data" in accordance with the instructions at Table 15-2 at FAR 15.408.

CODSIA Recommendation

We believe the events to which the Councils refer and rely upon as the basis for considering the proposed changes are, more likely than not, isolated instances that are not necessarily reflective of a larger concern. As previously indicated, all of the issues identified in the events above could be addressed more effectively with adequate training of contracting officers rather than making significant changes to established regulations.

We believe the existing regulations are sufficient to provide an unambiguous definition of "cost or pricing data" and "information other than cost or pricing data," a clear distinction between the two and guidance on TINA certification requirements. In doing so, we believe the existing regulations are consistent with the TINA statutes.

The changes proposed would only serve to create confusion within industry and Government on proposal submission and certification requirements and, as a result, increase inefficiencies with proposal preparation, evaluation and negotiation resulting in increased costs to both contractors and the Government.

In light of the significant concerns regarding this proposed rule, we strongly oppose the rule in its present form. Further detailed comments on specific aspects of the proposed rule changes are included in an Attachment to this letter. Finally, CODSIA recommends that the Councils conduct a public meeting to discuss the provisions of the proposed rule before moving forward with any regulatory changes.

Sincerely,

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Electronic Industries Alliance

Alan Chvotkin, Esq.
Senior Vice President and Counsel
Professional Services Council

Barry Cullen
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National Defense Industrial Association

Robert T. Marlow
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Aerospace Industries Association

Bruce Josten
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U.S. Chamber of Commerce

Attachment

Attachment

This detailed summary addresses CODSIA concerns associated with the proposed rule pertaining to "Cost or Pricing Data."

1. Definitions

Existing regulations delineate that data provided in support of proposals fall into two distinct categories: "cost or pricing data" and "information other than cost or pricing data." The primary differentiator between cost or pricing data and information other than cost or pricing data is that the former requires certification in accordance with 15.406-2, while the latter is any type of information that does not require certification per 15.406-2. The existing regulations clearly state that "information other than cost or pricing data" is "any type of information that is not required to be certified" and that the definition "includes cost or pricing data for which certification is determined inapplicable after submission." As a result, there is no ambiguity as to the type of data that can be requested or obtained through the submission of "information other than cost or pricing data."

In an apparent response to comments from the Defense Acquisition University (DAU) study, the Councils have proposed changes to existing definitions at FAR 2.101, which in their opinion conform the terminology in the FAR to that currently included in TINA statutes. Specifically, the proposed rule introduces new definitions for "certified cost or pricing data" and "data other than certified cost or pricing data," redefines "cost or pricing data," and eliminates the existing definition for "information other than certified cost or pricing data." While the proposed terminology is consistent in some regard to the terminology in the TINA statutes, the new definitions will, in our opinion, only serve to add confusion to what is currently unambiguous language within the FAR. In replacing two definitions with three, the Councils have done little to conform FAR to TINA. We note that "data other than certified cost or pricing data", which is proposed by the Councils, is not defined in the TINA statute.

In addition, by replacing "information other than certified cost or pricing data" with a new definition for "data other than certified cost or pricing data," the Councils have changed the type of non-certifiable data to include "cost data" rather than what was previously referred to as "cost information." The term "cost data" is used throughout the proposed rule. However the term is not defined. As discussed later, by introducing the concept of "cost data," the Councils have effectively instructed contracting officers to obtain "cost data" in commercial item acquisitions, without considering the type of cost data that is actually obtainable from commercial entities pursuant to TINA, FASA, FARA, and standard commercial practices.

The Councils note the current definitions at FAR 2.101 of "cost or pricing data" and "information other than cost or pricing data" need to be revised to be consistent with the requirements at 10 U.S.C. 2306a and 41 U.S.C. 254b and should be better defined so it is clear that the underlying information can be the same, but they are unclear as to where the inconsistency in the current regulatory coverage and the requirements of the statute occur.

We believe the current FAR definitions for "cost or pricing data" and "information other than cost or pricing data" are, in fact, consistent with the intent of TINA. In addition, we believe the proposed changes to the FAR are inconsistent with TINA.

