

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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October 28, 2016

Defense Acquisition Regulation System
Attn: Mr. Mark Gomersall
OUSD (AT&L) DPAP/DARS
Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

Subject: DFARS Case 2016-D006 - Procurement of Commercial Items

Dear Mr. Gomersall:

On behalf of the undersigned members of the Council of Defense and Space Industry Associations¹ (CODSIA), we offer the following comments and recommendations on Defense Federal Acquisition Regulation Supplement (DFARS) Case 2016-D006, "Procurement of Commercial Items." In general, we believe the proposed rule is a significant improvement from the proposed rule published under DFARS Case 2013-D034, "Evaluating Price Reasonableness for Commercial Items." The proposed rule implements provisions of the Fiscal Year 2016 (FY16) National Defense Authorization Act (NDAA) that were enacted to reaffirm the preference for maximizing the use of commercial products and services critical for implementation of our nation's defense strategy.

We have provided detailed comments on the proposed rule in two Enclosures to this letter. Because of our mutual concern for effective implementation of policies and procedures that provide optimum utilization for commercial pricing on Department of Defense (DoD) contracts, we recommend a joint industry/DoD commercial acquisition engagement strategy, both to develop a set of training materials, and to produce an update to the Commercial Item Handbook.

In sum, CODSIA recommends the proposed rule be implemented with our recommendations.

We thank you for your attention to our comments and your consideration of our recommendations. We would welcome the opportunity to meet with the review team to discuss these comments. In the interim, if you have any questions or need any additional information, please do not hesitate to contact Mr. Jonathan Clifford, who serves as our project officer for this case, at 202-524-5542

Sincerely,



John Luddy
Vice President National Security
Aerospace Industries Association



Jessica Salmoiraghi
Senior Policy Director
American Council of Engineering Companies

¹The Council of Defense and Space Industry Associations (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 six associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Information Technology Alliance for Public Sector (ITAPS), the National Defense Industrial Association, the Professional Services Council and the U.S. Chamber of Commerce. CODSIA acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. Combined these associations represent thousands of government contractors and subcontractors. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.



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ENCLOSURE 1: SUMMARY of RECOMMENDATIONS

CODSIA has ten substantive improvements and thirteen conforming changes that in total propose forty-four specific recommendations as outlined in Enclosure 2. The substantive improvements remove unnecessary compliance requirements. The conforming changes align the proposed rule to following: (1) other Federal Acquisition Regulations that govern commercial items and pricing; (2) the FY 2016 National Defense Authorization Act; and (3) the September 2, 2016, Director, Defense Procurement and Acquisition Policy Memorandum entitled, *"Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items"*.

Substantive improvements - in priority order.

1. **Subcontract price evaluation.** In both the basic and alternative version of the proposed rules in 252.215-70XX(d)(5), entitled "Subcontract price evaluation", there is a requirement for the offeror to provide data from subcontractors. CODSIA believes this is outside the scope of Section 831 of the Fiscal Year 2013 National Defense Authorization Act and recommend its removal as outlined in Enclosure 2 (recommendation 42) for the following reasons:
 - a. FAR 52.215-20, the regulation that the proposed rule would replace, does not contain special rules for subcontracts.
 - b. Subcontract pricing has no bearing on the commercial price offered to the Government.
 - c. In a fixed-price type commercial transaction, the prime contractor bears all the risk of subcontract price increases.
 - d. If the commercial item meets the Government's requirement and is determined to have a fair and reasonable price, there is little incentive for offeror's commercial subcontractors to provide "information necessary to support price reasonableness". In a commercial market place, the Government's buying power or position is not significant enough to garner unique pricing data not customarily provided to commercial buyers.
 - e. There is little justification to propose a DoD-unique subcontract price evaluation requirement as part of a rule to address Congressional direction on standards and limitations of cost data to support commercial pricing at the prime contract level.

Despite our recommendation, if this provision is included in any final rule, we recommend that firm-fixed type contracts be excluded from this requirement.

2. **Subcontracts.** In both the basic and alternative version of the proposed rules in 252.215-70XX(e), entitled "Subcontracts", there is a requirement to have subcontractors exceeding the simplified acquisition threshold meet requirements for certified cost or pricing data and requirements for data other than certified cost or pricing data. CODSIA believes this is outside the scope of Section 831 of the Fiscal Year 2013 National Defense Authorization Act and recommend its removal as outlined in Enclosure 2 (recommendation 43) for the following reasons:
 - a. The same concerns expressed in the first recommendation also apply to this proposed language – the bearing on price, the firm-fixed type contract and lack of incentive for commercial suppliers to comply.
 - b. Due to the nature of commercial supply chains, the fluidity of subcontractors is a common occurrence. With the increased use of electronic auctions and reverse auctions on commodities and basic services, the flow down requirement regarding proposal preparation and evaluation to first-tier subcontractors would be problematic from a compliance stand point.
 - c. It is exponentially more difficult to flow down to subcontractors at all tiers, as many lower-tier subcontracts may not be negotiated at the same time as the prime contract.
 - d. There is no way to flow down a solicitation provision in a "subcontract" because there isn't a subcontract yet.

- e. Paragraph (e)(1) requires flow down of paragraph (c), which sets out the requirements for certified cost or pricing data to all lower-tier subcontractors above the certified cost or pricing data threshold without exception, despite the fact that many subcontracts may qualify for an exemption from certified cost or pricing data due to competition or commercial item status.
 - f. Paragraph (e)(2) requires subcontractors to submit detailed data to support subcontract pricing for all subcontracts exceeding the simplified acquisition threshold, without any rationale or determination that such detailed data is necessary or relevant to the prices proposed by the prime. Paragraph (d)(5), if it is limited to apply to offers requiring the submittal of certified cost or pricing data as recommended above, provides adequate guidance to offerors on the level of information required from subcontractors.
 - g. The contractor purchasing processes will require substantial changes to deal with this issue and for those commercial companies not so conversant on government regulations, the changes discussed in 252.215-70XX(b)(ii) through (e) are complex and very confusing. Implementation will be difficult and take a long time.
 - h. This is a significant cost driver and runs counter to the basic principles of Better Buying Power.
3. **Market Prices.** In both the basic and alternative version of the proposed rules in Section 215.401, entitled "Market prices", the definition uses "current" prices. CODSIA believes this is outside the scope of Section 831 of the Fiscal Year 2013 National Defense Authorization Act and recommends striking "current prices that are" and inserting "prices that have been" as outlined in Enclosure 2 (recommendations 15 and 31) for the following reasons:
- a. The proposed rule's definition of "market prices" is too narrow because it focuses only on "current" prices. The proposed definition could be interpreted by contracting officers to limit market prices to only those prices that have just been agreed to by a customer, in extreme cases only prices that are less than a few days old. Whether a price is "current enough" to be relevant varies based on many factors that are best addressed through guidance on age of data rather than within the definition of market prices. Additionally, some commercial contracts include language that precludes the sharing of their purchase data with other customers (even including the government). This is a challenge for the government and industry alike, but a problem that must be recognized as solutions are developed to ensure fair and reasonable prices.
 - b. Section 853 of the FY 16 NDAA uses the term "recent" and not "current" – *"A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid..."*
 - c. The difference between "recent" and "current" is significant. "Recent" is having happened not long ago whereas "current" means in the present, contemporaneous, or being used or done now. Using "current" is not consistent with 215.404.1(v)(A) relating to "Age of data" which states: *"Whether data is too old to be relevant depends on the industry (e.g. rapidly evolving technologies), product maturity (e.g. stable), economic factors (e.g. new sellers in the market place) and various other considerations."*
4. **Volume and completeness of transaction data.** In Section 215.404.1(v)(C), entitled "Volume and completeness of transaction data", the definition uses "customer" as part of the data required. CODSIA recommends this be deleted and modified as outlined in Enclosure 2 (recommendation 25) for the following reasons:
- a. Many commercial customer sales agreements contain non-disclosure provisions that restrict the seller's ability to disclose contract information, including customer identity, outside of the organization. These confidentiality provisions are extremely common in

