

CERTIFICATE OF CURRENT COST OR PRICING DATA

What is it, and when is a Certificate Required?

INTRODUCTION

Contracting officers have a duty to purchase supplies and services at **fair and reasonable prices**¹. One method of ensuring that bid proposals and contracts are based on fair and reasonable prices is to obtain a Certificate of Current Cost or Pricing Data from the contractor. This article will discuss what a Certificate is, when it is and is not required, and steps contractors can take to mitigate their risk of **false claims violations**.

WHAT IS A CERTIFICATE OF CURRENT COST OR PRICING DATA?

A Certificate of Current Cost or Pricing Data (“Certificate”) is required in certain circumstances under FAR 15.403-4. When required (see below), the contractor must execute a Certificate and include it in the contract file. In submitting a Certificate², a contractor **certifies** that the cost or pricing data in support of a bid or contract are **accurate, complete, and current** as of the date of submission. It also includes the cost or pricing data that supports any advance agreements and forward pricing rate agreements that are part of the proposal.

The purpose of the Certificate is to assist the contracting officer in evaluating the reasonableness of the proposed pricing. It also serves as a mechanism to detect and discourage fraud and false claims.

WHEN IS A CERTIFICATE REQUIRED?

The requirements surrounding Certificates are laid out in Part 15 of the FAR, which sets forth the policies and procedures for negotiated contracts³. These policies and procedures denote that Certifications may be required⁴ for negotiated prime contracts (including subcontracts) and contract modifications, including modifications to contracts awarded by sealed bidding. The FAR sets forth both when a Certificate is required, and when a Certificate is prohibited.

A **Certificate is required** before any of the following actions that exceed the simplified acquisition threshold of \$700,000:

¹ FAR 15.402

² The Certification form is located at FAR 15.406-2.

³ FAR 15.000 (“A contract awarded using other than sealed bidding procedures is a negotiated contract”).

⁴ The contracting officer has discretion to not require a Certificate if certain criteria are met. See FAR 15.403-1, 403-2

- (1) Award of any negotiated contract,
- (2) Award of any subcontract at any tier, if the contractor and subcontractor were required to submit certified cost & pricing data, or
- (3) Modification of any sealed bid or negotiated contract (whether Certification was initially required or not). It should be noted that modifications for price adjustments include both increases and decreases; therefore, an increase of 400,000 and decrease of 350,000 would exceed the threshold amount, triggering a requirement for certification.

Conversely, a **Certificate is prohibited** when any of the following exceptions apply⁵:

- (1) The acquisition (or contract) is at or below the simplified acquisition threshold of \$700,000,
- (2) The CO determines that prices are based on adequate competition (i.e., two or more responsible bidders who meet the Government's expressed requirements),
- (3) The prices are set by law or regulation,
- (4) A commercial item is being acquired (as defined in FAR 2.101), or
- (5) The CO requests and is granted a waiver, believing that exceptional circumstances exist, and has sufficient data available to determine a fair and reasonable price.

Sealed bids under FAR 14.000 et seq., are evaluated without discussions or negotiations. Therefore, **Certificates cannot be required on a sealed bid**. However, if all bid proposals are at unreasonable prices or only one bid is received, and the contracting officer cannot determine the reasonableness of the bid price, the invitations for bid may be cancelled and all bids rejected⁶. Under some circumstances, the contracting agency may decide to continue the acquisition by negotiating and making an award without issuing a new solicitation⁷. Such negotiations on bids are then governed by Part 15 of the FAR, and are subject to the Certification rules.

Note: If a part of a sealed bid is negotiated before award, the entire contract is then a negotiated contract, thus requiring certification on the entire contract.

BEWARE OF FALSE CLAIMS TRAPS

When submitting a certificate of current cost or data pricing under FAR 15.406-2(a), it is imperative to include subsection (b) of that section in order to avoid potential False Claims Act (pdf) **violations**. Subsection (b) distinguishes between **fact** and the **judgment** of the contractor.

⁵ FAR 15.403-1

⁶ FAR 14.404-1(c)(6)

⁷ FAR 14.401-1(e)(1), (f)

This section clarifies that the certification is not a representation of the accuracy of the contractor's judgment on the estimate of *future* costs or projections. Rather, the contractor certifies that the data upon which the judgment or estimate was based, is correct and distinguishable.

In short, the contractor certifies that, as of the date of certification, the information used to determine pricing, future costs, or future projections is accurate. The Certification must also include the *factual* cost or pricing data that will be used to support any advance agreements and forward pricing rate agreements that are part of the proposal.

Some examples of **factual** items that are to be certified as correct and accurate include: overhead, bond, gross receipts tax rates and payments, labor, burden rates, timesheet data, equipment rates, material costs, and subcontract and supplier written or verbal quotations.

Some examples of **judgmental** items that could and are likely to change during the life of the contract include: profit, productivity rates, material quantities, price escalation, etc.

CONCLUSION

When a Certificate of Current Cost or Pricing Data is required, contractors must be aware of what information they are certifying, and the implications of certifying too much.

If contractors fail to distinguish between what is fact and what is judgmental, they run the risk of false claims violations.

Accordingly, a seemingly small error or oversight on the Certificate could have dire consequences in the future. The prudent contractor should consult with a contracting expert before submitting a Certificate, to ensure that the correct data is being certified, and that all pertinent FAR provisions are included and addressed. So, please feel free to give us a call.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel