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September 24, 2015

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD (AT&L) DPAP/DARS
Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Subject: DFARS Case 2013-D034, "Evaluating Price Reasonableness for Commercial Items"
CODSIA Case 9-15

Dear Mr. Gomersall:

On behalf of the undersigned members of the Council of Defense and Space Industry Associations¹ (CODSIA), we offer the following comments on the Defense Federal Acquisition Regulation Supplement (DFARS) Case 2013-D034, entitled, "Evaluating Price Reasonableness for Commercial Items." In general, we find the proposed rule irrecoverably flawed. Its fundamental conceptual errors would amount to a dramatic step backward for commercial item acquisition. **Because of the proposed rule's deep flaws, we believe the Defense Acquisition Regulatory (DAR) Council should withdraw it from consideration. We further believe the DAR Council should await Congressional enactment of proposals directly relevant to this subject now pending for final adoption into the Fiscal Year 2016 (FY16) National Defense Authorization Act (NDAA) and re-issue regulatory guidance based upon this expected new legislation and the corresponding sense of Congress.**

The proposed rule claims Section 831 of the Fiscal Year 2013 (FY13) NDAA as its authorizing provision, but the rule demonstrably fails to meet the requirements of Section 831. That provision of law has four parts: required guidance, which this rule is intended to satisfy, required training and increased expertise, required documentation whenever a contracting officer (CO) seeks uncertified cost data, and a study required of the Government Accountability Office (GAO). The guidance required by Section 831 is further comprised of four parts: standards for determining whether sales data for the same or similar items is sufficient for evaluating price reasonableness, standards for how much uncertified cost data is required when price information is not adequate for evaluating price reasonableness, a requirement that uncertified cost data "shall be provided in the form in which it is regularly maintained by the offeror in its business operations," and a prohibition on cost data in any case where sufficient non-government sales can establish price reasonableness. The proposed rule offers no consistently repeatable, objective standards whatsoever and instead substitutes highly subjective principles based on when a "prudent person" would consider sales data or the amount of uncertified cost data to be sufficient. While the proposed rule claims to require that uncertified cost data shall be provided in its native form, the rule

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, 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.

explicitly allows COs to designate the format required for uncertified cost or pricing data submissions in 252.215-70XX(d)(3). Last, the proposed rule prohibits COs from seeking uncertified cost data only in the most limited of circumstances pertaining to commercially available off the shelf (COTS) items, implying that uncertified cost data is fair game in every other circumstance. As the attachment to this letter demonstrates, these outcomes were not intended by Congress when it enacted Section 831.

Not only does the proposed rule manage to violate its authorizing provision, but it violates the frequently expressed goals of the Secretary of Defense, multiple provisions of federal law, and multiple provisions of the Federal Acquisition Regulation (FAR). Its impacts would undermine Secretary Carter's stated desire to gain access to an increased number of commercial suppliers, and particularly high-technology suppliers in Silicon Valley and elsewhere, and ignores value as a consideration in pricing. The proposed rule openly contradicts subsection (b)(5) of 10 U.S.C. § 2377, "Preference for acquisition of commercial items." Depending on one's interpretation of the proposed rule, it contradicts either 41 U.S.C. § 103, which establishes as commercial items those items "only offered for sale," "of a type," and "nondevelopmental items," or the requirement established by 41 U.S.C. § 3501 to exhaust price analysis for commercial items before employing cost analysis. The proposed rule would preempt Sections 805 and 852 of the draft FY16 NDAA passed by the House of Representatives and Section 864 of the Senate's version of the bill. It applies a "percentage of sales" test in explicit contradiction of the congressional intent behind Section 1202 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-255, Oct. 13, 1994, herein referred to as "FASA"). Its definition of "market-based pricing" overlaps and conflicts with the definition of "market prices" established in FAR Part 2. Lastly, the proposed rule's DFARS 252.215-70XX conflicts with FAR 52.215-20, drastically limiting what could be considered a fair and reasonable price. None of these deep and problematic conflicts with law or regulation is explained by the rule or necessary for a CO to determine that an offered price is fair and reasonable.

The proposed rule is technically flawed even beyond these legal and regulatory contradictions. Its key definition, "market-based pricing," is not bound by time, leaving entirely to a CO's discretion how to reach the 50 percent commercial sales threshold and rendering impossible any price analysis of obsolete commercial items. The definition would dismiss the value of private technology investment, the role of risk in commercial pricing, would limit access to cutting edge technologies only offered for sale, and is not supported by economic analysis.

The proposed rule omits a great deal of necessary or helpful guidance that it should have included. Nothing in the proposed rule would help or instruct COs in performing market research, a core feature of price analysis. The rule fails to provide guidance on how DoD COs should use the price analysis techniques itemized in FAR 15.404-1(b) and in fact never even employs the term "price analysis," quite a remarkable fact given the proposed rule's subject matter. To the extent that commercial cost information is necessary, the proposed rule offers COs no guidance on how to use it in a form regularly maintained by the vendor, which is unlikely to correspond to how data is formatted under government cost accounting standards.

Finally, the proposed rule creates a variety of other serious problems. It has even stricter rules for subcontract pricing than for contract pricing, a change that has no basis in the FAR. The proposed rule distinguishes between certified and uncertified cost data, but based upon recent False Claims Act (FCA) cases, that is a distinction without a difference. The proposed rule creates an extreme standard for sharing relevant sales data. And, the proposed rule creates a remarkably imprecise benchmark against which the Department of Defense (DoD) Inspector General (IG) will unfairly and inappropriately measure COs in the future.

These extensive concerns with the proposed rule are detailed in the attachment for your consideration.

In sum, CODSIA strongly recommends that DoD rescind the proposed rule, await enactment of the draft legislation relevant to this very topic now pending for final adoption into the FY16 NDAA, and then proceed, as appropriate, with a re-issuance of regulatory guidance. We have significant and pervasive concerns with DFARS Case 2013-D034. Because the basic constructs of the proposed rule conflict so deeply and so manifestly with so much of the law, regulation, and policy pertaining to the acquisition of commercial items, no conceivable improvements to the proposed rule could rehabilitate it. The new guidance should adhere much more closely to the requirements of Section 831 of the FY13 NDAA, federal law pertaining to commercial item purchasing, including the laws governing the preference for commercial items and the priority of price analysis in the process to establish a fair and reasonable price, and the helpful price analysis guidance in the FAR.

We thank you for your attention to our comments and your consideration of our recommendations. Should you need further information, please don't hesitate to call Will Goodman, Vice President for Policy at NDIA. He can be reached at 703-247-2595 or at Wgoodman@NDIA.org.