- business-to-business agreements due to the fact that the identity of a business' suppliers and the prices paid to those suppliers is competitively sensitive information.
- b. A supplier may determine that price information may be disclosed so long as the customer's identity is not included with the disclosure; however, requiring that both the price and the customer be identified puts the supplier at risk of violating contractual agreements with other customers.
 - c. Using the phrase "released by the offeror" will allow the current practice of allowing the contracting officer to view un-redacted invoices (but not physically collect them) to ensure the data provided to the government supports price reasonableness.
5. **Alternative I.** CODSIA recommends that Alternative I – which includes an alternative (c)(1) - be included in the final rule as noted in Enclosure 2 (recommendation 44). The key differences that CODSIA supports are underlined below. This will facilitate the ability of commercial companies that have an item not granted an exception to support the determination of price reasonableness with their commercial business systems (emphasis added in Alternative I).

Basic	Alternate I
<p>(c) <i>Requirements for certified cost or pricing data.</i> If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:</p> <p>(1) The Offeror shall prepare and submit certified cost or pricing data and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15-2 are incorporated as a mandatory format to be used in any resulting contract, unless the Contracting Officer and the Offeror agree to a different format and change this provision to use Alternate I.</p>	<p>(c) <i>Requirements for certified cost or pricing data.</i> If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:</p> <p>(1) The Offeror shall submit certified cost or pricing data, <u>data other than certified cost or pricing data</u>, and supporting attachments in the following format: <i>[Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.408, Table 15-2, Note 2. <u>The Contracting Officer shall insert the description at the time of issuing the solicitation or specify that the format regularly maintained by the offeror or prospective subcontractor in its business operations will be acceptable.</u> The Contracting Officer may amend the description as the result of negotiations].</i></p>

6. **10 days of a written request.** In Section 215.215-70XX(d)(4) there is a requirement that the offeror must provide additional data requested by the contracting officer within 10 days of a written request. CODSIA recommends this should be deleted as outlined in Enclosure 2 (recommendation 41) for the following reasons:
- a. Including deadlines for the offeror is not required as the offeror is motivated to respond as quickly as possible to secure the contract.
 - b. Alternatively, using 30 days would be consistent with the time the HCA has to review and revise a commercial item determination.
7. **Market research...where appropriate.** In Section 212.209(a) market research shall be used, where appropriate, to inform price reasonableness determinations. CODSIA recommends that "where appropriate" should be deleted as outlined in Enclosure 2 (recommendation 9) as it

injects the uncertainty that market research is conditional. Understanding the market place, even if there is limited research, is critical for commercial item determinations.

8. **Market research...prior to solicitation.** Section 212.001 provides the definition of market research. CODSIA recommends that market research be conducted before the solicitation as outlined in Enclosure 2 (recommendation 2) in order to inform the contracting officer whether a solicitation can be accommodated under FAR Part 12.
9. **Revised determination...to the offeror.** Section 212.102(a)(iii)(C)(2) requires the head of the contracting activity to issue a revised determination with a written explanation of the basis for the review. CODSIA recommends that the commercial item revision should be provided to the offeror as outlined in Enclosure 2 (recommendation 5).
10. **Collaboration on Commercial Item and Price Reasonableness Determinations.** It is CODSIA's view that when the offeror and the government work together in a collaborative manner, issues with commercial item determination and price reasonableness are resolved much faster. We recognize the final decisions will be made by the contracting officer. We strongly recommend the rule codify and provide the opportunity for collaboration with DoD's cadre of experts prior to a final decision by the contracting officer as outlined in Enclosure 2 (recommendation 27).

Conforming changes - in priority order.

1. **Uncertified cost data.** In various sections of the proposed rule, the new term "uncertified cost data" is used for new definitions (Part 202), price reasonableness (212.209), price policy (215.402), major system acquisition (234.7002), requirements for certified pricing (252.215-700XX), and the Alternative. CODSIA recommends that the term "uncertified cost data" be deleted as outlined in Enclosure 2 (recommendations 1, 13, 19, 20, 28, 32, and 40) for the following reasons:
 - a. This is not consistent with the FY 2016 NDAA Section 852 "... including information on labor costs, material costs, and overhead rates." (*emphasis added*)
 - b. This term is inconsistent with the statute at 10 USC 2379(d)(1) which requires: "*other relevant information regarding the bases for price and cost, including information on labor costs, material costs and overhead rates.*" (*emphasis added*)
 - c. Using the term "information" is consistent with FAR 15.403-1(c)(3)(ii)(A): "...*only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services.*" (*emphasis added*)
 - d. The term "data other than certified cost or pricing data" already includes cost data that does not require certification; it is not necessary to establish another definition in this regulation.
 - e. Deleting the term maintains consistency with Title 10 and FAR terminology.
2. **All relevant sales data certifications.** Section 252.215-780XX(b)(ii)(B)(2) requires a certification for catalog pricing. CODSIA recommends that 252.215-70XX(b)(ii)(B)(2) be deleted as outlined in Enclosure 2 (recommendations 35 and 36) for the following reasons:
 - a. The phrase "all relevant data" seems to be inconsistent with the minimum approach outlined in FAR 15.402(a)(3).

- b. Requiring such a certification is not permitted under 41 U.S.C. 1304 and FAR 1.107. In accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), a new certification by a contractor or offeror may not be required unless—
 - i. The certification requirement is specifically imposed by statute; or
 - ii. Written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.
 - c. With regard to catalog pricing, this is not consistent with the FAR 52.215-20:
 - i. (a)(1)(ii)(A) already provides instructions for this requirement: *“For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;”*
 - ii. (a)(2) limits access: *“The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror’s determination of the prices to be offered in the catalog or marketplace.”*
 - d. It is problematic for an offeror to state in its proposal that catalog pricing is “consistent with all relevant sales data”. Over what time period? What does “consistent” mean?
3. **All data necessary.** Section 252.215-70XX(d) Other than certified cost data: Requires all data necessary to permit a determination that the proposed price is fair and reasonable. CODSIA recommends: (1) to include the reference to FAR 15.402(a)(3) that requires additional data sufficient and (2) “all data necessary” be deleted and replaced with “the minimum data necessary to support” as outlined in Enclosure 2 (recommendations 38 and 39) for the following reasons:
- a. Requesting all data necessary is subjective and not consistent with FAR 15.403(a)(3) which states: *“The contracting officer shall ensure that data used to support price negotiations are sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror data should be limited to data that affect the adequacy of the proposal for negotiations, such as changes in price lists.” (emphasis added)*
 - b. This is also inconsistent with FAR 15.404-2(a)(1) instruction for contracting officers when seeking field pricing assistance: *“The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The contracting officer shall tailor requests to reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis.”*
 - c. FAR 15.402(a)(3) properly extends the direction of the existing pricing policy: *“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.”
(emphasis added)*

