



IN REPLY  
REFER TO

MMPPP  
PROCLTR 97-17

**DEFENSE LOGISTICS AGENCY**  
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JUN 1 0 1997

MEMORANDUM FOR PROCLTR DISTRIBUTION LIST

SUBJECT: Determinations of Commerciality and Price Reasonableness

Some of our Supply Centers are faced with sole source firms offering commercial items at prices that reflect excessive increases when compared to previous prices paid when cost or pricing data was allowed to be obtained on the same items. Many of these firms claim that an item is "commercial" and that the price is "reasonable" solely because the item and its price are in a catalog. The Centers have expressed concerns that not only are these prices unconscionable, but that our customers will not be able to absorb these dramatic increases into their budgets and may not be willing to pay higher prices for items they have bought for less in the past. Negotiations are continuing at the Centers, or higher levels where appropriate, in an attempt to resolve these issues.

The attached DLAD guidance describes in detail the kinds of information that must be obtained to determine if an item meets the commercial item definition and whether prices are fair and reasonable. The coverage also states what steps must be taken when offered prices cannot be determined fair and reasonable.

a. Determining Commerciality.

1. New guidance at 12.102(90) clarifies that it is the contracting officer, not the offeror or contractor, who is responsible for determining if an item meets the definition of "commercial item." In making this determination, the contracting officer shall request and consider the advice of appropriate specialists (see FAR 1.602-2(c)).

2. At 12.102(90)(2) it states that generally, to meet the commercial item definition at FAR 2.101 (i.e., paragraph (a)), an item must be "of a type customarily used for nongovernmental purposes" *and* must have been "sold, leased, or licensed to the general public" or "offered for sale, lease, or license to the general public." Invoices documenting sales to commercial customers should normally be sufficient to indicate that the item has been "sold" to the general public. To determine if an item has been "offered" for sale, lease, or license, the contracting officer needs evidence to indicate that the offeror or contractor makes its catalog available to legitimate potential customers, appropriate to the type of item being acquired. Knowledge that an item is in a catalog is insufficient to determine that the item is commercial, especially if the commerciality of all items included in the catalog has not been verified. The contracting officer should ask the offeror or contractor to identify to whom it markets. If such

firms are not implicitly known to be legitimate customers or potential customers, the contracting officer should contact the offeror or contractor for information on actual sales of similar items made to such customers or contact the prospective customer identified for more information to determine if the offering is legitimate. To determine that an item is commercial pursuant to one or more paragraphs of the definition other than (a), the contracting officer shall obtain appropriate documentation as necessary (e.g., commercial product literature, technical opinion as to the effect of a modification.)

3. New guidance at DLAD 12.102(90)(4) requires that contracts must provide that additions to catalogs are subject to a determination of commerciality.

b. Determining Price Reasonableness.

1. New guidance at 15.805-2(90) clarifies that if the contracting officer determines that an item meets the commercial item definition at FAR 2.101, the contracting officer cannot determine the offered price to be fair and reasonable on that basis alone. Guidance is added at 15.805-2(b) advising that the contracting officer must consider the nature of the Government's requirement (e.g., quantities being acquired, how the item is managed) compared with the circumstances under which prices were paid by another customer (e.g., quantities being acquired, whether an urgent requirement drove the price up). DLAD 15.805-2(b) also advises that the contracting officer must take maximum advantage of the Government's potential purchasing power and should expect terms and prices at least equal to those available to commercial customers who have similar size and influence in the market. In this regard, note that FAR 15.802(a)(2)(i) and 15.804-5(a)(2) together provide that the contracting officer must obtain pricing, sales, cost information, or other information other than cost or pricing data as necessary to determine price reasonableness or cost realism, albeit only to the extent necessary from the offeror, when price reasonableness cannot be based on adequate price competition.

2. The DLAD guidance recommends use of the provision at FAR 52.215-41, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, and the clause at FAR 52.215-42, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-Modifications, in all solicitations and contracts for sole source commercial items and for long term contracting arrangements. The provision and clause provide a means for the offeror or contractor to claim that the offered item is commercial. They also include examples of additional supporting information the contracting officer may need to request in order to determine that the price is fair and reasonable. The DLAD coverage also advises that the provision and clause are approved for use pursuant to the tailoring authority at FAR and DLAD 12.302(c).

3. If the contracting officer cannot determine that an item claimed to be commercial is in fact commercial and no exception or waiver applies, the contracting officer shall require submission and subsequent certification of cost or pricing data. New guidance at 15.803(d)

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advises that where an offeror or contractor refuses to provide cost or pricing data required pursuant to FAR 15.804-2, and/or to offer a price that can be determined fair and reasonable, the chief of the contracting office shall personally negotiate with the offeror or contractor in an attempt to secure cost or pricing data and/or delete those elements of the offer that render the price unreasonable. If unsuccessful, a detailed memorandum setting forth the results shall be forwarded with the referral to the head of the contracting activity for appropriate action. Guidance is added at 15.803(c) confirming the requirement to document determinations of price reasonableness and unreasonableness in the contract file and in appropriate automated price history records (e.g., SAMMS price reasonableness codes). It is essential to accurately complete the price reasonableness codes, because when conducting price analysis on future proposed prices for the same or similar items, the contracting officer cannot consider a comparison of prior contract prices with current proposed prices to be valid if the prior price was unreasonable (see FAR 15.805-2(b)). This is especially important for procurements of commercial items, where price analysis is becoming more prevalent.

