



THE TRUTH IN NEGOTIATIONS ACT*

AN OVERVIEW

***NOW CALLED THE TRUTHFUL COST OR PRICING DATA ACT EVEN THOUGH “TINA” IS
MUCH EASIER TO REMEMBER THAN “TCPDA”**

PRIMARY PURPOSE

- To ensure that the Government is placed on equal footing with the contractor with respect to cost or pricing data to support the proposed price
- The cost or pricing data enables the Government to determine whether the price is “fair and reasonable”



APPLICATION

- Requires the submission of certified cost or pricing data for all contracts with a threshold of \$2M (unless an exception applies)
 - *FAR Council required to make inflation-based judgments beginning in 2020 and every five years thereafter.
- Contractor signs a Certificate of Current Cost or Pricing Data

WHAT MUST THE CONTRACTOR CERTIFY?

- That the cost or pricing data submitted is:
- Current: Most recent data available up to the date of price agreement, or other agreed-to date, has been submitted or disclosed.
- Accurate: The cost or pricing data are free of errors or misstatements.
- Complete: All reasonably available data relevant to the pricing action has been submitted or disclosed.

WHAT IS COST OR PRICING DATA?

- All facts that
- as of the date of agreement on the price of a contract (or the price of a contract modification) or another date agreed upon between the parties
- a prudent buyer or seller would reasonably expect to affect price negotiations significantly.
- Facts, while not judgments, include factual information from which a judgment was derived.

WHAT ARE “FACTS?”

- Examples:
 - Vendor quotes
 - Non-recurring costs
 - Information on changes in production methods or volume
 - Hourly labor rates paid
 - Booked sales
 - Shop hour backlogs
 - Profit/loss on prior contracts

WHAT ARE “JUDGMENTS?”

- Subjective and not objective or verifiable except through hindsight
 - Estimates
 - Budgets
 - Forecasts
 - Reports or studies that predict future events,
- Examples:
 - Contracts to be awarded based on bids made
 - Expectations regarding production capacity
 - Increases in labor rates

FACTS UNDERLYING JUDGMENTS

- Data that must be disclosed:
 - forms the basis for judgment on future costs
 - that can be reasonably expected to contribute to the soundness of estimates of future costs and validity of historical costs incurred
- As one might expect, this has historically been a major source of tension - - and dispute - - between the parties to a contract.

WHAT FACTS ARE “SIGNIFICANT?”

- Test is for a “prudent person” with “reasonable expectations”
- It is objective; does not matter whether the contractor itself relied on the data
 - *Aerojet Solid Propulsion Co. v. White*, 291 F.3d 1328 (Fed. Cir. 2002): “with chemical prices fluctuating wildly, a reasonable buyer or seller would recognize that mere knowledge of undisclosed sealed . . . bids might give one negotiator an advantage during contract price negotiations.”

MEANINGFUL DISCLOSURE REQUIRED

- Can't bury the facts
- Must be produced (not simply made available on Government request)
- *General Dynamics Corp.*, 93-1 BCA 25378 (1992): Not enough for a prospective contractor to make available or hand over files for inspection, but must advise the Government of the content and kind of the cost or pricing data and their bearing on the proposal.
- And almost all facts at company are presumed to be reasonably available and known to contractor's negotiators

SO...YOU MENTIONED EARLIER THERE ARE EXCEPTIONS

- Certified cost or pricing data not required where:
 - Adequate price competition
 - Commercial items or services
 - Prices set by law or regulation
 - Waiver by Agency Head
 - Modifying a contract or subcontract for commercial items

ADEQUATE PRICE COMPETITION

- Two or more responsible offerors (or expectation that there would be two+ offerors, for civilian agencies) competing independently
- Price a substantial factor
- Price analysis clearly demonstrates that the proposed price is reasonable
- NB: anticipated competition removed in 2018 NDAA for DoD, NASA, Coast Guard



AND A THRESHOLD

- Certification not required for for contracts to be entered into below the \$2M threshold
- Under the 2018 NDAA, the \$2M threshold applies to the prime contract and subsequent modifications as well as subcontracts awarded under the prime contract after 7.1.18.
 - But note that the prior threshold of \$750K applies to prime contract and subsequent modifications as well as subcontracts awarded under the prime contract before that date
 - Where a contract was awarded on the earlier date and a subcontract awarded after 7.1.18, the contractor can request that the \$2M exception apply.

IN THESE INSTANCES, CAN THE GOVERNMENT REQUIRE COST OR PRICING DATA?

- The Government can require cost or pricing data, but it cannot require the contractor to provide a certification
- The FAR does state that the Government should require the least amount the Government needs to determine whether cost/price is sufficient

WHAT HAPPENS WHEN THE GOVERNMENT BELIEVES THE CERTIFICATION IS WRONG

- If the Government believes the contractor's certification was incorrect, it can allege that "defective pricing" has occurred.
 - Cost or pricing data exists
 - It was reasonably available to the contractor
 - It was not submitted prior to negotiations
 - The government relied on the data provided
 - And the "defective data" not provided caused an increase in the contract price

REMEDIES

- Price reductions is the statutory remedy
- But remember there are other remedies lurking, for example combined defective pricing and fraud claims

TINA SWEEPS

- A best practice, not required by regulations
- Internal control process in which all records are reviewed prior to final negotiated price and updates are provided to government customer
- Sweeps performed prior to final negotiation and certification

ON SWEEPS

- Sweeps do take time and some members of the Government have complained that they require multiple price negotiations on an uneven playing field
- The 2018 DoD SWEEP Policy reduced that time substantially:
- Contractors must execute certificate within five business days after date of agreement - - very difficult for large contractors with several sites
- Where contractors do not execute within five days, the DoD has directed KOs to defer consideration of impact until after award of the contract action - - in other words, see if the information rendered the certified price defective
- The effect is to rush a contractor sweep and create substantial risk that a contractor cannot provide “factual” information to the Government

SOME SWEEP MEMO SOLUTIONS

- Postpone price agreement until sweep completed, making the Government wait
- Refuse to provide an agreement on price until the Government accepts and evaluates the impact of sweep data.
- IN ANY EVENT, contractors should continue to view sweeps as a critical best practice.