4. **Commercial Determination and Price Reasonableness.** In Section 252.215-70XX(b)(ii), the exceptions from certified cost or pricing data on commercial items are listed. CODSIA recommends striking “For a commercial item exception” and inserting “For items determined to be commercial” as outlined in Enclosure 2 (recommendation 33). This will ensure that the commercial item determination process and the price reasonableness determinations are kept separate. This recommendation is consistent with:
- a. Section 852 of the FY 16 NDAA – *Modification to information required to be submitted by offeror in procurement of major weapon systems as commercial items* removed the prerequisite to establish a fair and reasonable price as a basis for commercial item determination.
 - b. The September 2, 2016, DPAP memorandum that rescinded the February 4, 2015, memorandum entitled, “*Commercial Items and the Determination of Reasonableness of Price for Commercial Items*”. The 2015 memorandum set forth interim instructions that improperly linked commercial prices with the separate commercial item determination.

5. **Right to examine.** Section 252.215-70XX(2) requires the offeror to grant the Contracting Officer access to information to verify a request for a commercial item exception:

“(2) The offeror grants the Contracting Officer or an authorized agent the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.”

This same requirement is found in the FAR 52.215-20(a)(2):

“The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror’s determination of the prices to be offered in the catalog or marketplace.”

The proposed rule does not include the last sentence of FAR 52.215-20(a)(2) that limits the request for item priced using catalogs, which is very germane to this section of the proposed rule. Accordingly, with the exclusion of the last sentence of the FAR 52.215-20(a)(2) and without any reference to this FAR instruction, the proposed rule grants significantly more governmental rights in examining information. There is no compelling reason to restate a section of the FAR that currently guides the access to additional information. CODSIA strongly recommends that this section be modified as outlined in Enclosure 2 (recommendation 37).

6. **Prior commercial sales.** Section 212.102(a)(iii)(A) states that the contracting officer may presume that a prior determination made shall serve as a determination for subsequent procurements. CODSIA recommends adding that contracting officers can accept prior FAR part 12 contract numbers from the offeror to demonstrate prior determinations as outlined in

Enclosure 2 (recommendation 4) to conform with the September 2, 2016, DPAP memorandum: "...contracting officer need only to include a copy of the prior determination in the contract file..."

7. **Nontraditional defense contractors.** Section 212.102(a)(iv) entitled "Nontraditional defense contractors" does not include "subcontractors" and injects uncertainty of the long term classification of commercial items from nontraditional defense contractors in the last sentence. Also, the insertion of "prime contractor" in the 212.7X01 procedures does not follow the letter of the statute and would narrow the applicability intended by Congress. CODSIA recommends "subcontractors" be added to the definition and to delete the last sentence as outlined in Enclosure 2 (recommendation 8) for the following reasons:
 - a. Adding the term "subcontractors" is consistent with the September 2, 2016 DPAP policy memorandum: "...expands opportunities for nontraditional contractors to do business with the DoD." Prime contractors will be making commercial item determinations at the point of acquisition. These nontraditional defense contractors need to be able to count on those determinations for future business with the DoD.
 - b. Stating that the decision to apply commercial item procedures for nontraditional contractors does not mean the item is commercial. This was not included in the FY 2016 NDAA. Section 857 states: *"Notwithstanding section 2376(1) of this title, items and services provided by nontraditional defense contractors (as that term is defined in section 2302(9) of this title) may be treated by the head of an agency as commercial items for purposes of this chapter."* This additional direction adds uncertainty for nontraditional contractors for renewal contracts and could adversely impact their initial decision to compete. Section 212.102(a)(iv) could be expanded to provide full meaning to Section 857. While an item treated as commercial solely because it is provided by a nontraditional defense contractor may not provide precedent for such sales by traditional defense contractors, a nontraditional defense contractor should be able to use such a sale as precedent. The policy behind Section 857 of favoring or inviting nontraditional defense contractors would be served through the grant of the precedential value in those circumstances.
8. **Prior commercial item determination.** Section 212.102(a)(iii)(C) adds a new subsection (3) that states if the head of the contracting activity fails to provide a written explanation that outlines the basis for a revision within 30 days, the prior commercial item determination remains. CODSIA recommends this be added as outlined in Enclosure 2 (recommendation 6).
9. **Non-governmental entities.** In various sections of the proposed rule, the reference to information from non-governmental entities for market research (212.209), pricing (215.402), and proposal analysis (215.404-1) is not included. CODSIA recommends that non-governmental entities be added as outlined in Enclosure 2 (recommendations 10, 12, 16, 18, 19, 22, 24, 26, 29, 30 and 34) for the following reasons:
 - a. FAR 15.404 states: *"From established catalog or market prices, sales to non-governmental and governmental entities"*
 - b. FAR 15.402(a)(2)(ii)(A) states: *"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."*
 - c. FAR 15-403-3(c)(i) states: *"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."*

- d. The September 2, 2016, DPAP memorandum states: *“Meaningful market research informs such determinations and can be accomplished by reviewing existing systems, capabilities and technologies in the commercial market place...”*
10. **Prime contractors.** The proposed rule does not account for commercial item determinations made by prime contractors. CODSIA recommends that prime contractors be added as outlined in Enclosure 2 (recommendations 3 and 14) for the following reasons:
- a. The September 2, 2016, DPAP memorandum states: *“...per the Department’s policy (DFARS 244.402), it is the prime contractor’s responsibility to determine whether a particular subcontracted supply or service meets the definition of a commercial item.*
 - b. DFARS 244.402 states: *“Contractors shall determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer’s responsibilities or determinations made under FAR 15.403-1(c)(3). Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10.”*
11. **Business Systems.** Section 215.402(C) requires the offeror to provide data to the contracting officer in a format regularly maintained in the offeror’s business operations. CODSIA recommends that “operations” be deleted and in its place insert “systems” and a reference to FAR 15.403-5(b)(2) as outlined in Enclosure 2 (recommendation 21) for the following reasons:
- a. This clarifies that for commercial companies, the contracting officer will use the business systems and associated reporting mechanism of the offeror.
 - b. This is consistent with FAR15.403-5(b): *“(2) Format for submission of data other than certified cost or pricing data. When required by the contracting officer, data other than certified cost or pricing data may be submitted in the offeror’s own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the solicitation.”*
12. **Relevant Price Analysis Factors.** Section 215.404-1 requires the contracting officer to look at the totality of other factors when conducting price analysis. CODSIA recommends expanding the direction of this section to reference FAR 15.404-1(b)(2) that lists the various price analysis techniques and procedures to ensure a fair and reasonable price as outlined in Enclosure 2 (recommendation 23).
13. **Pricing Techniques.** Section 212.209 provides instructions on market research and 215.404-1 provides instructions on proposal analysis. CODSIA recommends referencing FAR 15.404 that provides the pricing techniques is appropriate as outlined in Enclosure 2 (recommendations 11 and 23).