The definition of "cost or pricing data" included in the statute is found at 10 U.S.C 2306a(h) and is provided below:

> (1) Cost or pricing data.--The term ``cost or pricing data'' means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

When no certification of data is required, TINA defines such data as "other information" at 10 U.S.C 2306a (d) and states when certification is not required, the contracting officer shall require submission of "data other than certified cost or pricing data" to the extent necessary to determine the reasonableness of price. TINA defines data, as, 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. The FAR Council's intent to clarify that the two terms result in underlying data that is the same appears to be in direct conflict with this statutory definition. The statute does not eliminate the possibility that the data may be the same but it provides a different standard for "other information." Accordingly, there are two different types of data defined in TINA, "cost or pricing data" that is required to be certified and if certified is called certified cost or pricing data, and "other information" that is not required to be certified. It is clear from the statute that the data is defined differently.

If the intent of the FAR Council in changing the definitions is to clarify that contracting officers may request "other information" in any form that is necessary to determine the price is fair and reasonable, there are ways to accomplish that goal short of revising the definitions of "data" at FAR 2.101. These definitions have been in regulation for over a decade and have provided to both the Government and Industry a "bright line" between data that is subject to certification and data that is not. It also provides contracting officers and auditors a "bright line" between data that is subject to defective pricing and data that is not. The proposal to change the definitions at FAR 2.101 will surely add more confusion and ambiguity to the acquisition process.

CODSIA members believe the existing definitions of "cost or pricing data" and "information other than cost or pricing data" are unambiguous and consistent with the intent of the TINA statutes. We strongly urge the Councils to avoid making wholesale changes to these definitions. Doing so would only serve to confuse contractors and contracting officers regarding the requirements for the submission and certification of data.

2. Impact on Commercial Item Acquisitions

CODSIA strongly opposes the proposed changes made to FAR Subpart 15.403-3 requiring information other than cost or pricing data (changed to "Requiring data other than certified cost

or pricing data") and 15.404-1 Proposal analysis techniques. Specifically, we take exception to the changes to the requirements pertaining to commercial items as found in paragraph 15.403-3 (c) and 15.404-1(b) (1), which instruct contracting officers to obtain cost data on commercial items.

Consistent with the existing rules, the proposed rule instructs contracting officers to obtain data other than certified cost or pricing data (formerly "information other than cost or pricing data) whenever the contracting officer cannot determine whether an offered price is fair and reasonable. However, at FAR 15.403-3(c), the proposed rule goes on to elaborate that this data "may include sales history, cost data or any other information the contracting officer requires to determine the price is fair and reasonable." At FAR 15.404-1, the proposed rule specifically instructs contracting officers to obtain price or cost data from the offeror or contractor if that is the only means to determine the price to be fair and reasonable.

The term "cost data' is not defined within the existing regulations or the proposed rule. Without a clear definition of "cost data," it is unclear as to what type of data the contracting officer would require from offerors for purposes of analyzing fair and reasonable pricing on commercial items.

We note that TINA specifically requires reasonable limitations on the types of information contracting officers may require with respect to commercial items. Specifically 10 U.S.C. 2306a(d)(2) stipulates that:

> "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."

In making the proposed changes, the Councils have not taken the requirements of 10 U.S.C. 2306a (d)(2) into consideration. Specifically no apparent consideration has been given as to the type of "cost data" that is customarily maintained by commercial entities, and whether such data is meaningful for purposes of performing a price analysis or audit.

Instead, by including a requirement for possibly obtaining "cost data" in commercial item acquisitions, the proposed rule would lead contracting officers to expect offerors to maintain traditional Government cost accounting data for commercial items, despite the fact that FASA and FARA specifically exempt commercial items from such requirements. Contrary to the law, this would impose additional requirements on commercial entities and significantly impact the ability of commercial entities to offer their products and services to the Federal Government.