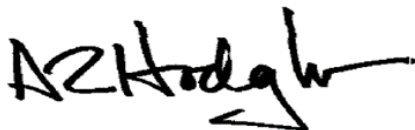
Sincerely,



John Luddy
Vice President, National Security
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Aerospace Industries Association



Jessica Salmoiraghi
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Attachment

The legislative history, intent, and requirements of Section 831.

The legislative history of Section 831. Section 831 originated with a proposal from the Director of Defense Pricing to eliminate the authority to purchase commercial items “of a type” and “offered for sale.”² While the House declined to act on the legislative proposal, the Senate included a related provision, Section 841, in its Senate Armed Services Committee-reported version of the bill, S. 3254.³ According to the Committee report, “The Administration requested legislation that would amend the definition of commercial items in section 103 of title 41, United States Code, to exclude items that are merely ‘offered for sale’ or ‘of a type’ offered for sale in the commercial marketplace. The committee declines to make this change.”⁴ Instead, “the provision recommended by the committee would provide the Department with additional tools to collect needed data for products and services that may arguably qualify as commercial items, without undermining the widely accepted definition of commercial items.”⁵

In conference, the House and Senate negotiated a compromise provision, Section 831. According to the conference report, “The House recedes [to the Senate’s Section 841] with an amendment that would require DOD to issue guidance on the use of the authority provided by sections 2379 and 2306a(d) of title 10, United States Code to evaluate the reasonableness of contractor prices. The conferees have determined that sections 2379 and 2306a(d) provide the Department with the authority that it needs to obtain price information and uncertified cost information, when necessary to evaluate the price reasonableness of commercial items. **The inconsistent use of this authority by the Department appears to have created uncertainty in the vendor community without assuring reasonable prices. The conferees expect the guidance required by this section to address these problems**”⁶ (emphasis added).

The congressional intent behind Section 831. The reports above indicate that Congress unambiguously rejected the Pentagon’s request to eliminate “offered for sale” and “of a type” from the legal definition of commercial item. Even the Senate’s more sympathetic approach explicitly declined to adopt it. Instead, the Congress confirmed the sufficiency of the Department’s existing authority to establish price reasonableness and identified the real problem—the inconsistent use of the authority to obtain uncertified cost data from contractors when price reasonableness proved difficult to establish by price analysis. The Congress wrote Section 831 to address the problems created for the vendor community by DoD’s inconsistent use of its own existing authority. Based on this clear intent, whatever guidance DoD ultimately issued should clarify and eliminate inconsistencies and make CO behavior much more predictable, within the confines of the existing framework of law and regulation.

² See “Dispute Brews Over Changes to Commercial Acquisition Process,” *DefenseNews*, May 20, 2012, available at <http://archive.defensenews.com/article/20120520/DEFREG02/305200002/Dispute-Brews-Over-Changes-Commercial-Acquisition-Process>.

³ S. 3254 is available at <https://www.congress.gov/112/bills/s3254/BILLS-112s3254es.pdf>.

⁴ Senate Report 112-173, “National Defense Authorization Act for Fiscal Year 2013 Report to Accompany S. 3254,” p. 143, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt173/pdf/CRPT-112srpt173.pdf>.

⁵ *Ibid.*, p. 144.

⁶ House Report 112-705, “National Defense Authorization Act for Fiscal Year 2013 Conference Report to Accompany H.R. 4310,” p. 806, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt705/pdf/CRPT-112hrpt705.pdf>.

The requirements of Section 831.⁷ The provision itself is broken into four parts, the first requiring guidance, the second requiring training and increased expertise, the third requiring that DoD document when it uses its authority to seek uncertified cost data, and the fourth requiring the GAO to review and report on the use of, and make recommendations to improve the use of, DoD's authority to seek uncertified cost data. The guidance, combined with a requirement to train the acquisition workforce, the requirement to create a cadre of experts to advise COs on how best to establish price reasonableness, capped off with a new requirement to document all requests for uncertified cost data along with the justification for them, clearly indicate that the Congress believed this authority was being improperly used. **Thus, to meet congressional intent, the guidance issued by DoD should set standards for the use of the authority to obtain uncertified cost data only when techniques of price analysis will not suffice to establish price reasonableness.**

The requirements of the guidance also break down into four parts. First, DoD was to create standards for determining whether sales data for the same or similar items is sufficient for evaluating price reasonableness. Second, DoD was to create standards for how much uncertified cost data is required when price information is not adequate for evaluating price reasonableness. Third, DoD's guidance for obtaining uncertified cost data must ensure that the uncertified cost data "shall be provided in the form in which it is regularly maintained by the offeror in its business operations." Last, DoD must preclude the requests for additional cost data in any case in which sufficient non-Government sales establish price reasonableness. **To meet congressional intent, these standards should eliminate apparently capricious or preemptory demands for uncertified cost data when COs can establish price reasonableness through price analysis techniques, limit those demands to the least amount of required uncertified cost data, and limit the burden such a demand places on contractors.**

DFARS Case 2013-D034 fails to meet the intent and requirements of Section 831.⁸

The proposed DFARS rule undermines the congressional intent of Section 831. Through a needlessly complex and confusing set of new processes and ambiguous "standards," the proposed DFARS rule fails to meet the intent of Congress in Section 831 of the FY13 NDAA. Without creating standards for whether sales data of the same or similar items are sufficient to establish price reasonableness, the proposed rule creates several additional procedural steps and requirements and reduces the confidence of the CO in making price reasonableness determinations. To the extent that any clarity is achieved by the rule, it is achieved only by the unstated but obvious implication that COs should seek uncertified cost data in almost any circumstance other than pricing a COTS item with a very high proportion of recent nongovernmental sales data. By implying that COs are safest from criticism when they establish price reasonableness using uncertified cost data, the proposed rule dramatically deemphasizes the price analysis process in the FAR and dramatically increases the imperative to seek uncertified cost data when it is not needed.

The "prudent person standard" is insufficient and is inconsistent with earlier guidance. Foremost among the proposed rule's flaws is its supposed "standard," the "prudent person standard." The "prudent person standard" is insufficient to the purpose intended by Congress for the guidance resulting from Section 831; it is merely another way of saying, "use good judgment." The proposed rule does not include a definition of the new term nor is the "standard" defined in existing FAR, DFARS, or Procedures,

⁷ H.R. 4310 is available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112hr4310enr.pdf>.

⁸ DFARS Case 2013-D034, "Defense Federal Acquisition Regulation Supplement: Evaluating Price Reasonableness for Commercial Items," is available at <http://www.gpo.gov/fdsys/pkg/FR-2015-08-03/pdf/2015-18938.pdf>.

