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**Understanding the
Truth in Negotiations Act
in Federal Procurement**

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Introduction

In 1961, the Truth in Negotiations Act (TINA) was introduced into the federal procurement process. The Act's primary purpose was to provide Government representatives the truth about a contractor's costs when they set out to negotiate a contract. TINA stipulated that the Government would have access to all the cost or pricing data the contractor used in making its offer. If the contractor withheld relevant data which resulted in an overstated price, the Government could recoup those excess prices resulting from the overstated costs. One question that TINA did not deal with was the issue of understated costs. Could a proven shortfall in costs be offset against the overstated costs? While TINA did not address this issue, the courts did by reading equity into the Act, and allowing such offsets to occur.

The other major issue confronting the government contract community related to TINA is a definitional issue. The major lynchpin of TINA is in the definition of "cost or pricing data". But what are costs or pricing data? Are they verifiable facts, judgments, estimates or other unverifiable information? These were the questions that confronted both the contractors and the regulators.

This paper will discuss many of these issues. We will explore many of the types of data which have commonly resulted in defective pricing allegations and fraud allegations. We will review the damages affect of TINA violations and discuss ways to avoid these violations and finally conclude with some things contractor representatives can learn from contracting officer actions.

The Truth in Negotiations Act (TINA)

The Truth in Negotiations Act (TINA), 10 USC § 2306a, appended as Attachment I, requires that every prime and subcontractor must submit cost or pricing data and certify that such data are current, complete and accurate prior to award of any negotiated contract, subcontract or amendment if the price exceeds \$100,000 (now \$700,000) and no exemption applies.ⁱ Even with these exemptions, TINA is an unfair baseline for contractors. It implies a tough disclosure standard for contractors to meet. It stands on the definition of cost or pricing data, some would argue, without adequately defining what cost or pricing data are. In addition, there is typically an automatic inference of fraud when a contractor is alleged to have violated the provisions of TINA.

Cost or Pricing Data

In a 1986 amendment to TINAⁱⁱ, regulators attempted to provide a definition of cost or pricing data in 10 USC § 2306a(g)ⁱⁱⁱ:

(g) Cost or pricing Data Defined.--- In this section, the term “cost or pricing data” means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonable expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

Met with not so wide acceptance from the contractor community, the regulators attempted to provide a better definition of cost or pricing data in a 1987 amendment to TINA.^{iv} This amendment changed the language of the already amended 10 USC § 2306a(g)ⁱⁱⁱ :

(g) Cost or pricing Data Defined.--- In this section, the term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the

price of a contract modification), a prudent buyer or seller would reasonable expect to affect price negotiations significantly. Such term does not include information that is judgmental but does include the factual information from which a judgment was derived.

Examining the two clauses, the subtle change from the 1986 amendment to the 1987 amendment is that cost or pricing data are now defined as “all facts” as opposed to “all information that is verifiable”. The two important concepts in the cost or pricing data definition are, 1) facts, which are information which can be objectively verifiable by audit or technical evaluation, and, 2) judgments which are subjective and unverifiable as to accuracy, except through hindsight. Examples of judgments include, a) budgets, b) estimates, c) forecasts, d) evaluations, and, e) conclusions which are not based upon objective facts.

The Significance of the Definition of Cost or Pricing Data

The significance of the definition of cost or pricing data may not be obvious to many contractors. However, clarification of this definition minimizes price reductions being sought for changes in forecasts, estimates and other judgmental information because of their erroneous classification as cost or pricing data. Limiting the classification of these data as cost or pricing data may result in limiting access to these data by government representatives. Also, by better clarifying the definition of cost or pricing data, contractors may avoid the open ended disclosure obligations of a broad definition of cost or pricing data.

Types of Cost or Pricing Data Information

While the definition of cost or pricing data may be less confusing, contractors are still faced with the questions of **what is fact and what is judgment**. For example:

- In an indirect rate proposal how does one categorize the revenue baseline forecast which may be comprised of backlog (business which is under contract) and anticipated (business which is forecast based upon some probability estimates)?

- If bids or proposals are outstanding, will they be winners or losers?
- And what about the labor and indirect rates used in outstanding bids or proposals, should they be adjusted to allow for a major award which could favorably impact rates.
- Is the same manufacturing process intended to be used for future work as on past work? Simply because the contractor is in receipt of a vendor quote, does that mean that the contractor will use that vendor?