ENCLOSURE 2: DETAILED RECOMMENDATIONS

Defense Federal Acquisition Regulation Supplement: Procurement of Commercial Items (DFARS Case 2016-D006), A Proposed Rule by the Defense Acquisition Regulations System on 08/11/2016

ACTION

Proposed Rule.

SUMMARY

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2013 and 2016 relating to commercial item acquisitions.

PART 202—DEFINITIONS OF WORDS AND TERMS

~~2. Amend section 202.101 by adding, in alphabetical order, the definition of “Uncertified cost data” to read as follows:~~

~~202.101 Definitions.~~

~~* * * * *~~

~~Uncertified cost data means the subset of “data other than certified cost or pricing data” (see FAR 2.101) that relates to cost.~~²

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Section 212.001 is added to read as follows:

212.001 Definitions.

As used in this part—

Market research means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of DoD in whole or in part. The review should be conducted prior to the solicitation and³ may include any of the techniques for conducting market research provided in section 10.002(b)(2) of the FAR and shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction (10 U.S.C. 2302(9)).

² **Recommendation 1.** This is not consistent with the FY 2016 NDAA Section 852 “... including information on labor costs, material costs, and overhead rates.”

This term is inconsistent with the statute at 10 USC 2379(d)(1) which requires: “other relevant information regarding the bases for price and cost, including information on labor costs, material costs and overhead rates.”

Using “information” is consistent with FAR 15.403-1(c)(3)(ii)(A): “...only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services.”

The term “data other than certified cost or pricing data” already includes cost data that does not require certification, it is not necessary to establish another definition in Section 215. In this complex area of rulemaking it is preferable to remain consistent with Title 10 and FAR terminology.

³ **Recommendation 2.** Market research conducted before the solicitation will help inform the contracting officer whether a solicitation can be accommodated under FAR Part 12.

4. Amend section 212.102 by—

a. Adding a paragraph (a)(i) heading; and

b. Adding paragraphs (a)(ii), (a)(iii), and (a)(iv).

end regulatory text

The additions read as follows:

begin regulatory text

212.102 Applicability.

(a)(i) *Commercial item determination.* * * *

(ii) Follow the procedures at PGI 212.102(a) regarding file documentation.

(iii) *Prior commercial item determination.* This section implements 10 U.S.C. 2306a(b)(4).

(A) The contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, ~~or~~ another component of DoD or prime contractor⁴ shall serve as a determination for subsequent procurements of such item. The contracting officer may accept as evidence of a prior determination a government contract number from the offeror to assess if the prior determination remains a valid determination.⁵

(B) If the contracting officer does not make the presumption described in paragraph (a)(iii)(A) of this section and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement.

(C) Not later than 30 days after receiving a request for review of a commercial item determination under paragraph (a)(iii)(B) of this section, the head of a contracting activity shall—

(1) Confirm that the prior determination was appropriate and still applicable; or

(2) Issue a revised determination with a written explanation of the basis for the revision (see 212.72) to the offeror.⁶

(3) The prior commercial item determination will remain if the contracting activity fails to provide a written explanation of the basis for the revision within the 30 day review period.⁷

(iv) *Nontraditional defense contractors.* Supplies and services provided by nontraditional defense contractors and subcontractors⁸ may be treated as commercial items (10 U.S.C. 2380A). This permissive authority is intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD. It is not intended to recategorize current noncommercial items, however,

⁴ **Recommendation 3. [Conforming]** This addresses the situation where a prime contractor makes commercial item determinations as part of the acquisition of a new system.

a) Under section 10 USC Section 2306a(b), the DoD should accept a prior determination of commerciality.

b) The September 2, 2016, DPAP memorandum states: "...per the Department's policy (DFARS 244.402), it is the prime contractor's responsibility to determine whether a particular subcontracted supply or service meets the definition of a commercial item.

c) DFARS 244.402. "Contractors shall determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer's responsibilities or determinations made under FAR 15.403-1(c)(3). Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10."

⁵ **Recommendation 4. [Conforming]** This is consistent with the September 2, 2016, DPAP Guidance on Commercial Item Determinations and the Determination of Price Reasonableness for Commercial Items.

⁶ **Recommendation 5.** This provides a mechanism for the offeror to understand the underlying justification for the revised determination.

⁷ **Recommendation 6. [Conforming]** This is consistent with the 30 day review period as well as DPAP guidance to make commercial item determinations in a timely manner: "Timely and consistent commercial item determination must be the standard for the Department." (September 2, 2016, DPAP policy memorandum)

⁸ **Recommendation 7. [Conforming]** This is consistent with the September 2, 2016 DPAP policy memorandum: "...expands opportunities for nontraditional contractors to do business with the DoD." Prime contractors will be making commercial item determinations at the point of acquisition. These nontraditional defense contractors need to be able to count on those determinations for future business with the DoD during sustainment.

when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even though they have been established under traditional defense contractors. ~~The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not constitute a requirement for a commercial item determination and does not mean the item is commercial.~~⁹

5. Section 212.209 is added to read as follows:

212.209 Determination of price reasonableness.

(a) Market research shall be used, ~~where appropriate,~~¹⁰ to inform price reasonableness determinations. The market research will include a review of prices and price-related information of items or services similar to those offered or paid by the Government, non-governmental entities or commercial customers that meet the needs of the DoD in whole or part.¹¹

(b) If the contracting officer determines that the information obtained through market research pursuant to paragraph (a) of this section, is insufficient to determine the reasonableness of price, in accordance with FAR 15.404¹² the contracting officer shall consider information submitted by the offeror of recent ~~purchase~~ prices paid by the Government, non-governmental entities¹³ or commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. The contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)).

(c) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information ~~on~~ according to the following order of preference—

- (1) Prices paid for the same or similar items sold under different terms and conditions;
- (2) Prices paid for similar levels of work or effort on related products or services;
- (3) Prices paid for alternative solutions or approaches; and
- (4) Other relevant information that can serve as the basis for determining the reasonableness of price.

⁹ **Recommendation 8. [Conforming]** Similar to above, this guidance was not included in the FY 2016 NDAA. Section 857 states: “Notwithstanding section 2376(1) of this title, items and services provided by nontraditional defense contractors (as that term is defined in section 2302(9) of this title) may be treated by the head of an agency as commercial items for purposes of this chapter.” This additional direction adds uncertainty for nontraditional contractors for renewal contracts and could adversely impact their initial decision to see to the DoD.

¹⁰ **Recommendation 9.** The inclusion of “where appropriate” injects the uncertainty that market research is conditional. Understanding the market place, even if there is limited research, is critical for commercial item determinations.

¹¹ **Recommendation 10. [Conforming]** This is consistent with FAR 15.403-3(c)(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.” CODSIA believes it is important to insert “price-related information” to clearly indicate that is an acceptable form of information under the category of “any other information”.

¹² **Recommendation 11. [Conforming]** This uses the stated FAR 15.404 Pricing Policy provides guidance on price analysis: “Use techniques such as, but not limited to, price analysis, cost analysis, and/or cost realism analysis to establish a fair and reasonable price.”

¹³ **Recommendation 12. [Conforming]** This is consistent with the following:

- a) FAR 15.404 that states: “From established catalog or market prices, sales to non-governmental and governmental entities”; and
- b) FAR 15.402(a)(2)(ii)(A) states: (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.
- c) FAR 15-403-3(c)(i) that states: “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.
- d) September 2, 2016, DPAP memorandum that states: “Meaningful market research informs such determinations and can be accomplished by reviewing existing systems, capabilities and technologies in the commercial market place...”