Guidance, and Information (PGI) authorities.⁹ Furthermore, formal guidance issued by the Director of Defense Pricing on February 04, 2015, establishes the standard of review as that of a “reasonable businessman,” or “reasonable businesswoman.”¹⁰ This inconsistency among terms reflects the very casual inconsistency of the new “standard” across the board. A CO may in fact interpret the “prudent person standard” as more or less restrictive than the “reasonable businessman/woman standard” and make more or fewer data requests of contractors based on the inexplicably renamed “standard.” Congress required guidance to help create more consistency among requests by COs for uncertified cost data from contractors. The “prudent person” articulation by the proposed rule does not come close to an objective or consistently repeatable standard for a CO to determine price reasonableness or when and to what degree to request uncertified cost data from an offeror.

Although the proposed rule claims to allow companies to provide cost data in the form that such data is kept and maintained, as required by Section 831, the clause actually allows the CO to dictate the format in which such data is provided, another deviation from Section 831 of the FY16 NDAA. The proposed rule permits new data formatting in spite of the clear legislative prohibition against it. While the FY13 NDAA directs that guidance shall require uncertified cost information in the form in which it is regularly maintained by the offeror in its business operations, and while the proposed rule purports in at least two places to comply with this mandate, the rule explicitly allows COs to designate the format required for uncertified cost or pricing data submissions in 252.215-70XX(d)(3).

The proposed rule revolves around a flawed new definition, “market-based pricing.” The DFARS proposed rule creates an entirely unnecessary new DFARS-unique term and definition, “market-based pricing.” (The term itself and its definition conflict with the definition of “market prices” embedded within the definition of “Commercial item” in FAR 2.101, a point upon which this letter elaborates elsewhere.) The proposed rule states, “*Market-based pricing* means pricing that results when nongovernmental buyers drive the price in a commercial marketplace. When nongovernmental buyers in a commercial marketplace account for a preponderance (50 percent or more) of sales by volume of a particular item, there is a strong likelihood the pricing is market based.” The two sentences of the definition should be analyzed as separate elements since the first sentence of “market-based pricing” is a threshold restatement of current pricing policy and as such is an unnecessary substitute for the FAR definition of “market prices.”

The second sentence, however, establishes that COs can conclude *a strong likelihood* of market-based pricing when 50 percent of a particular item’s sales are attributable to non-government buyers in the

⁹ The “prudent person rule” is a recognized fiduciary principle used for the *ex post facto* review of decision-making. It is a mature concept in the investment and medical fields. CODSIA is not aware of a similarly mature concept in the field of acquisition, which would be required for the “prudent person” standard to meet the requirements of Section 831. Federal law does employ the term “prudent person” in at least four cases (10 U.S.C. §§ 1437 and 1450, 19 U.S.C. § 507, and 45 U.S.C. § 231n), but three cases pertain to fiduciary oversight of retirement funds and the fourth pertains to assisting law enforcement. While FAR 31.201-3 employs the term “prudent person” in establishing a basis for reasonable costs, it goes on to itemize the ways in which a CO would make such an evaluation. Such further elaboration is notably absent from this proposed rule. CODSIA was not able to locate a use of the “prudent person” concept in either the DFARS or the PGI. Without a thoroughly developed concept, the “prudent person standard” fails to achieve congressional intent, which was for a standard or standards meant to improve the objectivity, and thus the consistency, of COs’ use of their authority to seek uncertified cost data.

¹⁰ See Director of Defense Pricing memo, “Commercial Items and the Determination of Reasonableness of Price for Commercial Items,” February 4, 2015, p. 2, available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA007164-14-DPAP.pdf>.

commercial marketplace. Leaving aside the deep flaws of the 50 percent threshold to be explored elsewhere in this letter, the definition implies that there are some circumstances in which a CO will seek to price a COTS item that has more than half of its sales to commercial customers and yet cannot definitively establish market-based pricing. While such an outcome may be circumstantial and fact-specific, any policy that leaves the definition open to a variety of interpretations is the opposite of the consistency intended by Congress for this guidance.

Further, the definition implies, but does not explicitly state, that market-based pricing is less likely in circumstances where a particular item has less than 50 percent sales by volume to nongovernmental customers. This framing of market-based pricing simultaneously creates ambiguity and rigidity—COs face a deeply ambiguous, risky situation if they use their discretion to determine price reasonableness for an item with commercial sales below the “market-based pricing” threshold, so many COs looking to avoid criticism will likely see the 50 percent threshold as a rigid, bright line for determining whether a particular item has market-based pricing or not. Such an unspecific and yet rigid standard is not what Congress intended by Section 831.

The proposed rule compounds the flawed definition of “market-based pricing” with circular reasoning in its definition of “relevant sales data” and its pricing policy. Building upon the precarious foundation of “market-based pricing,” the proposed DFARS rule compounds the ambiguity with its definition of “relevant sales data” and its pricing policy. The proposed definition of “relevant sales data” is whatever sales data would be considered relevant “by a prudent person.” Put another way, relevant sales data are those data properly considered relevant. In its 48 CFR 215.402, the proposed rule states that the “standard” for determining the adequacy of pricing data is “whether a prudent person” would consider it adequate. If the pricing data is not adequate, COs should request uncertified cost data “to the extent that a prudent person would consider necessary...” Nothing in this definition or policy enables a CO to analyze his or her own price reasonableness determinations to make a more prudent determination, or to establish more conclusively the prudence of any past decision. If a CO were not already able to make prudent pricing decisions before reading these definitions and policy, no part of the proposed rule’s circular logic would enable him to do so.

The proposed rule’s process for proposal analysis is confusing and would encourage needless requests for uncertified cost data. The proposed rule employs these flawed definitions and policies in its proposed 48 CFR 215.404-1, “Proposal analysis techniques,” a needless, far less informative, and unhelpful attempt to recast the proposal analysis techniques at 48 CFR 15.404-1, especially the price analysis techniques at 48 CFR 15.404-1(b). The proposed section, which essentially creates a DoD-specific set of proposal analysis techniques out of whole cloth, creates a hierarchy for determining whether a proposed price is fair and reasonable, preferring first “relevant sales data” for the same item reflecting “market-based pricing.” Next in the order of preference are “relevant sales data” for similar items reflecting “market-based pricing.” Less preferred are “relevant sales data” for the same item not reflecting “market-based pricing.” And least preferred are “relevant sales data” for similar items not reflecting “market-based pricing.” Nothing in the proposed process even suggests which level of data would be considered adequate (or not) to establish price reasonableness. This omission hardly constitutes clarification.