These are questions contractors must deal with each day in developing bids or proposals.

Assessing the requirements of the request for proposal/quote is critical. Equally as critical is assessing how the scope of work is to be carried out by the contractor. Contractor representatives should not be concerned about, in fact, they should be motivated to disclose circumstances which are different from the norm. If the contractor has an approved set of forward pricing rates, and award of a major contract will cause those rates to vary significantly, contractor representatives may need to withdraw the approved rates and propose new rates, or disclose to government representatives why the contractor is deviating from his approved rates for a specific proposal.

Following are examples of potential defective or fraudulent cost or pricing data.^v Contractors should take appropriate precautions to avoid these circumstances.

EXAMPLES OF POTENTIAL DEFECTIVE COST OR PRICING DATA

1. Operating budget plan usually involving indirect cost which contains data that are different from the data in the proposal to the Government.
2. Labor hour standards are not current. Defective pricing can occur when new standards exist and are not disclosed or more current data from which the standards are computed are not disclosed.
3. Labor hour estimates, other than estimates based on pure judgment, not complete, not current, or not accurate.
4. Valuation of contractor inventory erroneously computed or latest valuation not reflected in contractor's proposal.
5. Contractor pricing personnel or negotiators failure to follow contractor internal pricing policy or estimating and/or purchasing manual instructions and updates.
6. Quantity errors in required material and parts caused by co-production buys or failure to read current specification drawings correctly or use of obsolete drawings.
7. Contractor failure to reveal evaluation of vendor or subcontractor quotes and failure to reveal changes to the contractor evaluations.
8. Contractor nondisclosure of production or program directives affecting current and future business volumes and changes which affect overhead and general and administration rates.
9. Canceled purchase order not disclosed to Government.
10. Duplication of costs included in contractor's proposals.
11. Change in make or buy decisions by prime contractor or subcontractor not disclosed (may be related to new or revised manufacturing processes not disclosed).
12. Contractor distortion of time periods, especially for labor hours, when computing averages for purpose of proposal to Government.
13. Contractor failure to disclose vendor quotes, voluntarily reduced at request of prime.

INDICATORS AND SCENARIOS OF POTENTIAL FRAUD IN DEFECTIVE PRICING

1. Falsification or **alteration** (without notice to the Government) of supporting data.
2. Failure to update cost or pricing data even though it is known that past activity showed that costs or prices have decreased.
3. Failure to make complete disclosure of data known to responsible contractor personnel.
4. Failure to correct in a timely manner, known estimating or pricing system deficiencies which directly and repeatedly result in defective pricing.

Cost or Pricing Data Must be made Available in Usable Format

Cost or pricing data may not simply be disclosed. Contractors must disclose the relationship between the data and the proposal. Data may be physically delivered to government representatives or they may be made available for review by these representatives. However done, the disclosure must clearly set out actual costs and non cost data, and both should be disclosed and linked to the proposal. Once disclosed, these data should be timely updated before, during and possibly after agreement on price. Failure to update such information could lead to allegations of defective pricing. Contractor negotiators are vulnerable. They are presenting to government representatives the official position of the contractor. If they are armed with incomplete, inaccurate or non current data, they are literally presenting a precursor to defective pricing. For this reason, data sweeps are strongly recommended prior to final agreement on price. The use of internal sweeps allow contractor representatives to examine cost or pricing data disclosed and used during the negotiations, and determine whether such data remain current, complete and accurate prior to final agreement on price.

Prime Contractors are responsible for Subcontractor's Faulty Cost or Pricing Data

Subcontractor requirements for cost or pricing data are the same as prime contractors if cost or pricing data are required of the prime contractor and there is no exemption for the subcontractor. Because of the inherent risks to prime contractors when submitting and certifying cost or pricing data, prime contractors should seek regulatory exemptions for their subcontractors. Such exemptions are the same as those available to prime contractors, including, adequate price competition, commercial pricing exemptions, and prices determined by law or regulation. Other exemptions may apply. Prime contractors should look for exemptions for their subcontractors before automatically requiring the submission of cost or pricing data. If prime contractors are exempt from submission of cost or pricing data they should avoid requiring such data from their subcontractors.