The proposed changes to 15.403-1(3)(i) state if the contracting officer determines that an item "claimed" to be commercial is, in fact, not commercial, the contracting officer shall require submission of certified cost or pricing data. The use of the word "claimed" reveals a great deal

about the underlying philosophy that is perpetuated throughout the proposed rule. The Councils seem to be of the opinion that the Government does not procure "commercial items," and that any offeror that asserts that a commercial item is being offered should be viewed with skepticism. See detailed recommendations related to the use of the term "of a type commercial items" below. The implementation of this underlying philosophy in procurement policy will be to the Councils' detriment. FAR 52.215-20, paragraph (a) more correctly states the perspective the Councils should have in this regard. That provision allows offerors to "...submit a written request for exception" to the requirement for cost or pricing data based on the offered item meeting the definition of a commercial item.

More broadly, Subpart 15.4 should not be used to determine whether or not an item being offered is a commercial item. The Contracting Officer should conduct market research, as prescribed in FAR Part 10, to establish if the Government's need can be met by a commercial item. Whether or not the Government's need can be met by a commercial item is determined through market research and in advance of the receipt of offers, not through "cost analysis" of individual offers. If the Government does not believe a commercial item can meet its need, that decision should be established with the prospective offerors in advance; the pricing policies in Subpart 15.4 should not be used for that purpose. The definition of a commercial item is a different issue from how an agency will acquire that item and is different from how an agency determines that an offered price is fair and reasonable.

The proposed change to 15.403-3 states that where certified cost or pricing data are not required, the contracting officer "shall require" submission of data other than certified cost or pricing data...adequate to determine a fair and reasonable price..." The proposed rule goes on to state that the purpose of requesting this data is to "support a cost realism analysis." The rule does not explain why the contracting officer would be requesting "cost or pricing data" or doing a "cost realism" estimate for a procurement that falls under an exception to the TINA requirements. Aside from the considerable confusion this will cause, this and other language in the proposed change will set up a conflict that will not serve the Government well. Given the very clear demand in the proposed rule for "cost" data to price everything, including commercial items, it is unlikely that any contracting officer will ever be satisfied with any other types of data that are more typical of commercial items such as previous sales, comparison to other models, etc. The message is clear that contracting officers "shall require" cost data because it will be the lowest risk approach.

The proposed change to 15.403-3(c), Commercial Items, is particularly troublesome. It states that even if an offeror provides catalog or market pricing, the contracting officer cannot assume that such information would be sufficient to establish a fair and reasonable price and therefore the contracting officer "shall require" the offeror to submit data other than certified cost or pricing data to support further analysis. This data may include any other information the contracting officer requires to determine the price is fair and reasonable. Given that language, few contracting officers will feel safe with any approach other than requiring the standard TINA-style data - data described in the Background to the proposed rule as "all the same data as is required for certification, but without the certification." This will most certainly result in considerable tension in the solicitation and negotiation of contracts for commercial items, and

will also likely result in a further reduction in the number of commercial firms choosing to do business with the Government.

The proposed change to FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, illustrates the tremendous confusion the proposed rule will cause and the very onerous nature of the pricing requirements for commercial items. For example, the FAR is clear today that items that the contracting officers determines meet the FAR 2.101 definition of a commercial items qualify for an exception to TINA. However, the proposed rule would "require" contracting officers to demand that offerors of those commercial items submit "data other than cost or pricing data" if the contracting officer believes that is necessary to determine a price is fair and reasonable (something most contracting officers will conclude). Proposed paragraph (b) of FAR 52.215-20 then states that if the offeror is not granted an exception from TINA, then the offeror shall submit "data other than certified cost or pricing data." As noted above, the decision to acquire a commercial item, and the associated exception to the TINA requirement, should be independent of the pricing process for that item.