(d) Nothing in this section shall be construed to preclude the contracting officer from requiring the contractor to supply information that is sufficient to determine the reasonableness of price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement in accordance with DFARS 234.7002. ~~If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer may request other relevant information regarding the basis for price or cost, including uncertified cost data such as labor costs, material costs, and other direct and indirect costs.~~¹⁴

6. Amend section 212.301 by adding paragraph (f)(vi)(E) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vi) * * *

(E) Use the provision 252.215-70XX, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, as prescribed at 215.408(6)(i) to comply with section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and section 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(1) Use the basic provision as prescribed at 215.408(6)(i)(A).

(2) Use the alternate I provision as prescribed at 215.408(6)(i)(B).

7. Add subpart 212.7X to read as follows:

Subpart 212.7X—Limitation on Conversion of Procurement From Commercial Acquisition Procedures

Sec.

212.7X00 Scope.

212.7X01 Procedures.

end regulatory text

SUBPART 212.7X—LIMITATION ON CONVERSION OF PROCUREMENT FROM COMMERCIAL ACQUISITION PROCEDURES

212.7X00 Scope.

This subpart implements section 856 of the National Defense Authorization Act for Fiscal Year 2016 ([Pub. L. 114-92](#)).

212.7X01 Procedures.

(a) *Limitation.* (1) For a procurement valued at more than \$1 million, but less than \$100 million, previously procured as a prime contract or subcontract using FAR part 12 procedures based on a commercial item determination made by a military department, a defense agency, ~~or~~ another DoD component or prime contractor¹⁵, prior to converting the procurement from commercial acquisition procedures to noncommercial acquisition procedures under FAR part 15, the contracting officer for the procurement shall determine in writing that—

(i) The earlier use of commercial acquisition procedures under FAR part 12 was in error or based on inadequate information; and

¹⁴ **Recommendation 13. [Conforming]** Same as Recommendation 1. This language is not needed in this rule as it is the same instruction that appears in DFARS 234.7002.

¹⁵ **Recommendation 14. [Conforming]** Same as Recommendation 3.

- (ii) DoD will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.
- (2) In the case of a procurement valued at more than \$100 million, a contract may not be awarded pursuant to a conversion of the procurement described in paragraph (a)(1) of this section until—
- (i) The head of the contracting activity approves the determination made under paragraph (1) of this section; and
- (ii) A copy of the determination so approved is provided to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.
- (b) In making a determination under paragraph (a) of this section, the determining official shall, at a minimum, consider the following factors:
- (1) The estimated cost of research and development to be performed by the existing contractor to improve future products or services.
- (2) The costs for DoD and the contractor in assessing and responding to data requests to support a conversion to noncommercial acquisition procedures.
- (3) Changes in purchase quantities.
- (4) Costs associated with potential procurement delays resulting from the conversion.
- (c) The requirements of this subpart terminate November 25, 2020.
- begin regulatory text*

PART 215—CONTRACTING BY NEGOTIATION

8. Section 215.401 is added to read as follows:

215.401 Definitions.

As used in this subpart—

Market prices means ~~current prices that are~~ prices that have been¹⁶ established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Relevant sales data means information provided by an offeror of sales of the same or similar items to the Government, non-governmental entities or commercial companies¹⁷ that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets or other adjustments).

9. Amend section 215.402 by—

a. Adding paragraph (a)(i); and

b. Redesignating the introductory text as paragraph (a)(ii).

end regulatory text

The addition reads as follows:

begin regulatory text

215.402 Pricing policy.

¹⁶ **Recommendation 15.** The proposed rule's definition of "market prices" is too narrow because it focuses only on "current" prices. The proposed definition could be interpreted by contracting officers to limit market prices to only those prices that have just been agreed to by a customer, in extreme cases only prices that are less than a few days old. Whether a price is current enough to be relevant varies based on many factors that are best addressed through guidance on age of data rather than within the definition of market prices. Also, Section 853 of the FY 16 NDAA uses the term "recent" and not "current" – "A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid..." The difference between "recent" and "current" is significant. Recent is having happened in the past where current is part of a fluid that continuously moves in a certain direction.

¹⁷ **Recommendation 16. [Conforming].** Same as Recommendation 12.

(a)(i) Pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)—

(A) The contracting officer, in accordance with FAR 15.402(a)(2)(ii)(A),¹⁸ is responsible for determining if the information gathered from within the government, from nongovernmental entities, from sources other than the offeror (e.g. market research) and¹⁹ provided by the offeror is sufficient to determine price reasonableness. This responsibility includes determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price, and determining the extent of ~~uncertified cost data~~ additional data²⁰ that should be required in cases in which price information is not adequate;

(B) The contracting officer shall not limit the Government's ability to obtain any data that may be necessary to support a determination of fair and reasonable pricing by agreeing to contract terms that preclude obtaining necessary supporting information; and

(C) When obtaining ~~uncertified cost~~ additional²¹ data, in accordance with FAR 15.402(a)(3), the contracting officer shall not require the offeror to provide the information in the any form other than that in which it is regularly maintained in the offeror's business systems operations as required by FAR 15.403-5(2).²²

* * * * *

10. Amend section 215.403-1 by adding paragraph (c)(3)(C) to read as follows:

215.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(3) * * *

(C) When applying the commercial item exception under FAR 15.403-1(b)(3), see 212.102(a)(iii) regarding prior commercial item determinations.

* * * * *

11. Amend section 215.404-1 by—

a. Redesignating paragraphs (1), (2), and (2)(i) through (iv) as paragraphs (a)(i), (a)(ii), and (a)(ii)(A) through (D), respectively;

b. Adding a paragraph (a) heading; and

c. Adding paragraph (b).

end regulatory text

The additions read as follows:

begin regulatory text

215.404-1 Proposal analysis techniques.

(a) General.

¹⁸ **Recommendation 17. [Conforming]** By referencing FAR 15.402, it provides the additional guidance to the contracting officer on the data required to determine price reasonableness.

¹⁹ **Recommendation 18. [Conforming]** Same as Recommendation 12.

²⁰ **Recommendation 19. [Conforming]** Same as Recommendation 12.

²¹ **Recommendation 20. [Conforming]** Same as Recommendation 1.

²² **Recommendation 21. [Conforming]** This clarifies that for commercial companies, the contracting officer will use the business systems and associated reporting mechanism of the offeror. This is consistent with FAR.403-5(2): "(2) *Format for submission of data other than certified cost or pricing data. When required by the contracting officer, data other than certified cost or pricing data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the solicitation.*"

* * * * *

(b) *Price analysis for commercial and noncommercial items.* (i) In the absence of adequate price competition in response to the solicitation, pricing based on market prices is the preferred method to establish a fair and reasonable price.

(ii) If the contracting officer determines that the information obtained through market research gathered from within the government, from nongovernmental entities, from sources other than the offeror (e.g. market research) and provided by the offeror²³ is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government or commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. The contracting officer, in accordance with FAR 15.404-1(b)(2) shall consider the totality of other relevant factors such as, but not limited to, the time elapsed since the prior purchase, or differences in the quantities purchased. Nothing in this section precludes use of the price analysis techniques at FAR 15.404-1 to include: price analysis, parametric estimating, value-based analysis and regression analysis to establish a fair and reasonable price.²⁴ (section 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

(iii) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b)(ii) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information on—

- (A) Prices paid for the same or similar items sold under different terms and conditions;
- (B) Prices paid for similar levels of work or effort on related products or services;
- (C) Prices paid for alternative solutions or approaches; and
- (D) Other relevant information that can serve as the basis for determining the reasonableness of price.