Damages

One of the most misunderstood elements of defective pricing claims by government representatives is determination of damages to the government. Representatives are inconsistent in developing damage theories, but here is the straight talk about damages under defective pricing claims. The maximum price adjustment is the dollar amount of the overstated costs, plus burdens and profit. Simple interest at the US Treasury rates is typically applied to these costs, and such interest runs from the date of the defective award to the date payment is made by the contractor. Various methods of determining damages have been attempted by government representatives. Such methods use proposed prices, estimated costs and forecasted costs as a basis for damages determination. Contractors should avoid these methods of damage determination and seek defenses against defective pricing allegations. Among the defenses which contractors should seek are determining whether the alleged defective data are judgments or facts. If such data are judgments, there is no defective cost or pricing data. Contractors may obtain offsets against defective cost or pricing data claims when the contractor; 1) certifies that he is entitled to the offset, 2) proves that data were available but not submitted before the date of agreement on price, 3) proves that the current, complete and accurate certification was not known to be false, and, 4) the government fails to prove that the data would not have caused an increase in the contract price. Contractors who are faced with defective pricing allegations should seek competent legal advice.

Other defenses which contractors should pursue include proving that the defective data did not cause an increase in the contract price. This is often achieved when the price was determined on a basis other than that specific cost or price information. The Price Negotiation Memorandum (PNM) is often the best source for determining this. Another effective defense against defective pricing claims is to prove that the government did not rely on the alleged defective data. This is often achieved when the price was determined under one of the exemption criteria discussed above.



Contractors used to argue that having signed no certification they could not have violated the requirements of TINA, however, TINA amendments make this argument no longer effective.

Do's and Dont's for Managing Defective Pricing

Contractors can learn a lot from what contracting officers are required to do. On the following pages, we have assembled do's and dont's based upon guidance to which contracting officers attempt to adhere. Contractors who study and understand these actions can take appropriate steps to minimize their exposure to defective cost or pricing data submissions and allegations of defective pricing.

DO'S AND DON'TS FOR MANAGING DEFECTIVE PRICING AVOIDANCE (What Contractors can Learn from Contracting Officer Actions)

DISCLOSURE/SUBMISSION

DO:

- ◆ Remember that the requirement for submission of cost or pricing data is met only if all cost or pricing data reasonably available to the offeror are either submitted or identified in writing to the contracting officer or his authorized representative by the time of agreement on price. However, there is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without proper identification specific to the potential contract. The latter does not constitute “submission” of cost or pricing data.
- ◆ Require the contractor to disclose the factual information from which a judgment was derived when the bases for the judgments are so intertwined with facts and data that the facts and data are not meaningful without them.
- ◆ Remember that the overall burden of proving defective pricing is with the Government. The Government does have the benefit of a rebuttable presumption that a defectively priced contract will cause an overstated contract price. Once nondisclosure of data and the fact that the Government relied on the defective data has been proved, a prima facie case arises from that presumption and the contractor must provide evidence to rebut it.
- ◆ Require the contractor to update all data as of the latest dates for which information is reasonably available and point out the relevance of that data to the negotiators before agreement on price.
- ◆ Remember that if cost or pricing data are not obtained from the prime contractor, there is no statutory or regulatory requirement for prime contractors to obtain such data from subcontractors. Subcontractors must submit cost or pricing data only if the value of the subcontract exceeds the threshold for submission of cost or pricing data and the prime contractor and each higher-tier subcontractor have been required to provide cost or pricing data, and none of the exemptions for requiring cost or pricing data applied.

DO: (Cont'd)