The next paragraph, subsection (ii), delivers the coup de grâce to price analysis for non-developmental items other than COTS items, including those commercial items “of a type” and “only offered for sale.” It states, “The contracting officer may obtain additional data necessary to verify the price to be paid is fair and reasonable. However, if relevant sales data for the same supplies or services being acquired reflects

market-based pricing, and is made available for the contracting officer to review, the contracting officer shall not obtain uncertified cost data.” In this formulation, a CO is prohibited from seeking uncertified cost data only in the case of a COTS item with high-volume commercial sales, and a CO can thus reasonably conclude that he or she has permission to seek uncertified cost data in all other circumstances. Whether a CO will do so is left to unpredictable, inconsistent individual discretion—the very opposite of congressional intent. **While never explicitly stating as much, the rule sends a clear message to COs looking to avoid criticism of their price reasonableness determinations: when you are pricing any commercial item besides a COTS item, forgo price analysis techniques—as this proposed rule does—and seek uncertified cost data.**

The proposed rule carefully avoids the outright elimination of commercial items “of a type” and “offered for sale” or military-purpose non-developmental items. But the impact of the proposed rule will have the same outcome, at least as it pertains to using price analysis to establish price reasonableness for such items. COs are likely to read and interpret the rule, especially in light of amplified levels of criticism by oversight entities, as an encouragement to seek uncertified cost data for all commercial items besides COTS items. **The following concerns are based on our understanding of how the proposed rule is likely to impact the process of determining a fair and reasonable price for commercial items.**

The proposed rule is conceptually flawed. At its most fundamental level, the concepts underpinning the proposed rule contradict both guidance from the highest levels of DoD and basic principles of economic value that should guide all marketplace decisions, including those of DoD.

The proposed rule undermines the vision and intent of the Secretary of Defense to gain access to commercial technology, including from providers in Silicon Valley. The Secretary of Defense has announced a plan to gain more “non-traditional,” predominantly commercial, suppliers in the defense supply chain. For the reasons stated below, CODSIA believes this proposed rule would irretrievably undermine the Secretary’s initiatives in this area. The proposed rule disincentivizes rather than incentivizes commercial participation. Seeking sales data from commercial firms to justify prices and then to provide a basis of negotiation has a chilling effect on the participation of commercial firms in sales to the U.S. Government. This chilling effect is especially severe for high-technology firms. The Secretary has declared his interest in attracting such firms, but they are not dependent on government sales for a significant percentage of their revenue. In most such cases, government sales are a marginal segment of their overall market.

A commercial firm’s sales data are paramount trade secrets on a par with patents. Ignoring customary and proven methods of price analysis in favor of collecting such trade secrets will only repel commercial firms from the DoD market and induce current market participants to exit or spin off their government-facing entities. Recent failures by the U.S. Government to protect its own highly sensitive data from theft have increased the anxiety and justifiable concern about sharing competition-sensitive information with the government.

The proposed rule minimizes the importance of the overall product value as an element of price reasonableness. The United States has the world’s finest military for three reasons: outstanding people, realistic and continuous training, and cutting-edge equipment. To remain predominant, we must have all three.

For that reason, the acquisition workforce of the Department of Defense faces a daunting task: collective responsibility for one of the three key requirements of our national military power. Each

program and contracting action should contribute to our military strength. Further adding to the difficulty, the cost of each program and contracting decision is closely scrutinized by oversight authorities both inside and outside of the Pentagon, and a CO faces potential criticism whenever an auditor believes the CO may have overpaid for a good or service.

Price reasonableness determinations should always include consideration of the value provided to the warfighter. While oversight officials are universally vigilant about program costs, few demonstrate such vigilance over a program's contributions to our military strength. In fact, the *Performance of the Defense Acquisition System: 2013 Annual Report* made this very point in its section entitled, "Judging Benefits Against Cost."¹¹ Investigators and auditors question purchase prices down to the penny but appear to devote little consideration to the contributions the purchased good or service will make to our national security. COs know with confidence that their decisions will be graded on cost, but far fewer reviews are made of the relationship of costs to outcomes. A quote from the 2013 testimony of Pierre Chao of the Center for Strategic and International Studies before the House Armed Services Committee sums up the current environment: "Culturally we have evolved to a point where the system would rather pay \$1 billion and 5 percent profit for a defense good, than \$500 million and 20 percent profit. Even though in that example the taxpayer would save over \$400 million, the focus would be on why 20 percent of profit was paid."¹²

On the other hand, the price analysis techniques at 48 CFR § 15.404-1(b) require complete and rigorous use of analytical procedures and techniques. These techniques include value analysis of the benefits DoD receives from cost reductions resulting from commercial purchases. Such cost reductions include, for example, leveraging a company's innovation and investment in new technology, significantly reducing development cost and time for the government, leveraging a broader industrial base and greater competition, leveraging a product support infrastructure, leveraging a larger sales base to reduce the overall costs of every item, avoiding the cost of inventory for government-unique parts, leveraging parts obsolescence management, intellectual property developed at private expense, supply chain integrity, quality, and traceability, and reduction of the risk involved in materiel cost fluctuation in the commodity marketplace.

Instead of reinforcing the principle of value, this proposed rule encourages COs to satisfy themselves exclusively with cost data. According to the proposed rule, COs should compare the costs to the taxpayer to buy with the costs to the vendor to produce. The proposed rule places no emphasis on relating a proposed price to its marketplace alternatives and company investments. By failing to bring tangible and demonstrated value into the consideration of a fair and reasonable price, the proposed rule leaves the taxpayer at risk of purchasing a good or service that, when all is said and done, fails to deliver national security value commensurate to its price, however well a CO may have justified that price based on cost data.

¹¹ Kendall, Frank. *Performance of the Defense Acquisition System: 2013 Annual Report*. Department of Defense: Jun3 28, 2013, pp. 3-4. Available at <http://www.defense.gov/Portals/1/Documents/pubs/PerformanceoftheDefenseAcquisitionSystem-2013AnnualReport.pdf>.

¹² "Twenty-Five Years of Acquisition Reform: Where Do We Go From Here?" Statement of Pierre A. Chao before the Committee on Armed Services, U.S. House of Representatives, October 29, 2013, available at <http://docs.house.gov/meetings/AS/AS00/20131029/101414/HHRG-113-AS00-Wstate-ChaoP-20131029.pdf>.

Additional training on applying value-based pricing concepts is essential to maintaining the world's finest military. The Secretary's push to get Silicon Valley entrepreneurs into the defense supply chain reflects the desire for greater value, whatever the prices paid. This proposed rule unfortunately emphasizes just the opposite. By focusing on cost alone without considering value, COs risk considering high-cost items reasonably priced regardless of low-cost alternatives presenting a greater value.