(iv) If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer may request other relevant information, to include cost data. However, no cost data may be required in any case in which there are sufficient Government, nongovernment sales and commercial sales²⁵ of the same item to establish reasonableness of price (section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)).

(v) When evaluating pricing data, the contracting officer shall consider materially differing terms and conditions, quantities, and market and economic factors. For similar items, the contracting officer shall also consider material differences between the similar item and the item being procured (FAR 15.404-1(b)(2)(ii)(B)). Material differences are those that could reasonably be expected to influence the contracting officer's determination of price reasonableness. The contracting officer shall consider the following factors when evaluating the relevance of the information available:

(A) *Market prices.*

(B) *Age of data.* (1) Whether data is too old to be relevant depends on the industry (e.g., rapidly evolving technologies), product maturity (e.g., stable), economic factors (e.g., new sellers in the marketplace), and various other considerations.

(2) A pending sale may be relevant if, in the judgement of the contracting officer, it is probable at the anticipated price, and the sale could reasonably be expected to materially influence the contracting officer's determination of price reasonableness. The contracting officer may consult with the cognizant ACOs as they may have information about future sales.

²³ **Recommendation 22. [Conforming]** Same as Recommendation 12.

²⁴ **Recommendation 23. [Conforming]** Same as Recommendation 11. Referencing FAR 15.404-1(b)(2) underscores the associated guidance on relevant price analysis for commercial and non-commercial items.

²⁵ **Recommendation 24. [Conforming]** Same as Recommendation 12. This is consistent with FAR 15.403-3(c)(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."

(C) *Volume and completeness of transaction data.* Data must include a sufficient number of transactions to represent the range of relevant sales to all types of customers. To the extent it is reasonably available and can be released by the offeror, the data shall ~~The data must also~~ include key information, such as date, quantity sold, part number, part nomenclature, and sales price, ~~and customer.~~²⁶ If the number of transactions is insufficient or the data is incomplete, the contracting officer shall request additional sales data to evaluate price reasonableness. If the contracting officer cannot conclude the offered price is fair and reasonable from data from within the government, from nongovernmental entities, sources other than the offer (e.g. market research) and sales data provided by the offeror, provide sufficient sales data,²⁷ the contracting officer shall request other relevant information in accordance with FAR 15.402(a)(3).

(D) *Nature of transactions.* The nature of a sales transaction includes the information necessary to understand the transaction, such as terms and conditions, date, quantity sold, sale price, unique requirements, the type of customer (government, distributor, retail end-user, etc.), and related agreements. It also includes warranties, key product technical specifications, maintenance agreements, and preferred customer rewards.

(vi) The contracting officer shall consider catalog prices to be reliable when they are regularly maintained and supported by relevant sales data (including any related discounts, refunds, rebates, offsets, or other adjustments). The contracting officer may request that the offeror support differences between the proposed price(s), catalog price(s), and relevant sales data.

(vii) The contracting officer may consult with the DoD cadre of experts who are available to provide expert advice to the acquisition workforce in assisting with commercial item and price reasonableness determinations. The DoD cadre of experts is identified at PGI 215.404-2(a)(iii). The contracting officer should include the offeror in the consultations with the DoD cadre of experts that review disputed commercial item determination and price reasonableness determinations.²⁸

12. Amend section 215.408 by—

a. In paragraph (3)(i)(A)(1), removing “FAR 52.215-20, Requirement for” and adding “DFARS 252.215-70XX, Requirements for Certified Cost or Pricing Data and” in its place;

b. In paragraph (3)(i)(A)(2), removing “FAR 52.215-20” and adding “DFARS 252.215-70XX” in its place;

c. Revising paragraph (3)(i)(B);

d. Redesignating paragraphs (4)(i), (4)(ii), and (5) as paragraphs (4)(i), (4)(ii), and (5), respectively; and

²⁶ **Recommendation 25.** Many commercial customer sales agreements contain non-disclosure provisions that restrict the seller’s ability to disclose contract information, including customer identity, outside of the organization. These confidentiality provisions are extremely common in business-to-business agreements due to the fact that the identity of a business’ suppliers and the prices paid to those suppliers is competitively sensitive information.

A supplier may determine that price information may be disclosed so long as the customer’s identity is not included with the disclosure; however, requiring that both the price and the customer be identified puts the supplier at risk of violating contractual agreements with other customers.

By using the proposed “released by the offeror” will allow the current practice of allowing the contracting officer to view un-redacted invoices (but not physically collect them) to ensure the data provided the government supports price reasonableness.

²⁷ **Recommendation 26. [Conforming]** Same as Recommendation 12.

²⁸ **Recommendation 27.** It is CODSIA’s view that when the offeror and the government work together in a collaborative manner, issues with commercial item determination and price reasonableness are resolved much faster. We recognize the final decisions will be made by the contracting officer. We strongly recommend the rule codify and provide the opportunity for collaboration with DoD’s cadre of experts prior to a final decision by the contracting officer.

e. Adding paragraph (6).

end regulatory text

The revisions and addition read as follows:

begin regulatory text

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) * * *

(i)(A) * * *

(B) Do not use 252.225-7003 in lieu of DFARS 252.215-70XX in competitive acquisitions; and

* * * * *

(6) When reasonably certain that the submission of certified cost or pricing data or data other than certified cost or pricing data will be required—

(i) Use the basic or alternate of the provision at 252.215-70XX, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in lieu of the provision at FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

(A) Use the basic provision when submission of certified cost or pricing data is required to be in the FAR Table 15-2 format, or if it is anticipated, at the time of solicitation, that the submission of certified cost or pricing data may not be required.

(B) Use the alternate I provision to specify a format for certified cost or pricing data other than the format required by FAR Table 15-2;

(ii) Use the provision at 252.215-70YY, Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor, when using the basic or alternate of the provision at 252.215-70XX and copies of the proposal are to be sent to the ACO and contract auditor; and

(iii) Use the provision at 252.215-70ZZ, Requirements for Submission of Proposals via Electronic Media, when using the basic or alternate of the provision at 252.215-70XX and submission via electronic media is required.

PART 234—MAJOR SYSTEM ACQUISITION

13. Amend section 234.7002 by—

a. In paragraph (a)(1)(i)(B), removing “;” and adding “; and” in its place:

b. Removing paragraph (a)(1)(ii);

c. Redesignating paragraph (a)(1)(iii) as paragraph (a)(1)(ii);

d. In paragraph (b), removing “may” and adding “shall” in its place, and removing “only if—” and adding “if—” in its place;

e. Revising paragraph (b)(2); and

f. In paragraph (c)(1), removing “only if—” and adding “if—” in its place;

g. Revising paragraph (c)(1)(ii); and

h. Revising paragraph (d).

end regulatory text

The revisions read as follows:
begin regulatory text

234.7002 Policy.

* * * * *

(b) * * *

(2) The contracting officer determines in writing that the subsystem is a commercial item.