- ◆ Negotiated forward pricing rate agreement (FPRA) rates must be used by COs and contractors as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement.
- ◆ Require submission of cost or pricing data when there is such a disparity between the quantity being procured and the quantity for which there is a catalog or market price that a determination as to the reasonableness of prices cannot reasonably be accomplished by comparing the two.
- ◆ Remember that the burden of proof is on the contractor to convince the CO with verifiable evidence that the offered price is an established catalog or market price for a commercial item.
- ◆ Review and analyze subcontract prices that are negotiated by the prime contractor before negotiating the prime contract.
- ◆ Ensure that a proposal generated by an estimating system with an identified deficiency is evaluated as to whether the deficiency impacts the negotiations. If it does not, proceed with negotiations. If it does, consider using the remedies set forth in the Defense Federal Acquisition Regulation Supplement.^{vi}
- ◆ Ensure that contracting officers and those supervising contracting officers pay close attention to whether they should grant TINA exemptions, particularly for adequate price competition. Although the contracting officer has broad discretion in granting or denying TINA exemptions, a CO decision to grant an exemption could be binding on a subsequent contracting officer, even if the decision is later determined to be poor or incorrect.^{vii}
- ◆ Determine the existence of adequate price competition on a case by case basis. Where the CO determines under FAR that adequate price competition exists, certified cost or pricing data shall not be obtained. However, it may be appropriate, in certain cases, to obtain some cost data in support of the price analysis performed. The CO may ask for partial or limited data when the data are necessary but shall not ask the contractor to certify these data (DFARS 215.403-1). Where adequate price competition does not exist, certified cost or pricing data is required by the Truth In Negotiations Act unless another valid exception applies. It should be clearly recognized that the adequate price competition determination on dual-source procurements should be made on a case-by-case basis and only after deliberation and thorough review.

DO: (Cont'd)

- ◆ Ensure that the price negotiation memorandum (PNM) reflects the same cost or pricing data submitted by the contractor in his proposal (including updates) as well as the costs questioned in the preaward audit report. Any differences should be fully explained in the PNM.
- ◆ Remember that subsection (c) of 10 U.S.C. § 2306a(c) expressly provides the authority for the head of the agency to require cost or pricing data to be submitted even when not otherwise required, if the head of the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract.

DON'T:

- ◆ Require submission or certification of cost or pricing data on negotiated contracts or modifications over \$700,000 when the contract price is based on adequate price competition, based on established catalog or market prices of commercial items, or set by law or regulations. This policy applies to subcontracts as well as prime contracts, and contracting officers should not require a prime contractor to obtain cost or pricing data from a subcontractor that qualifies for an exemption. This policy may also apply to a portion of a contract or subcontract when, for example, a contractor will provide both an item that qualifies for a catalog exemption and a service that does not qualify for an exemption. If the portion of the contract that does not qualify for the exemption exceeds the threshold for submission for cost or pricing data (currently \$700,000), cost or pricing data should be obtained for that portion of the contract only.^{viii}
- ◆ Presume that because price competition exists, it is adequate if one of the following circumstances exists:
 - The solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;
 - The low offeror has such a decided advantage that it is practically immune from competition; or
 - There is a finding, supported by a statement of the facts and approved at a level above the CO, that the lowest price is unreasonable.

DON'T: (Cont'd)

- ◆ Attempt to waive the “duty” of the contractor to furnish accurate, complete, and current cost or pricing data when such data are otherwise required by law or regulation.^{ix} The duty cannot be waived by a Government agent.

- ◆ Accept subcontract prices that are negotiated before the prime contract is negotiated as the sole evidence that these prices are reasonable. Such subcontract prices must be reviewed and analyzed.

Attachment I LEGISLATION

PUBLIC LAW 87-653, AS AMENDED, 10 U.S.C. § 2306a, THE TRUTH IN NEGOTIATIONS ACT

Sec. 2306a. Cost or pricing data: truth in negotiations

(a) Required Cost or Pricing Data and Certification.—

(1) The head of an agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after December 5, 1990, the price of the contract to the United States is expected to exceed \$550,000 (now \$700,000); and

(ii) in the case of a prime contract entered into on or before December 5, 1990, the price of the contract to the United States is expected to exceed \$100,000.

(B) The contractor for a prime contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if--

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed \$550,000 (now \$700,000);

(ii) in the case of a change or modification made after December 5, 1991, to a prime contract that was entered into on or before December 5, 1990, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed \$550,000 (now \$700,000); and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed \$100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and--

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed \$550,000 (now \$700,000);

- (ii) in the case of a subcontract entered into after December 5, 1991, under a prime contract that was entered into on or before December 5, 1990, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed \$550,000 (now \$700,000); and
- (iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed \$100,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if--

- (i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed \$550,000 (now \$700,000); and
- (ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed \$100,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted--

- (A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or
- (B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under that paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before December 5, 1990, the head of the agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

(b) Exceptions.--

(1) In general.--Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract--

(A) for which the price agreed upon is based on--

- (i) adequate price competition; or
- (ii) prices set by law or regulation;

(B) for the acquisition of a commercial item; or

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

(2) Modifications of contracts and subcontracts for commercial items.--In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if--

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(c) Cost or Pricing Data on Below-Threshold Contracts.--

(1) Authority to require submission.--Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of

the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) Exception.--The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

(3) Delegation of authority prohibited.--The head of a procuring activity may not delegate functions under this paragraph.