The proposed rule conflicts with federal law and congressional intent.

The proposed rule would make it more difficult to acquire commercial items, contradicting federal law. In that the proposed rule would make it more confusing and difficult for COs to establish a fair and reasonable price for any commercial item besides a COTS item, it contradicts 10 U.S.C. § 2377, "Preference for acquisition of commercial items," which states in subsection (b)(5) that the head of an agency shall, to the maximum extent practicable, "revise the agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items..."¹³ In that this proposed rule does just the opposite without legal basis, it contravenes the law.

The proposed rule would, in its effects described earlier in the letter, discourage the possible use of price analysis for commercial items "only offered for sale" and "of a type" and "non-developmental items," contradicting federal law. According to 41 U.S.C. § 3501, subsection (b)(2), COs must first exhaust price analysis techniques before requesting cost information for commercial items.¹⁴ But because the proposed rule glosses over the many price analysis techniques found in the FAR,¹⁵ the proposed rule contradicts either 41 U.S.C. § 103, which establishes as commercial items those items "only offered for sale" and "of a type," and "nondevelopmental items,"¹⁶ or 41 U.S.C. § 3501, which states that cost analysis can be performed for commercial items only after all price analysis options are fully exhausted without establishing a fair and reasonable price.

The proposed rule undermines the intent of multiple provisions of both the House and Senate versions of the draft FY16 NDAA. In that the proposed rule would limit the CO's ability to use comparisons to the prices of the same or similar items in the marketplace, it appears to contradict several provisions of the two draft FY16 NDAs, including H.R. 1735, Section 805, which amends 10 U.S.C. § 2370 by clarifying that, "the contracting officer may request the offeror to submit prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers."¹⁷ The same goes for Section 852 of H.R. 1735, which amends 10 U.S.C. §

¹³ 10 U.S.C. § 2377, available at <http://uscode.house.gov/view.xhtml?edition=prelim&req=granuleid%3AUSC-prelim-title10-section2377&num=0&hl=false>.

¹⁴ 41 U.S.C. § 3501, available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title41-section3501&num=0&edition=prelim>, (b)(2) states, "To the extent necessary to make a determination under paragraph (1), the contracting officer may request the offeror to submit—(A) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and (B) **if the contracting officer determines that the information described in subparagraph (A) is not sufficient to determine the reasonableness of price**, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates" (**emphasis added**).

¹⁵ Price analysis techniques are itemized at 48 CFR § 15.404-1(b), available at http://www.ecfr.gov/cgi-bin/text-idx?SID=e122e5818dc9c5f722b140570730636c&mc=true&node=se48.1.15_1404_61&rgn=div8.

¹⁶ 41 U.S.C. § 103 is available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title41-section103&num=0&edition=prelim>.

¹⁷ H.R. 1735, available at <https://www.congress.gov/114/bills/hr1735/BILLS-114hr1735eh.pdf>.

2306a(b) with a new paragraph: “A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the government for the same or similar items in establishing price reasonableness on a subsequent purchase...” The limitation on the usefulness of price analysis even more directly contradicts the Senate substitute amendment to H.R. 1735, Section 864, which amends 10 U.S.C. § 2379 subsection (d) that requires the offeror to submit “prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers.” If the CO determines the offeror does not have access to and cannot provide this information, Section 864 establishes a hierarchy of information to determine the reasonableness of price which differs substantially in its value-based assessment from the cost-based approach of the proposed rule: “(i) prices for the same or similar items sold under different terms and conditions; (ii) prices for similar levels of work or effort on related products or services, (iii) prices for alternative approaches; and (iv) other relevant information that can serve as the bases for price assessment...”¹⁸ If these provisions pass into law, especially the Senate’s Section 864, the proposed rule would need to be rescinded to accommodate the legal priority ordering of proposal and price analysis techniques.

The proposed rule’s definition of “market-based pricing” applies a “percentage of sales test,” explicitly contrary to the congressional intent of the FASA. The proposed DFARS rule establishes a “percentage of sales test” in its definition of “market-based pricing.” Congress expressly rejected this approach in passing FASA. In the discussion of Section 1202 of FASA in H.R. Conf. Rpt. 103-712, the conferees state: “The existing regulations apply a ‘percentage of sales test’, which compares a company’s sales to the general public to the company’s sales to the federal government, for the purposes of determining whether a product is sold in substantial quantities to the general public. Under this approach, two companies that sell precisely the same number of an identical item to the general public are treated differently, depending on the quantity of items they sell to the federal government. The conferees intend that the ‘percentage of sales’ test no longer be used.”¹⁹ Section 831 of the FY13 NDAA did not repeal FASA, nor did it alter the legislative intent behind FASA. The proposed rule should therefore not reintroduce a percentage of sales test.

The proposed rule conflicts and is inconsistent with the FAR. In addition to its conflicts with federal law and congressional intent itemized above, the proposed rule conflicts with the FAR.

The proposed rule includes a definition of “market-based pricing” which conflicts with the definition of the essentially identical term, “market prices,” in FAR Part 2. The proposed rule’s definition of “market-based pricing” conflicts with the definition of “market prices” in FAR Part 2, defined as “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.”²⁰ The proposed rule introduces this inconsistency without making any distinction between the two terms or explaining to COs when to consider “market prices” operative versus “market-based pricing.” In so doing, the proposed rule thus creates needless confusion and the probability of error in the contracting process since the definition of “market prices” is far more expansive and accurate than the proposed new DFARS definition of “market-based pricing.”

¹⁸ Senate substitute amendment to H.R. 1735, available at <https://www.congress.gov/114/bills/hr1735/BILLS-114hr1735eas.pdf>.

¹⁹ H.R. Conf. Rpt. 103-712 available at http://federalconstruction.wp.lexblogs.com/wp-content/uploads/sites/344/2006/12/1994_USCCAN_2607.pdf.

²⁰ See the definition of *Commercial item*, subsection (6)(ii), available at http://www.ecfr.gov/cgi-bin/text-idx?SID=05ad6423b837deaa18a97dfc684ab971&mc=true&node=se48.1.2_1101&rgn=div8.

The proposed rule's DFARS 252.215-70XX conflicts with FAR 52.215-20, limiting what could be considered a fair and reasonable price.

The proposed rule's use of the word "shall" in (b)(1)(ii) of its proposed solicitation provision in DFARS 252.215-70XX-Basic conflicts with the use of "may" in (a)(1)(ii) and what follows of the solicitation provision in FAR 52.215-20.²¹ The use of "shall" as opposed to "may" limits what information is admissible to support a determination that a price is fair and reasonable, in contrast to the price analysis techniques outlined in FAR 15.404-1(b) and the flexible approach reflected in FAR 52.515-20. Under the proposed solicitation provision, in order to qualify for a commercial item exception from the requirement to submit certified cost or pricing for an item, information submitted by an offeror would be limited to one of the following alternatives:

- For items priced based on a catalog, either: a copy of a catalog with a statement that it is consistent with all relevant sales data, or a copy of the catalog with a statement that it is not consistent with all relevant sales data and a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price. The proposed solicitation provisions define relevant sales data as "the subset of an offeror's sales data that, as considered by a prudent person, could reasonably be expected to influence the contracting officer's determination of price reasonableness," but a further definition in the proposed provision clearly implies that it is only the case that "*Sufficient nongovernment sales to establish reasonableness of price* exist when relevant sales data reflects (sic) market-based pricing, are made available for the contracting officer to review, and contains (sic) enough information to make adjustments covered by FAR 15.404 1(b)(2)(ii)(B)."
- For items using market-based pricing, a description of the nature of the commercial market, the methodology used to establish a market-based price, and all relevant sales data. As noted elsewhere in this letter, the proposed rule makes no allowance for other possible approaches to price analysis, such as those described in FAR 15.404-1(b)(2), including the use of parametric estimating methods.
- For items included on an active Federal Supply Service Multiple Award Schedule contract in cases where an offeror can prove it has been granted a commercial item exception to the requirement to provide certified cost or pricing data.

The proposed solicitation provision would allow no other alternative approaches to qualify for a commercial item exception to the requirement to provide certified cost or pricing data to establish price reasonableness.

While the solicitation provision conflicts with the FAR as described above, its Alternate I solicitation provision for the proposed DFARS 252.215-70XX-Basic uses the term "may" instead of "shall" in the similar sentence in (b)(1)(ii), leaving open to question which word was used erroneously. If the words were not exchanged in error, it is unclear why one provision should employ a stricter standard in conflict with the FAR, and the other provision should employ the more flexible FAR standard.

²¹ 48 CFR § 52.215-20 available at http://www.ecfr.gov/cgi-bin/text-idx?SID=05ad6423b837deaa18a97dfc684ab971&mc=true&node=se48.2.52_1215_620&rgn=div8.

The proposed solicitation provision 252.215-70XX leaves out a key statement found in FAR 52.215-20(a)(2). The proposed DFARS 252.215-70XX omits: “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.” This statement should remain in any solicitation provision intended to replace FAR 52.215-20. Nothing in Section 831 directed or authorized DoD to remove this safeguard against needless requests for information; in fact, the statement’s inclusion in any proposed DFARS solicitation provision is supported by Section 831’s direction to include guidance that no additional cost information may be required when price reasonableness is established by sufficient nongovernmental sales.

Proposed DFARS solicitation provision 252.215-70XX would replace FAR 52.215-20, yet the FAR provision contains an alternate provision that is conspicuously absent from the proposed DFARS provision. Alternate IV of FAR 52.215-20 is used when certified cost or pricing data is not expected to be required but data other than certified cost or pricing will be required. Alternate IV clearly states that the submission of certified cost or pricing is not required. Experience suggests that COs often revert to demands for certified cost or pricing data when negotiations over pricing data reach a stalemate, yet the proposed rule would eliminate the alternate FAR provision that would provide certainty to offerors that certified cost or pricing data are not required. Given the congressional direction of Section 831 to limit needless requests for cost data, DoD should not have proposed to eliminate this key statement in FAR 52.215-20 Alternate IV.

The proposed rule includes numerous technical flaws. The proposed rule’s technical flaws would make it difficult or even impossible to implement it in a consistent, predictable way as intended by Congress when it enacted Section 831 of the FY13 NDAA.

In addition to its conflicts with both law and regulation, the definition of “market-based pricing” is deeply flawed in other respects. Because of fundamental flaws in the definition of “market-based pricing,” it cannot be implemented as framed by the proposed rule.

Market-based pricing is not bound by time. The rule does not offer instructions to a CO on how to evaluate commercial sales over time. For example, if the commercial item in question has sold 100 units a year for 10 years, would the denominator be 1,000 units? Accordingly, if DoD procures 125 units, does the CO use a denominator of 1,000 and a numerator of 125 units? In that analysis, the DoD would only account for 12.5 percent of the sales. Or, does the CO use the sales data from the last year, 100 units, as the denominator? In that analysis, the DoD would account for the preponderance of the market. Without some genuine standard for making such determinations, the CO is left to his or her own devices, possibly by concluding that DoD establishes the price of a commercial item at a specific point in time by comparing its bulk purchase to a narrow time window of comparable sales. This outcome would be the antithesis of what Congress required of the Department’s guidance.

Furthermore, the proposed rule does not address cases where the DoD continues to use an obsolete commercial item long after the commercial marketplace has moved on. DoD routinely buys and operates items much longer than commercial customers, and at times DoD elects not to purchase an upgrade to a newer configuration of a commercial product. Sales of an item that are predominantly commercial may therefore erode over time. In such situations, pricing previously determined to be fair and reasonable could be used together with inflation indices to efficiently compare with currently offered prices. The proposed rule, however, provides no guidance to COs to price analyze legacy commercial items and instead would have COs resort to inefficient cost analyses.

Market-based pricing establishes a precedent that the value of and investment in commercial technology developed exclusively at private expense have an expiration date. Under the market-based pricing approach, when DoD becomes the predominant buyer, COs may dismiss underlying factors such as continued investment, brand, intellectual property, engineering investments, warranty, quality controls, and manufacturing technology in a proposal analysis of uncertified cost data. This DFARS proposed rule advances the concept that the DoD is a special buyer in the marketplace not subject to value-based pricing, market factors, or alternative analyses that commercial buyers routinely use to negotiate fair and reasonable prices.

Market-based pricing discounts the cost and associated risk of capital investment in developing and maintaining technology products and services. For many commercial items, DoD did not fund the initial engineering, research and development, product design, intellectual property, and capital investment costs for commercial items at the point of initial acquisition. From the point of view of a commercial vendor, these aspects of price do not expire on a date certain—they retain value in comparison to the next best alternative the customer has in the marketplace. In the commercial marketplace, DoD is the same as any other large purchaser. Instead, the proposed rule maintains the pretense that DoD can dictate its own terms to the commercial marketplace, a proposition that is inconsistent with reality.

Market-based pricing will inhibit DoD from acquiring new technologies that are offered for sale. In the instances where commercial items are either offered for sale or for which no significant nongovernmental sales have occurred, the proposed rule encourages COs to seek uncertified cost data from the offeror. This approach will significantly limit the DoD access to new, innovative technologies in a manner inconsistent with Secretary of Defense Ash Carter’s effort to expand the partnership between the Pentagon and technology innovators as described elsewhere in this letter.