3. Reprioritization of Pricing Policies

Within the proposed rule, the Councils have made significant changes that result in the reprioritizing of the Government's pricing policy as detailed at FAR Subpart 15.402. The changes to the existing regulations are detailed below:

CURRENT REGULATION	PROPOSED REGULATION
15.402 Pricing policy. 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: (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 ; second, on information obtained from sources other than	**15.402 Pricing policy.** Contracting officers ~~must~~ shall— (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~~ shall not obtain more data or information than is necessary. ~~To the extent that cost or pricing data are not required by 15.403-4, the~~The contracting officer ~~must~~ shall generally use the following order of preference in determining the type of ~~information~~data required: (1) No additional ~~information~~data from the offeror, if the price is based on adequate price competition, except as provided by 15.403–3(b). (2) I~~nformation~~Data other than certified cost or pricing data: (i) I~~nformation~~Data related to prices (*e.g.*, established catalog or market prices, sales, or previous contract prices), relying first on ~~information~~data available within the; second, on ~~information~~data obtained from sources other than the offeror; and, if necessary, on

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. (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 resources. (b) Price each contract separately and independently and not— (1) Use proposed price reductions under other contracts as an evaluation factor; or (2) Consider losses or profits realized or anticipated under other contracts. (c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.	~~information~~data obtained from the offeror. When obtaining ~~information~~data from the offeror is necessary, unless an exception under 15.403–1(b)(1) or (2) applies, such ~~information~~data submitted by the offeror shall include, at a minimum, appropriate ~~information~~data 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~~data necessary for the contracting officer to determine a fair and reasonable price. ~~definition of cost or pricing data at 2.101.~~ ~~(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 resources..~~ ~~(b) Price each contract separately and independently and not—~~ ~~(1) Use proposed price reductions under other contracts as an evaluation factor; or~~ ~~(2) Consider losses or profits realized or anticipated under other contracts.~~ ~~(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.~~ (3) *Certified cost or pricing data.* When required by 15.403–4.

The proposed rule changes substantially modify the pricing policy originally adopted in Federal Acquisition Circular (FAC) 90-32, which incorporated the FASA provisions into the FAR in an effort to streamline the acquisition process and minimize burdensome Government-unique requirements. Specifically, by removing from 15.402(a) (3), the requirement that "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," the proposed rule would

effectively allow contracting officers to request cost or pricing data (now 'certified cost or pricing data') even when it is not necessary or permitted.

In addition, the changes incorporated into FAR 15.402(a) suggest that contracting officers should follow the same order of preference in determining the type of data required in response to a solicitation regardless of whether the data is required to be certified under FAR 15.403-4. Specifically, the proposed rule indicates the following order of preference is required for the evaluation of proposal data, regardless of whether a TINA certification is required:

(1) No additional data if the price is based on adequate price competition,
(2) Data other than certified cost or pricing data (currently information other than cost or pricing data), which includes cost data necessary for the contracting officer to determine fair and reasonable price, and
(3) Certified cost or pricing data, when required by 15.403-4.

The proposed rule suggests that data other than certified cost or pricing data is preferred over certified cost or pricing data, even when certified cost or pricing data is required by 15.403-4. This clearly is not the intent of TINA. It is unclear whether the effects of the changes are intentional or unintentional.

4. Audit and Records

The Background to the rule states that not only will the contracting officer request "cost data' when procuring commercial items, but will also obtain and audit (see changes to 52.215-2) the judgmental data that accompanies that data, something the current TINA statute does not contemplate. This change goes far beyond clearing up "confusion" that may exist. The proposed change to 52.215-2, Audit and Records - Negotiation, creates further barriers to Government procurement of commercial items. As noted above, the proposed rule clearly states that contracting officers "shall require" offerors for commercial items to provide cost or pricing data; data that is clearly described in the proposed rule as being exactly the same as that required for TINA certification, without the certification. This data will also include the consideration of "judgmental" information, and that this judgmental data will also be subject to agency audit. No thought has been given to the standards with which auditors will evaluate this data. The only logical conclusion is that auditors will use the exact same standard as that used for "certified cost or pricing data," especially given the description of the data as being precisely the same data, less only the certification. We cannot overemphasize the disincentive that the expanded audit rights, which are inconsistent with the intent of FASA, FARA and TINA and commercial practices, provide to any potential offeror of commercial items.