(d) Submission of Other Information.--

(1) Authority to require submission.--When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.

(2) Limitations on authority.--The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial items.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(e) Price Reductions for Defective Cost or Pricing Data.—

(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such price was increased because the

contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that--

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

- (i) was the sole source of the property or services procured; or
- (ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost and 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;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2).

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if--

- (i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if—

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(i) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(f) Interest and Penalties for Certain Overpayments.—

(1) If the United States makes an overpayment to a contractor under a contract subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States—

(A) for interest on the amount of such overpayment, to be computed—

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(g) Right of United States To Examine Contractor Records.--For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, the head of an agency shall have the authority provided by section 2313(a)(2) of this title.

(h) Definitions.--In this section:

(1) Cost or pricing data.--The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) Subcontract.--The term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(3) Commercial item.--The term "commercial item" has the meaning provided such term in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)).

(Added Pub. L. 99-500, Sec. 101(c) [title X, Sec. 952(a)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-166, and Pub. L. 99-591, Sec. 101(c) [title X, Sec. 952(a)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-166; Pub. L. 99-661, div. A, title IX, formerly title IV, Sec. 952(a), Nov. 14, 1986, 100 Stat. 3945, renumbered title IX, Pub. L. 100-26, Sec. 3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 100-180, div. A, title VIII, Sec. 804(a), (b), Dec. 4, 1987, 101 Stat. 1125; Pub. L. 101-510, div. A, title VIII, Sec. 803(a)(1), (d), Nov. 5, 1990, 104 Stat. 1589, 1590; Pub. L. 102-25, title VII, Sec. 701(b), (f)(8), Apr. 6, 1991, 105 Stat. 113, 115; Pub. L. 102-190, div. A, title VIII, Sec. 804(a)-(c)(1), title X, Sec. 1061(a)(9), Dec. 5, 1991, 105 Stat. 1415, 1416, 1472; Pub. L. 103-355, title I, Secs. 1201-1209, Oct. 13, 1994, 108 Stat. 3273-3277; Pub. L. 104-106, div. D, title XLII, Sec. 4201(a), title XLIII, Sec. 4321(a)(2), (b)(7), Feb. 10, 1996, 110 Stat. 649, 671, 672; Pub. L. 104-201, div. A, title X, Sec. 1074(a)(12), Sept. 23, 1996, 110 Stat. 2659; Pub. L. 105-85, div. A, title X, Sec. 1073(a)(46), Nov. 18, 1997, 111 Stat. 1902; Pub. L. 105-261, div. A, title VIII, Secs. 805(a), 808(a), Oct. 17, 1998, 112 Stat. 2083, 2085.)

Endnotes

ⁱ Federal Acquisition Regulation (FAR) 15.403-1 prohibits contracting officers from obtaining cost or pricing data when the acquisition is at or below the simplified acquisition threshold, when the contracting officer determines that prices agreed upon are based on adequate price competition, set by law or regulation, when a commercial item is being acquired, a waiver has been granted or when modifying a contract or subcontract for commercial items.

ⁱⁱ Public Law No. 99-661, § 952, 1986 TINA Amendment.

ⁱⁱⁱ “Living With TINA: A Practical Guide to the Truth in Negotiations Act”, Clarence T. Kipps, Jr., John Lloyd Rose, 1989.

^{iv} Public Law No. 100-180, 1987 TINA Amendment.

^v “The Truth in Negotiations Act (TINA) Handbook”, Inspector General Department of Defense, April 1993

^{vi} DFARS 215.811-70(g)(2).

^{vii} Honeywell Federal Systems, Inc., ASBCA No. 39974, 92-2 BCA ¶24,966 March 26, 1992.

^{viii} Director, Defense Procurement Memorandum, May 29, 1992.

^{ix} M-R-S Mfg Co. vs. United States, 203 Ct. CL. 551, 492 F. 2d 835 (1974).