

PART 3

SOURCE SELECTION AND CONTRACT FORMATION

SUBPART 3-8 -- COST OR PRICING DATA AND ANALYSIS; AUDITS

3-801 Scope.

This subpart sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted.

3-802 Requirements for Cost or Pricing Data.

(1) Submission of Cost or Pricing Data - Required. Cost or pricing data shall be required in support of a proposal leading to:

(a) the pricing of any contract expected to exceed \$100,000 to be awarded by competitive sealed proposals or sole source procurement; or

(b) the pricing of any adjustment to any contract, including a contract, awarded by competitive sealed bidding, whether or not cost pricing data was required in connection with the initial pricing of the contract, as requested by the purchasing agent. However, this requirement shall not apply when unrelated and separately priced adjustments for which cost or pricing data would not be required are consolidated for administrative convenience.

(2) Submission of Cost or Pricing Data - Permissive. After making determination that circumstances warrant such action, the purchasing agent may require the offeror or contractor to submit cost or pricing data in any other situation except where the contract award is made pursuant to competitive sealed bidding. Generally, cost or pricing data should not be required where the contract or modification is less than \$2,000. Moreover, when less than complete cost analysis (for example, analysis of only specific factors) will provide a reasonable pricing result on awards or for change orders without the submission of a complete cost or pricing data, the purchasing agent shall request only that data considered adequate to support the limited extent of the cost analysis needed and need not require certification.

(3) Exceptions. Cost or pricing data need not be submitted and certified:

(a) where the contract price is based on:

(i) adequate price competition;

(ii) established catalog prices or market prices, if trade discounts are reflected in the prices; or

(iii) prices set by law or regulation; or

(b) when the purchasing agent determines in writing that the requirements for submitting cost or pricing data may be waived and the reasons for such waiver are stated in the determination. A copy of such determination shall be kept in the contract file and made available to the public upon request.

If, after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified.

If, despite the existence of an established catalog price or market price, the purchasing agent considers that a price appears unreasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by limited data pertaining to the differences in the item or services, requests should be so limited.

3-803 Submission of Cost or Pricing Data and Certification.

Cost or pricing data shall be submitted to the purchasing agent at the time and in the manner prescribed in these regulations or as otherwise from time to time prescribed by the purchasing agent. When the purchasing agent requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing. When cost or pricing data is required, the data is to be submitted prior to beginning price negotiation and the offeror or contractor is required to keep such submission current throughout the negotiations. The offeror or contractor shall certify, as soon as practicable after agreement is reached on price, that the cost or pricing data submitted is accurate, complete, and current as of a mutually determined date prior to reaching agreement. Certification shall be made using the certificate set forth in Section 3-804 of this Subpart. A refusal by the offeror to supply the required data shall be referred to the purchasing agent whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the purchasing agent who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment.

3-804 Certificate of Current Cost or Pricing Data.

(1) Form of Certificate. When cost or pricing data must be certified, the certificate set forth below shall be included in the contract file along with any award documentation required under these regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in the Utah Procurement Regulations submitted, either actually or by specific identification in writing, to the purchasing agent in support of . . .*, are accurate, complete, and current as of (date) (month) (year) . . .**

This certification includes the cost or pricing data supporting any advance agreement(s) between the offeror and the purchasing agency which are part of the proposal.

Firm

Name

Title

Date of Execution ****

(End of Certificate)

*Describe the proposal, quotation, request for price adjustment of other submission involved, giving appropriate identifying number

(e.g., RFP No.).

**The effective date shall be the date when price negotiations were concluded and the contract price was agreed to. The responsibility of the offeror or contractor is not limited by the personal knowledge of the offeror's or contractor's negotiator if the offeror or contractor had information reasonably available at the time of agreement, showing that the negotiated price is not based on accurate, complete, and current data.

***This date should be as close as practical to the date when the price negotiations were concluded and the contract price was agreed to.

(2) Limitation of Representation. Because the certificate pertains to cost or pricing data, it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, apply to the data upon which the offeror's or contractor's judgment is based. A certificate of current cost or pricing data is not a substitute for examination and analysis of the offeror's or contractor's proposal.

(3) Inclusion of Notice and Contract Clause. Whenever it is anticipated that a certificate of current cost or pricing data may be required, a clause giving notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving the purchasing agency a contract right to a price adjustment, that is, to a reduction in the price to what it would have been if the contractor had submitted accurate, complete, and current data.

(4) Exercise of option. The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

3-805 Defective Cost or Pricing Data.

(1) Overstated Cost or Pricing Data. If certified cost or pricing data is subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the purchasing agency shall be entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is assumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee; therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the purchasing agent is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(2) Understated Cost or Pricing Data. In determining the amount of an adjustment, the contractor shall be entitled to an adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the purchasing agency's claim for over-stated cost or pricing data arising out of the same pricing action.

(3) Dispute as to Amount. If the contractor and the purchasing agent cannot agree as to the amount of adjustment due to defective cost or pricing data, the purchasing agent shall set an amount in accordance with Subsections 3-805(1) and 3-805(2) of this Subpart.

3-806 Price Analysis Techniques.

Price analysis is used to determine if a price is reasonable and acceptable. It involves a comparison of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

(1) price submissions of other prospective bidders or offerors;

(2) prior price quotations and contract prices charged by any bidder, offeror, or contractor;

(3) prices published in catalogs or price lists; and

(4) prices available on the open market.

In making such analysis, consideration must be given to any differing delivery factors and contractual provisions, terms and conditions.

3-807 Cost Analysis Techniques.

(1) General. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

(a) specific elements of costs;

(b) the necessity for certain costs;

(c) the reasonableness of amounts estimated for the necessary costs;

(d) the reasonableness of allowances for contingencies;

(e) the basis used for allocation of indirect costs;

(f) the appropriateness of allocations of particular indirect costs to the proposed contract; and

(g) the reasonableness of the total cost or price.

(2) Evaluations. Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent price and cost estimates. They shall also include consideration of whether such costs are reasonable and allocable under these regulations.

3-808 Audit.

(1) The purchasing agent may, at reasonable times and places, audit or cause to be audited, the books and records of a contractor prospective contractor, subcontractor, or prospective subcontractor which are related to:

(a) the cost of pricing data submitted hereunder;

(b) a contract, including subcontracts, other than a firm fixed-price contract, awarded pursuant to these regulations and the Utah Procurement Code.

(2) An audit performed by an auditor selected or approved by the purchasing agent shall be submitted containing at least the following information:

(a) for cost and pricing data audits:

(i) a description of the original proposal and all submissions of cost or pricing data;

(ii) an explanation of the basis and the method used in preparing the proposal;

(iii) a statement identifying any cost or pricing data not submitted but examined by the auditor which has a significant affect on the proposed cost or price;

(iv) a description of any deficiency in the cost or pricing data submitted and an explanation of its affect on the proposal;

(v) a statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and

(vi) a statement identifying any information obtained from other sources;

(b) the number of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;

(c) the use of federal assistance funds; or

(d) the fluctuation of market prices affecting the contract.

The scope of the audit may be limited by the purchasing agent.

(3) The contract audits, the scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the audited data relates and a statement of the degree to which the auditor believes the audited data and evidence compliance with those terms.

3-809 Retention of Books and Records.

(1) Relating to Cost and Pricing Data. Any contractor who receives a contract, change order, or contract modification for which cost or pricing data is required shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract.

(2) Relating to Other than Firm Fixed-Price Contracts. Books and records that relate to a contract in excess of \$25,000, including subcontracts, other than a firm fixed-price contract, shall be maintained:

(a) by a contractor, for three years from the date of final payment under the contract; and

(b) by a subcontractor, for three years from the date of final payment under the subcontract.