

Chart A: Major Changes to Obtaining Fair and Reasonable Cost Information

Policy Change	Impact
Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. Law 103-355)	Reduced oversight on a large number of government purchases, in part by undermining the Truth in Negotiations Act (TINA), later renamed the Truthful Cost or Pricing Data statute, requirements to submit accurate cost or pricing data. The law created an exception to supplying cost or pricing data for “commercial items that are sold in substantial quantities to the general public.”
Clinger-Cohen Act (Federal Acquisition Reform Act of 1996) (Pub. Law 104-106)	Further relaxed acquisition oversight and expanded the definition of, and exemptions available to, so-called “commercial items.” ¹ Specifically, the law exempted all commercial items, not only those sold in substantial quantities.
Sec. 831, FY 2013 National Defense Authorization Act (NDAA) (Pub. Law 112-239)	Required the Department of Defense (DoD) to issue guidance on commercial items, which included looking at previous prices, policies for requesting uncertified cost information, and banning a request for additional cost information if there are “sufficient non-Government sales to establish reasonableness of price.”
Sec. 815, FY 2015 NDAA (Pub. Law 113-291)	Allowed DoD to use simplified acquisition procedures for “commercial items.” The simplified acquisition threshold at the time was \$150,000. ²
Sec. 851, FY 2016 NDAA (Pub. Law 114-92)	Required DoD to create a publicly available database to oversee the making of commercial item determinations. The law also promoted using prior commercial item determinations and placed burdens on contracting officers who did not abide by a prior commercial item determination.
Sec. 852, FY 2016 NDAA (Pub. Law 114-92)	Significantly restricted a contracting officer’s ability to obtain actual cost or pricing information on major weapon systems. ³

¹ For more analysis see Project On Government Oversight, *Pick Pocketing The Taxpayer: The Insidious Effects of Acquisition Reform*, March 11, 2002. <https://www.pogo.org/report/2002/03/pick-pocketing-taxpayer-insidious-effects-of-acquisition-reform/>

² Federal Acquisition Regulation, Subpart 2.101 (defining “Simplified acquisition threshold”), December 26, 2014. https://www.acquisition.gov/sites/default/files/archives/pdf/FAR_22.pdf

³ The DoD’s former pricing czar wrote of the change, “Obtaining cost data is a last resort,” and a contracting officer can only request it after exhausting information on similar items, prices for alternatives, or any other information other than certified pricing information from the company performing work for the DoD. Department of Defense

Sec. 853, FY 2016 NDAA (Pub. Law 114-92)	Locked the DoD into paying past prices regardless of whether they are fair and reasonable, and made it burdensome for contracting officers to challenge price reasonableness.
Sec. 855, FY 2016 NDAA (Pub. Law 114-92)	Reconfirmed the need for market research for commercial items. It also mandated that officials could not enter into “a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency’s needs,” establishing a strong preference for commercial items and adding burdens on government officials.
Sec. 856, FY 2016 NDAA (Pub. Law 114-92)	Limited the ability of contracting officers to increase protections for taxpayers by converting commercial item contracts to Federal Acquisition Regulation (FAR) Part 15 (noncommercial) contracts. For procurements above \$100 million, the head of contracting has to provide approval.
Sec. 857, FY 2016 NDAA (Pub. Law 114-92)	Commercial items and services provided by nontraditional defense contractors may be treated as commercial, opening up DoD to additional awards without cost or pricing information.
Sec. 872, FY 2017 NDAA (Pub. Law 114-328)	Allowed contractors to provide “information or analysis” of the value of a commercial item for determining price reasonableness, rather than cost and pricing data. ⁴
Sec. 873, FY 2017 NDAA (Pub. Law 114-328)	Removed public access to commercial item determination information.
Sec. 874, FY 2017 NDAA (Pub. Law 114-328)	Provided express language that certain laws, including “defense-unique” laws and contract clauses, are not applicable to commercial items, promoting a hands-off position on commercial buying. The term “defense-unique” wasn’t defined in the law, increasing the risk of buying products and services that have no commercial market without knowing if the price is fair or reasonable.

Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 93. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

⁴ “The so-called ‘value based pricing’ concepts are no more than an industrial code word for unfettered price gouging.... We found no evidence in any of the visits with those companies that they rely on ‘value based’ pricing.” Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 91. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

Sec. 875, FY 2017 NDAA (Pub. Law 114-328)	Promoted so-called commercial buying by requiring the DoD to use commercial or non-governmental standards in lieu of military standards and specifications. Military specifications can only be used when the commercial standard isn't "cost effective."
Sec. 876, FY 2017 NDAA (Pub. Law 114-328)	Established a preference for commercial services, which is now codified at 10 U.S.C. § 2377 and 41 U.S.C. § 3307, and has been enforced by a federal court. ⁵
Sec. 877, FY 2017 NDAA (Pub. Law 114-328)	Exempted contractors from providing information on price reasonableness for items valued at less than \$10,000 that will be used in the performance of multiple DoD contracts.
Sec. 878, FY 2017 NDAA (Pub. Law 114-328)	Prevented contracting officers from assessing whether services are offered at a fair and reasonable price if the contractor is a nontraditional defense contractor.
Sec. 805, FY 2018 NDAA (Pub. Law 115-91)	Increased the simplified acquisition threshold to \$250,000, which restricted DoD's access to certain cost or pricing data.
Sec. 811, FY 2018 NDAA (Pub. Law 115-91)	Prohibited contracting officers from obtaining certified cost and pricing data to prevent price gouging for purchases under \$2,000,000. Before this change was implemented, the DoD said increasing the thresholds was "unlikely to provide cost savings." ⁶ Additionally, the law permitted contractors to supply uncertified cost or pricing data rather than certified data.
Sec. 812, FY 2018 NDAA (Pub. Law 115-91)	Eliminated the requirement to provide cost and pricing information to show the government is paying a fair and reasonable price if the product is "similar" to another item deemed commercial, regardless of whether that item is the same. The provision also added a waiver of cost or pricing certification requirements.
Sec. 846, FY 2018 NDAA (Pub. Law 115-91)	Created an e-commerce portal for parts, which may have created a false impression of fair and reasonable prices.
Sec. 847, FY 2018 NDAA (Pub. Law 115-91)	Revised the definition of commercial to include nondevelopmental items developed exclusively

⁵ *Palantir USG, Inc. v. U.S.*, No. 17-1465, USCA Fed. Cir. (September 13, 2018).

http://www.cafc.uscourts.gov/sites/default/files/Palantir_17-1465.Opinion.9-13-18.pdf

⁶ Office of the Under Secretary of Defense, Acquisition, Technology, and Logistics, *Eliminating Requirements Imposed on Industry Where Costs Exceed Benefits*, 2015, p. 96. <http://www.acq.osd.mil/fo/docs/Eliminating-Requirements-Imposed-on-Industry-Study-Report-2015.pdf>

	at private expense and sold in substantial quantities on a competitive basis to multiple foreign governments. The expanding definition of commercial items inhibits contracting officers from obtaining information to determine if prices are fair and reasonable.
Sec. 848, FY 2018 NDAA (Pub. Law 115-91)	Locked the DoD into previous commercial item determinations regardless of whether that item is actually sold to the general public in like quantities, which increases the likelihood DoD will continue to buy, and be overcharged for, items that aren't actually commercial.
Sec. 836, FY 2019 NDAA (Pub. Law 115-232)	Separated commercial items into commercial products and commercial services.
Sec. 837, FY 2019 NDAA (Pub. Law 115-232)	Backdated laws, expanding the list of contract clauses that do not apply to commercial products and services to October 13, 1994. This provision promoted a hands-off approach to commercial product and service contracts. This provision also amended laws to mention "commercial products."
Sec. 838, FY 2019 NDAA (Pub. Law 115-232)	Waived competition requirements to determine price reasonableness if an item is purchased through an e-commerce portal and there is more than one supplier, even if it's actually a false market because there is only one company that manufactures the item.
Sec. 839, FY 2019 NDAA (Pub. Law 115-232)	Mandated a review of why contractor compliance laws and contract clauses do not exempt commercial products or services. This is an effort to further make commercial items free of pricing, labor, environmental, and transparency requirements that protect DoD and the public.