This PROCLTR expires upon incorporation into the DLAD, but in any event not later than 1 year after date of issue. Questions may be directed to Anne Burleigh, MMPPP, DSN 427-1358, or via Internet to [anne\\_burleigh@hq.dla.mil](mailto:anne_burleigh@hq.dla.mil).

Attachment



ROBERT L. MOLINO  
Executive Director  
(Procurement)

SUBPART 2.1 - DEFINITIONS

2.101 Definitions.

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"Commercial item" -- See 12.102(90) regarding *determinations of commerciality*.

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SUBPART 12.1 - ACQUISITION OF COMMERCIAL ITEMS - GENERAL

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12.102 Applicability.

(90) (1) The contracting officer, not the offeror or contractor, is responsible for determining if an item meets the definition of "commercial item." In making this determination, the contracting officer shall request and consider the advice of appropriate specialists (see FAR 1.602-2(c)).

(2) Generally, to meet the commercial item definition at FAR 2.101 (i.e., paragraph (a)), an item must be "of a type customarily used for nongovernmental purposes" and must have been "sold, leased, or licensed to the general public" or "offered for sale, lease, or license to the general public."

(i) Invoices documenting sales to commercial customers should normally be sufficient to indicate that the item has been sold to the general public.

(ii) To determine if an item has been offered for sale, lease, or license, the contracting officer needs evidence to indicate that the offeror or contractor makes its catalog available to legitimate potential customers, appropriate to the type of item being acquired.

(iii) Knowledge that an item is in a catalog is insufficient to determine that the item is commercial, especially if the commerciality of all items included in the catalog has not been verified. The contracting officer should ask the offeror or contractor to identify to whom it markets and, if such firms are not implicitly known by the contracting officer to be legitimate customers or potential customers, ask the offeror or contractor for information on actual sales of similar items made to such customers or contact the prospective customer identified for more information to determine if the offering is legitimate.

(3) To determine that an item is commercial pursuant to one or more paragraphs of the definition other than (a), the contracting officer shall obtain appropriate documentation as necessary (e.g., commercial product literature, technical opinion as to the effect of a modification.)

(4) Contracts must require that additions to catalogs are subject to a determination of commerciality.

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SUBPART 15.8 - PRICE NEGOTIATION

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15.803 General.

(c) Occasionally, the price is not as close to the negotiation objective as the contracting officer would like, but it cannot be judged unreasonable. In such cases, the file should contain a positive statement that the price is considered fair and reasonable under the circumstances and enumerate the circumstances. For every price reasonableness determination, the contracting officer shall accomplish price or cost/price analysis, as necessary, to determine the price either to be reasonable or unreasonable. *This determination shall be documented in the contract file and in appropriate automated price history records (e.g., SAMMS price reasonableness codes). It is essential to accurately complete the price reasonableness codes, because when conducting price analysis on future proposed prices for the same or similar items, the contracting officer cannot consider a comparison of prior contract prices with current proposed prices to be valid if the prior price was unreasonable (see FAR 15.805-2(b)).* The offeror's refusal to provide and/or certify cost or pricing data or information other than cost or pricing data does not relieve the contracting officer from the requirement to perform a proposal analysis; nor does such refusal provide a sufficient basis for determining the price unfair or unreasonable.

(d) Higher authority may be any level above the contracting officer, including the Commander (Administrator, DAPSC and DNSC). *In cases where an offeror refuses to provide cost or pricing data required pursuant to FAR 15.804-2, and/or a price that can be determined fair and reasonable, the chief of the contracting office shall personally negotiate with the offeror or contractor in an attempt to secure cost or pricing data and/or delete those elements of the offer that render the price unreasonable. If unsuccessful, a detailed memorandum setting forth the results shall be forwarded with the referral to the head of the contracting activity for appropriate action.*

15.804 Cost or pricing data and information other than cost or pricing data.

15.804-2 Requiring cost or pricing data.

(a)(1) *See 12.102(90) for guidance on determining if a procurement is for an item that meets the commercial item definition at FAR 2.101. If the contracting officer cannot determine that an item claimed to be commercial is in fact commercial and no exception or waiver applies, the contracting officer shall require submission and subsequent certification of cost or pricing data. In determining whether an action meets the \$500,000 threshold for requiring cost or pricing data when,*

(i)-(ii) *No Change.*

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15.804-8 Contract clauses and solicitation provisions.

(h) *The provision at FAR 52.215-41, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, and the clause at FAR 52.215-42, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-Modifications, are available for use when cost or pricing data or information other than cost or pricing data is likely to be required (see FAR 15.804-8(h) and (i), respectively). The provision and the clause provide a means for the offeror or contractor to claim that the offered item is commercial. The provision and clause also include examples of additional supporting information the contracting officer may need to request in order to determine that the price is fair and reasonable. The provision and clause are recommended for use in all solicitations and contracts for sole source commercial items and for long term contracting arrangements. This DLAD coverage constitutes the waiver required by FAR 12.302(c) to use terms or conditions that are inconsistent with customary commercial practice.*

(i) *See paragraph (h) in this subsection.*

15.805-2 Price analysis.

(b) *When a comparison or trend analysis to prior prices is used, the rationale and amount of allowance (negative, zero, or positive adjustment) for each factor cited in the FAR shall be included in documentation of the price reasonableness determination, along with a statement of*