The definition of “market-based pricing” is not supported by any apparent economic analysis that would indicate that 50 is the appropriate standard percentage figure. The 50 percent threshold does not bear any meaningful economic relationship to price reasonableness. Essentially the proposed rule attempts to establish a “fair market value” standard with only one guidepost to determine fair market value, which is whether the government is a predominant buyer in the market. To analogize the standard, because the U.S. Government owns approximately 81 percent of the land in Nevada, the commercial marketplace cannot conclusively establish fair and reasonable prices for real estate within its borders. Such a laughably absurd result cannot possibly be what Congress intended. Such “rules of thumb” are only useful where the workforce is trained, experienced in, and familiar with the concept of fair market value and demonstrates that familiarity consistently across the entire workforce and over the course of many individual transactions.

The proposed rule is missing necessary or helpful guidance. In addition to its many flaws of commission, the proposed rule omits guidance that actually is necessary or would be helpful to COs in an effort to determine fair and reasonable prices.

Nothing in the proposed rule would instruct COs on how to do market research to determine a fair and reasonable price. The proposed rule includes no guidance to COs on how to evaluate the market or how to perform market research to determine the percentage of sales to nongovernment customers. COs will likely require the offeror to provide information to prove the percentage of commercial sales, even if the offeror has not been the source of all such sales and lacks information on commercial sales by competitors. The proposed rule, therefore, will result in COs comparing the offeror’s sales to the

government to the same offeror's sales to nongovernmental customers. Offerors who have chosen to do business with DoD and have been successful in such efforts will be treated less favorably than their peers that provide similar products but have captured more nongovernmental sales.

The proposed rule fails to provide instructions on how to perform price comparisons with work that a customer (including DoD) performs itself. For example, DoD performs aircraft maintenance, in some cases under subcontracts to DoD contractors, yet the proposed rule provides no guidance to COs on how to obtain information about the prices charged for such work, nor how to make comparisons between such prices and the offer under review, even if the work is essentially identical. In fact, industry experience is that COs routinely refuse to consider very meaningful information that is already in the government's possession in favor of requesting less relevant data from prime and subcontractors.

The proposed rule seems premised on the hypotheses that the prices of commercial items sold to the government are too high, the only barrier to the government's ability to negotiate better prices is a lack of information, particularly cost information, and the government obtains better prices when it performs cost analysis and negotiates on the basis of cost. These premises are inconsistent with the basic premises of commercial supply and demand that are the foundation of the global free enterprise system. The majority of the world's commerce is conducted without the buyer knowing the seller's costs and without the buyer knowing what prices the seller charges to other customers. In proposing this rule, DoD has missed the opportunity to refine its own system of market research based on available commercial options and better its procurement performance and outcomes using the demonstrated success of commercial acquisition practices and skilled negotiation.

By limiting the definition of "market-based pricing" to sales of a "particular item," DoD limits its ability to negotiate prices down to the exact part number or item model that is sold to DoD. The proposed rule's narrow view of the market ignores the fact that even if a product is sold on a sole-source basis to DoD, there are comparable products available in the marketplace that are legitimate comparisons for the purpose of evaluating prices. To use a commonplace example, if a buyer shops for a particular ink cartridge to fit a particular printer model, the prices of ink cartridges that fit other printer models are still relevant data for evaluating the reasonableness of the price of the specific cartridge that the buyer needs and can inform future printer model purchasing decisions. Similarly, aircraft parts have price ranges in the market, even if a particular part number is not interchangeable among aircraft models, yet the definition of "market-based pricing" in the proposed rule would have COs ignore such price comparisons in favor of cost data. The proposed rule also ignores the possibility that such price comparisons may produce better negotiation results in a more efficient way than cost analysis.

The proposed rule offers no guidance for the acquisition of commercial services, particularly services in support of a commercial item. Many services are sold in conjunction with items, particularly in the case of product support contracts such as performance based logistics contracts. The absence of meaningful guidance will likely lead to disagreements that delay contracting and worsen outcomes. For instance, how should a CO evaluate the market in connection with a contract for maintenance of an item that is commercial with minor modifications unique to the government if the maintenance is performed on the parts of the product that are identical to its commercial equivalent? An original equipment manufacturer may be the only source qualified to maintain the government-unique product model, yet competing the maintenance contract among a large commercial market of qualified maintainers would reduce prices and improve performance. But using the product model of price comparison in the services market makes little sense when the CO could use commercial service price comparisons to obtain a better price.

The proposed rule provides no guidance on the use of FAR 15.404-1(b) price analysis techniques to establish price reasonableness, and in fact never even uses the term, “price analysis.” The title of this DFARS proposed rule is “Evaluating Price Reasonableness for Commercial Items,” for which the primary tool is well established in the FAR, namely, price analysis. Remarkably, despite the more than five pages devoted to the proposed rule, the rule does not once even employ the term “price analysis,” which is the method, by law and regulation, that COs must use to establish price reasonableness of a commercial item. Having not even used the term, the rule certainly does not elaborate on the proper standards for thorough and accurate price analysis that could be evaluated using an objective standard—which, after all, was the purpose of the proposed rule according to its originating legislation.

This omission constitutes a significant missed opportunity, since the study required of GAO by Section 831 establishes that price analysis is the most frequent tool used by COs to establish fair and reasonable prices for commercial items.²² GAO studied 32 commercial item contracts awarded non-competitively, of which 12 involved requests for additional cost or pricing information: six cases with requests only for additional pricing information and six cases where a CO requested both pricing and cost information. For the significant majority of the contracts, 20 out of 32, or 62.5 percent, the government did not request any additional information at all from contractors in order to establish a fair and reasonable price. In only six of 32 cases, or 18.75 percent, did COs request cost data to establish a fair and reasonable price. Based on GAO’s data, this proposed rule skips past the majority of commercial purchases in order to focus on a very limited subset.

This dismissal of price analysis harms the Department in other ways as well. To avail itself of a greater proportion of commercial items, DoD must change the cultural paradigm that results in a workforce most practiced in and comfortable with cost analysis. The Department’s leaders must create a culture that not only recognizes the importance of price analysis but also actively prefers it to cost analysis. This proposed rule missed a major opportunity to begin that paradigm shift. Without such a change in paradigm and culture, the workforce will never realize the law’s commercial item preference or the Secretary’s vision for greater commercial participation in the defense supply chain.