(c) * * *

(1) * * *

(ii) The contracting officer determines in writing that the component or spare part is a commercial item.

* * * * *

(d) *Relevant information.* This section implements 10 U.S.C. 2379.

(1) To the extent necessary to make a determination of price reasonableness, the contracting officer shall require the offeror to submit prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers.

(2) If the contracting officer determines that the offeror cannot provide sufficient information described in paragraph (d)(1) of this section to determine the reasonableness of price, the contracting officer shall request the offeror to submit information on—

(i) Prices paid for the same or similar items under different terms and conditions;

(ii) Prices paid for similar levels of work or effort on related products or services;

(iii) Prices paid for alternative solutions or approaches; and

(iv) Other relevant information that can serve as the basis for a price reasonableness determination.

(3) If the contracting officer determines that the information submitted pursuant to paragraphs (d)(1) and (2) of this section is not sufficient to determine the reasonableness of price, the contracting officer may request the offeror to submit other relevant information, ~~including uncertified cost data~~. However, no ~~uncertified cost data~~ additional data²⁹ may be required in any case in which there are sufficient Government, non-government, and commercial sales³⁰ of the same or similar item or service³¹ to establish reasonableness of price.

(4) An offeror shall not be required to submit information described in paragraph (d)(3) of this section with regard to a commercially available off-the-shelf item. An offeror may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraphs (d)(1) and (2) of this section is not sufficient to determine the reasonableness of price.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

14. Revise section 239.101 to read as follows:

239.101 Policy.

(1) A contracting officer may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the contracting activity determines in writing that no commercial items are suitable to meet the agency's needs, as determined through the use of market research appropriate to the circumstances (see FAR 10.001(a)(3)) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

²⁹ **Recommendation 28.** Same as Recommendation 1.

³⁰ **Recommendation 29.** Same as Recommendation 10.

³¹ **Recommendation 30.** Same as Recommendation 12.

- (2) See subpart 208.74 when acquiring commercial software or software maintenance.
(3) See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

PART 252—ACQUISITION OF INFORMATION TECHNOLOGY

15. Add section 252.215-70XX to read as follows:

252.215-70XX Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

Basic. As prescribed in 215.408(6)(i) and (6)(i)(A), use the following provision:

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Basic (Date)

(a) *Definitions.* As used in this provision—

Market prices means ~~current prices that are~~ prices that have been³² established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Nongovernment sales means sales of the supplies or services to nongovernmental entities for purposes other than governmental purposes.

Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

Sufficient nongovernment sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

~~*Uncertified cost data* means the subset of “data other than certified cost or pricing data” (see FAR 2.101) that relates to cost.~~³³

(b) *Exceptions from certified cost or pricing data.* (1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in the paragraphs (b)(1)(i) and (ii) of this section. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) *Exception for prices set by law or regulation.* Identification of the law or regulation establishing the prices offered. If the prices are controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Commercial item exception.* ~~For a commercial item exception~~ For items determined to be commercial,³⁴ the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items

³² **Recommendation 31.** Same as Recommendation 15.

³³ **Recommendation 32.** Same as Recommendation 1.

³⁴ **Recommendation 33. [Conforming]** For 252.215-70XX(b)(ii) that sets exceptions from certified cost or pricing data on commercial items, CODSIA recommends striking “For a commercial item exception” and inserting “For items determined to be commercial”. This will ensure that commercial item determination process and the price reasonableness determinations are kept separate. This recommendation is consistent with:

- a) The FY 16 NDAA, Section 852 – “Modification to information required to be submitted by offeror in procurement of major weapon systems as commercial items” removed the prerequisite to establish a fair and reasonable price as a basis for commercial item determination.
- b) The September 2, 2016, DPAP memorandum that rescinded the February 4, 2015, memorandum entitled, “*Commercial Items and the Determination of Reasonableness of Price for Commercial Items*”. The 2015 memorandum set forth interim instructions that linked commercial price and determination.

have been sold to Government, non-government entities in the as well as the³⁵ commercial market. Such information shall include—

- (A) For items previously determined to be commercial, the contract and military department, defense agency, or other DoD component that rendered such determination;
- (B) For items priced based on a catalog—~~(1) A copy of or identification of the Offeror's current catalog showing the price for that item in accordance with FAR 52.215-20(a)(1)(ii)(A).~~³⁶; and
~~(2) Either of the following two statements included in the proposal:~~
~~(i) "The catalog pricing provided with this proposal supports the determination of price reasonableness is consistent with all relevant sales data (including any related discounts, refunds, rebates, offsets or other adjustments). Relevant sales data shall be made available upon request of the Contracting Officer.";~~ or
~~(ii) "The catalog pricing provided with this proposal does not support the determination of price reasonableness is not consistent with all relevant sales data, due to the following: [Insert a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments)].";~~

(C) For items priced based on market pricing, a description of the nature of the commercial market and, the methodology used to establish a market price, and all relevant sales data in accordance with FAR 15.402(a)(3).³⁷ The description shall be adequate to permit the Department of Defense to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.

(2) The Offeror grants the Contracting Officer or an authorized representative access to additional information to support the reasonableness of price in accordance with FAR 52.215-20(a)(2). ~~the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.~~³⁸

³⁵ **Recommendation 34. [Conforming]** Same as Change 12.

³⁶ **Recommendation 35. [Conforming]** The use of "all relevant data" seems to be inconsistent with minimum approach as outlined in FAR 15.402(a)(3). Requiring such a certification is not permitted under 41 U.S.C. 1304 and FAR 1.107.

- a) FAR 1.107: Certifications. In accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), as amended by Section 4301 of the Clinger-Cohen Act of 1996 (Public Law 104-106), a new requirement for a certification by a contractor or offeror may not be included in this chapter unless— (a) The certification requirement is specifically imposed by statute; or (b) Written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.
- b) This is not consistent with the FAR 52.215-20(a)(1)(ii)(A) which already provides instructions for this requirement: "For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;"
- c) Finally, it problematic for an offeror to state in a proposal that catalog pricing is "consistent with all relevant sales data" – Over what time period? What does "consistent" mean?

³⁷ **Recommendation 36. [Conforming]** Same as Recommendation 35.

³⁸ **Recommendation 37. [Conforming]** The proposed instruction exceeds what is required by the FAR 52.215-20(a)(2) which already sets out the requirements as follows: "The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and

(c) *Requirements for certified cost or pricing data.* If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Offeror shall prepare and submit certified cost or pricing data and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15-2 are incorporated as a mandatory format to be used in any resulting contract, unless the Contracting Officer and the Offeror agree to a different format and change this provision to use Alternate I.

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(d) *Requirements for data other than certified cost or pricing data.*

(1) ~~In accordance with FAR 15.402(a)(3),³⁹ data other than certified cost or pricing data submitted in accordance with this provision shall include the minimum data sufficient to support all data necessary to permit⁴⁰ a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and DFARS 215.404-1(b).~~

(2) In cases in which ~~additional information uncertified cost data⁴¹~~ is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: *[Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].*

~~(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.⁴²~~

~~(5) Subcontract price evaluation.~~

~~(i) Offerors shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.~~

~~(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient nongovernment sales of the same item to establish reasonableness of price.~~

~~(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—~~

~~(A) To support the conclusion that items are technically similar; and~~

the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace."

