

15.407-1 Defective certified cost or pricing data.

(a) If, before agreement on *price*, the *contracting officer* learns that any *certified cost or pricing data* submitted are inaccurate, incomplete, or noncurrent, the *contracting officer shall* immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract *price*. The *contracting officer shall* consider any new data submitted to correct the *deficiency*, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotiating the contract *price*. The *price* negotiation memorandum *shall* reflect the adjustments made to the data or the corrected data used to negotiate the contract *price*.

(b)

(1) If, after award, *certified cost or pricing data* are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on *price* or an earlier date agreed upon by the parties given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a *price* adjustment, including profit or fee, of any significant amount by which the *price* was increased because of the defective data. This entitlement is ensured by including in the contract one of the clauses prescribed in 15.408(b) and (c) and is set forth in the clauses at 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data, and 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data-Modifications. The clauses give the Government the right to a *price* adjustment for defects in *certified cost or pricing data* submitted by the contractor, a prospective subcontractor, or an actual subcontractor.

(2) In arriving at a *price* adjustment, the *contracting officer shall* consider the time by which the *certified cost or pricing data* became reasonably available to the contractor, and the extent to which the Government relied upon the defective data.

(3) The clauses referred to in paragraph (b)(1) of this subsection recognize that the Government's right to a *price* adjustment is not affected by any of the following circumstances:

(i) The contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position;

(ii) The *contracting officer should* have known that the *certified cost or pricing data* in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the *contracting officer*;

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(iv) *Certified cost or pricing data* were required; however, the contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract.

(4) Subject to paragraphs (b)(5) and (6) of this subsection, the *contracting officer shall* allow an offset for any understated *certified cost or pricing data* submitted in support of *price* negotiations, up to the amount of the Government's *claim* for overstated *pricing* data arising out of the same *pricing* action (e.g., the initial *pricing* of the same contract or the *pricing* of the same *change order*).

(5) An offset *shall* be allowed only in an amount supported by the facts and if the contractor-

(i) Certifies to the *contracting officer* that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset in the amount requested; and

(ii) Proves that the *certified cost or pricing data* were available before the "as of" date specified on the Certificate of Current *Cost or Pricing Data* but were not submitted. Such offsets need not be in the same cost groupings (*e.g.*, material, direct labor, or *indirect costs*).

(6) An offset *shall* not be allowed if-

(i) The understated data were known by the contractor to be understated before the "as of" date specified on the Certificate of Current *Cost or Pricing Data*; or

(ii) The Government proves that the facts demonstrate that the *price* would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on the Certificate of Current *Cost or Pricing Data*.

(7)

(i) In addition to the *price* adjustment, the Government is entitled to recovery of any overpayment plus interest on the overpayments. The Government is also entitled to penalty amounts on certain of these overpayments. Overpayment occurs only when payment is made for *supplies* or services accepted by the Government. Overpayments do not result from amounts paid for contract financing, as defined in 32.001.

(ii) In calculating the interest amount due, the *contracting officer shall*-

(A) Determine the defective *pricing* amounts that have been overpaid to the contractor;

(B) Consider the date of each overpayment (the date of overpayment for this interest calculation *shall* be the date payment was made for the related completed and accepted contract items; or for *subcontract* defective *pricing*, the date payment was made to the prime contractor, based on prime contract progress billings or deliveries, which included payments for a completed and accepted *subcontract* item); and

(C) Apply the underpayment interest rate(s) in effect for each quarter from the time of overpayment to the time of repayment, utilizing rate(s) prescribed by the Secretary of the Treasury under 26 U.S.C.6621(a)(2).

(iii) In arriving at the amount due for penalties on contracts where the submission of defective *certified cost or pricing data* was a knowing submission, the *contracting officer shall* obtain an amount equal to the amount of overpayment made. Before taking any contractual actions concerning penalties, the *contracting officer shall* obtain the advice of counsel.

(iv) In the demand letter, the *contracting officer shall* separately include-

(A) The repayment amount;

(B) The penalty amount (if any);

(C) The interest amount through a specified date; and

(D) A statement that interest will continue to accrue until repayment is made.

(c) If, after award, the *contracting officer* learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately verified by the contractor as of the time of negotiation, the *contracting officer shall* request an audit to evaluate the accuracy, completeness, and currency of the data. The Government *may* evaluate the profit-cost relationships only if the audit reveals that the data certified by the contractor were defective. The *contracting officer shall* not reprice the contract solely because the profit was greater than forecast or because a contingency specified in the submission failed to materialize.

(d) For each advisory audit received based on a postaward review that indicates defective *pricing*, the *contracting officer shall* make a determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, the *contracting officer should* give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. The *contracting officer shall* prepare a memorandum documenting both the determination and any corrective action taken as a result. The *contracting officer shall* send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative *contracting officer* (ACO). A copy of the memorandum or other notice of the *contracting officer's* determination *shall* be provided to the contractor. When the *contracting officer* determines that the contractor submitted defective *cost or pricing data*, the *contracting officer*, in accordance with agency procedures, *shall* ensure that information relating to the *contracting officer's* final determination is reported in accordance with 42.1503(h). Agencies *shall* ensure updated information that changes a *contracting officer's* prior final determination is reported into the FAPIIS module of Contractor Performance Assessment Reporting System (CPARS) in the event of a—

(1) *Contracting officer's* decision in accordance with the Contract Disputes statute;

(2) Board of Contract Appeals decision; or

(3) Court decision.

(e) If both the contractor and subcontractor submitted, and the contractor certified, or *should* have certified, *cost or pricing data*, the Government has the right, under the clauses at 52.215-10, *Price Reduction for Defective Certified Cost or Pricing Data*, and 52.215-11, *Price Reduction for Defective Certified Cost or Pricing Data-Modifications*, to reduce the prime contract *price* if it was significantly increased because a subcontractor submitted defective data. This right applies whether these data supported *subcontract* cost estimates or supported firm agreements between subcontractor and contractor.

(f) If Government audit discloses defective subcontractor *certified cost or pricing data*, the information necessary to support a reduction in prime contract and *subcontract prices* may be available only from the Government. To the extent necessary to secure a prime contract *price* reduction, the *contracting officer should* make this information available to the prime contractor or appropriate subcontractors, upon request. If release of the information would compromise Government security or disclose trade secrets or confidential business information, the *contracting officer shall* release it only under conditions that will protect it from improper disclosure. Information made available under this paragraph *shall* be limited to that used as the basis for the prime contract *price* reduction. In order to afford an opportunity for corrective action, the *contracting officer should* give the prime contractor reasonable advance notice before determining to reduce the prime contract *price*.

(1) When a prime contractor includes defective *subcontract* data in arriving at the *price* but later awards the *subcontract* to a lower priced subcontractor (or does not *subcontract* for the work), any adjustment in the prime contract *price* due to defective *subcontract* data is limited to the difference (plus applicable *indirect cost* and profit markups) between the *subcontract price* used for *pricing* the prime contract, and either the actual *subcontract price* or the actual cost to the contractor, if not subcontracted, provided the data on which the actual *subcontract price* is based are not themselves defective.

(2) Under cost-reimbursement contracts and under all fixed-*price* contracts except firm-fixed-*price* contracts and fixed-*price* contracts with economic *price* adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor *certified cost or pricing data* shall be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15.408(b) and (c). The Government has a continuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract *price*.

Parent topic: 15.407 Special cost or pricing areas.