

Government Contracts Blog

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Redefining Cost Or Pricing Data

By [Alexander W. Major](#)

Effective October 1, 2010, the final rule amending FAR subpart 15.4 expands government contracting officers' ability to obtain cost or price-related data for *all* contracts, including currently exempted commercial-items contracts. The amended rule is intended to clarify the FAR's definition of "cost or pricing data" and to make the definition consistent with that used in the Truth in Negotiations Act ("TINA") (10 U.S.C. §2306a and 41 U.S.C. §254b). The final rule's effect, however, may increase both a government contractor's disclosure requirements and its False Claims Act vulnerability.

Under the current iteration of the FAR, "cost or pricing data" require certification pursuant to FAR 15.406-2. *See* FAR 2.101. Commercial-item contracts have long been exempted from the requirement to submit such data. *See* FAR 15.403-1(c)(3). But, in the amended final rule, the FAR now differentiates between "*certified* cost or pricing data," "data other than certified cost or pricing data," and "cost or pricing data" generally. These distinctions now unbind the government and may provide it access to formerly unavailable cost and pricing data associated with commercial-items contracts, as needed to examine price fairness and reasonableness. This expanded breadth likely will require more detailed pricing submissions by contractors, including commercial-item contractors, and, accordingly, may provide increased fodder for DOJ False Claims Act allegations. To be sure, the recent Department of Defense procurement changes include express directions that contracting officers are now expected "to conduct negotiations with all single bid offerors and that the basis of that negotiation shall be cost or price analysis, as the case may be, using non-certified data." *See* [Can DoD Be "The Biggest Loser"? Gates Unveils DoD's New Fiscal Diet Plan](#).

The final rule, announced in the Federal Register on August 30, 2010 (75 Fed. Reg. 53135), is not markedly different from that proposed on April 23, 2007 (72 Fed. Reg. 20092). The 2007 proposed rule and the implications of its definitions were discussed in detail in the October 8, 2007 *Legal Times* article "*Rolling Back Past Reforms*" authored by two of our Government Contracts lawyers, John W. Chierichella and Marko W. Kipa, and reprinted on this Blog with permission [here](#).

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