The proposed rule provides no guidance on how to use commercial cost information, in the form regularly maintained by the business, to determine a reasonable commercial price. The proposed rule fails to provide guidance in the event that the offeror does not have a system to collect the uncertified cost data desired by the government. A commercial business may not have per-item cost data that the CO is likely to request, nor would a commercial business have a system to collect indirect cost data or calculate an indirect rate to apply to each item in order to establish the total cost of the item in accordance with government accounting systems. A commercial business may not have a system to remove unallowable costs from cost data that it maintains for its commercial business, since unallowable costs do not exist in the commercial marketplace.

Furthermore, the proposed rule provides no guidance for evaluating profit margins for commercial products. Commercial sales involve risks, rewards, and economic models that are fundamentally different from government sales, yet COs are likely to evaluate commercial profits through a lens of DoD profits on per-item costs. Earnings from today’s sales of successful products developed years earlier fund the development of new technologies and sustain the production of items that are not yet

²² Woods, William T. *Defense Contracts: DOD’s Requests for Information from Contractors to Assess Prices*. Government Accountability Office: August 2015. Available at <http://www.gao.gov/assets/680/671946.pdf>.

profitable. COs are not trained to understand cost and profit analysis in a commercial environment, and the proposed rule provides no guidance that would enable them to do so.

The proposed rule creates an assortment of other insurmountable issues. In addition to all of the other issues described above, the proposed rule also includes a number of other assorted problems.

The proposed rule includes even stricter rules for subcontract pricing than for contract pricing that have no basis in the FAR. The proposed solicitation clause 252.215-70XX in both its Basic and Alternate I forms requires subcontract price evaluation in (d)(5)(i) that has no equivalent in the solicitation provisions of FAR Part 52. The proposed provision would require that contractors obtain “whatever information is necessary” from subcontractors to support a determination of price reasonableness, which may include “cost data to support a commerciality determination, cost realism analysis, should-cost review, or any other type of analysis addressed in FAR part 15 and DFARS part 215.” This requirement creates several issues:

- Other than the requirement for the limited cases covered under 10 USC 2379 and DFARS 234.7002, both of which may be eliminated in the Fiscal Year 2016 National Defense Authorization Act, there is no requirement or method anywhere in statute, the FAR, or the DFARS for using cost data to support a commerciality determination for an item at either the prime or subcontract level.
- The insertion of the word “cost” in each of the categories of specific data, review, or analysis referenced in the provision suggests that cost information is required to be obtained from subcontractors to establish price reasonableness.
- The inclusion of the phrase “or any other type of analysis addressed in FAR part 15 and DFARS part 215” would necessitate that both the requirements for information in FAR Part 15 and the very restrictive proposed DFARS part 215 would have to be met for an adequate determination of price reasonableness for items obtained from a subcontractor under a contract.
- The subjective language directing prime contractors to obtain “whatever information is necessary” and “all data necessary” from subcontractors provides insufficient guidance about the types and amount of data required for a determination of price reasonableness. COs ultimately make the final determination regarding the sufficiency of data, so the lack of guidance provided by the proposed rule will inevitably result in frustrating and prolonged negotiations between prime contractors and subcontractors as prime contractors struggle to balance the need to request enough data to satisfy COs with the need to limit the data burden on commercial suppliers who are already struggling to provide the level of cost or pricing data currently required by the government.
- The requirement to submit “additional information” for proposal analysis within 10 days is unreasonable. The proposed rule does not limit what this additional information might entail, and thus establishes no basis for determining compliance or non-compliance.
- The proposed rule establishes no basis for the methods the prime contractor will use to establish price reasonableness for subcontracts.

The net effect of these requirements would be a much more intrusive, rigid, and ill-defined set of requirements for items supplied by subcontractors than for commercial items supplied by a prime

contractor under a contract. Paragraph (d)(5) of the proposed solicitation provision in both proposed variants should never be used in future solicitations.

The proposed rule makes a distinction between certified and uncertified cost data, but the government's recent aggressive pursuit of FCA cases makes uncertified versus certified cost data a distinction without a difference. The proposed rule defaults to "uncertified" cost data whenever other information is deemed insufficient to determine price reasonableness. However, no practical distinction exists between "uncertified" cost data and cost or pricing data certified to be current, accurate, and complete under FAR 15.406-2.²³ Neither the FCA nor the False Statements Act requires that the provider of "false" information to the U.S. Government include a certification that information is true. The U.S. Government's aggressive use of the FCA to bring large lawsuits against contractors for proposals premised on what the government later judges as "false" information means that there is equivalent risk for a commercial contractor providing "uncertified" cost data as for a contractor subject to the requirement to submit certified cost or pricing data. In fact, the FCA has been interpreted as not even requiring proof that the government relied on the false information. In order to avoid a future lawsuit, any offeror providing cost data must ensure that the information is accurate and sufficiently current and complete so as to not mislead, even if the government does not use the information in negotiations. Commercial offerors will have to invest in expensive systems and processes to collect and verify cost information before providing it to the U.S. Government, the only customer that requires it.

The proposed rule creates an extreme standard for sharing relevant sales data. First, the proposed rule does not allow for commercial sales agreements that contain confidentiality clauses that would require permission from a commercial customer for the CO to review the agreement. Second, the proposed DFARS rule would require that the CO have access to "all relevant sales data" within 10 days of a written request to review the data. The phrase "all relevant sales data," sets a burdensome and costly standard of completeness. To do business with DoD, a commercial company would need a system to collect and review all sales data, potentially over a period of many years and for all of its customers, to make that data available to a CO. This requirement would be an incredible burden on any company for which sales to DoD are the minority of its business.

Based on past experience with the DoD IG, the IG will very strictly interpret the new standard, making it all the more difficult for COs to procure commercial items. However carefully or deftly DoD intended to draft its new rule of thumb and standard, and however ably COs implement the new standard and use price analysis to establish fair and reasonable prices for commercial items, recent history has shown that the DoD IG is likely to treat the 50 percent threshold as a bright line standard and grade COs based on their adherence to that standard. This tendency would be further worsened by the proposed language in Section 215.403-5(a): "[t]he 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." This language implies that within DoD there are other government officials besides the CO who are ultimately responsible for determining fair and reasonable prices, such as the IG. Formal criticisms of COs by the IG permeate the culture of the acquisition workforce and become unwritten rules followed more strongly than the law, FAR, or DFARS. Therefore, DoD should be very cautious about "rules of thumb" or other gross stereotypes applied across the entire universe of goods and services that the IG could misinterpret as a threshold to be vigorously maintained and enforced.

²³ 48 CFR 15.406-2 available at http://www.ecfr.gov/cgi-bin/text-idx?SID=b0d244e2c602e42b043710e9e54524d1&mc=true&node=se48.1.15_1406_62&rgn=div8.