³⁹ **Recommendation 38. [Conforming]** Including the reference to FAR 15.402(a)(3) properly extends the direction of the existing pricing policy: "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."

⁴⁰ **Recommendation 39. [Conforming]** Requesting all data necessary is subjective and not consistent with FAR 15.403(a)(3) which states: "The contracting officer shall ensure that data used to support price negotiations are sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror data should be limited to data that affect the adequacy of the proposal for negotiations, such as changes in price lists." (Underlined emphasis added)

This is also inconsistent with FAR 15.404(2)(a)(1) instruction for contracting officers when seeking field pricing assistance: "The contracting officer should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The contracting officer shall tailor requests to reflect the minimum essential supplementary information needed to conduct a technical or cost or pricing analysis."

⁴¹ **Recommendation 40.** Same as Recommendation 1.

⁴² **Recommendation 41.** Including deadlines for the offeror is not required as the offeror is motivated to respond as quickly as possible to secure the contract. Alternatively, using 30 days would be consistent with the time the HCA has to review and revise a commercial item determination.

~~(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.~~⁴³

~~_(e) Subcontracts. The Offeror shall insert the substance of this provision, including this paragraph (e), in subcontracts exceeding the simplified acquisition threshold defined in FAR part 2. The Offeror shall require prospective subcontractors to adhere to the requirements of—~~

~~(1) Paragraphs (c) and (d) of this provision for subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4; and~~

~~(2) Paragraph (d) of this provision for subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.~~⁴⁴

(End of provision)

⁴³ **Recommendation 42.** This requirement is not consistent with Section 831 of the FY2013 NDAA. FAR 52.215-20, the provision that proposed DFARS 252.215-70XX would replace, does not contain special rules for subcontracts, and neither should the DFARS. In a fixed-price commercial transaction (most, if not all, commercial items are sold as firm-fixed price), the prime contractor bears all the risk of subcontract price reasonableness and price increases. There is little justification to propose a DoD-unique subcontract price evaluation requirement as part of a rule purporting to address Congressional direction on standards and limitations of cost data to support commercial pricing at the prime contract level. If this included in the final rule, we recommend that firm-fixed based contracts be excluded from this requirement.

⁴⁴ **Recommendation 43.** Due to the nature of commercial acquisition, the fluidity of subcontractors is a common occurrence. With the increased use of electronic auction and reverse auctions on commodities and basic services, the flow down requirement regarding proposal preparation and evaluation to first-tier subcontractors would be problematic from a compliance stand point. Exponentially more difficult to flow down to subcontractors at all tiers, as many lower-tier subcontracts may not be negotiated at the same time as the prime contract. Additionally, there is no way to flow down a solicitation provision in a “subcontract” if there isn’t a subcontract yet.

Paragraph (e)(1) requires flow down of paragraph (c), which sets out the requirements for certified cost or pricing data to all lower-tier subcontractors above the certified cost or pricing data threshold without exception, despite the fact that many subcontracts may qualify for an exemption from certified cost or pricing data due to competition or commercial item status.

Paragraph (e)(2) requires subcontractors to submit detailed data to support subcontract pricing for all subcontracts exceeding the simplified acquisition threshold, without any rationale or determination that such detailed data is necessary or relevant to the prices proposed by the prime. Paragraph (d)(5), if it is limited to apply to offers requiring the submittal of certified cost or pricing data as recommended above, provides adequate guidance to offerors on the level of information required from subcontractors.

The contractor purchasing processes will require substantial changes to deal with this issue and for those commercial companies not so conversant on government regulations, the changes discussed in 252.215-70XX(b)(ii) through (e) are complex enough to be very confusing. Therefore, implementation will be difficult and take several years. This is a significant cost driver and runs counter to the basic principles of Better Buying Power.

Alternate I. As prescribed in 215.408(6)(i) and (6)(i)(B), use the following provision, which includes a different paragraph (c)(1).

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Alternate I (Date) ⁴⁵

(a) *Definitions.* As used in this provision—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Nongovernment sales means sales of the supplies or services to nongovernmental entities for purposes other than governmental purposes.

Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

Sufficient nongovernment sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

Uncertified cost data means the subset of “data other than certified cost or pricing data” (See FAR 2.101) that relates to cost.

(b) *Exceptions from certified cost or pricing data.*

(1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in the following paragraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) *Exception for price set by law or regulation.* Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Commercial item exception.* For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract and military department, defense agency, or other DoD component that rendered such determination;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror's current catalog showing the price for that item; and

(2) Either of the following two statements included in the proposal:

(i) “The catalog pricing provided with this proposal is consistent with all relevant sales data (including any related discounts, refunds, rebates, offsets or other adjustments). Relevant sales data shall be made available upon request of the Contracting Officer.”; or

(ii) “The catalog pricing provided with this proposal is not consistent with all relevant sales data, due to the following: *[Insert a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments)]*.”;

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit the Department of Defense to verify the accuracy of the description;

⁴⁵ Since the only difference between the Basic and Alternative I is (C)(1), CODSIA recommends the same proposed recommendations in the Basic version be incorporated in the final rule if the Alternative I is adopted. To be clear, CODSIA recommends the adoption of Alternative I with the aforementioned recommendations be incorporated with the Alternative I (c)(1) as the preferred outcome.

- (D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or
- (E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.
- (2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.
- (c) *Requirements for certified cost or pricing data.* If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:
- (1) The Offeror shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in the following format: *[Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.408, Table 15-2, Note 2. The Contracting Officer shall insert the description at the time of issuing the solicitation or specify that the format regularly maintained by the offeror or prospective subcontractor in its business operations will be acceptable. The Contracting Officer may amend the description as the result of negotiations].*⁴⁶
- (2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.
- (d) *Requirements for data other than certified cost or pricing data.*
- (1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and DFARS 215.404-1(b).
- (2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.
- (3) The Offeror shall provide information described as follows: *[Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-63].*
- (4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.
- (5) *Subcontract price evaluation.* (i) Offerors shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.
- (ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient nongovernment sales of the same item to establish reasonableness of price.
- (iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—
- (A) To support the conclusion that items are technically similar; and
- (B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.
- (e) *Subcontracts.* The Offeror shall insert the substance of this provision, including this paragraph (e), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2. The Offeror shall require prospective subcontractors to adhere to the requirements of—
- (1) Paragraph (c) and (d) of this provision for subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4; and

⁴⁶ **Recommendation 44.** CODSIA recommends that the Alternative I be adopted for the final rule.

(2) Paragraph (d) of this provision for subcontracts exceeding the simplified acquisition threshold defined in FAR (End of provision)

16. Add section 252.215-70YY to read as follows:

252.215-70YY Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor.

As prescribed in 215.408(6)(ii), use the following provision:

Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor (Date)

When the proposal is submitted, the Offeror shall also submit one copy each to—

- (a) The Administrative Contracting Officer; and
- (b) The Contract Auditor.

(End of provision)

17. Add section 252.215-70ZZ to read as follows:

252.215-70ZZ Requirements for Submission of Proposals via Electronic Media.

As prescribed in 215.408(6)(iii), use the following provision:

Requirements for Submission of Proposals Via Electronic Media (Date)

The Offeror shall submit the cost portion of the proposal via the following electronic media: *[Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.]*.

(End of provision)

end regulatory text