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Many government contract compliance practitioners are aware of the Truth-in-Negotiations Act (or Truthful Cost or Pricing Data) or **whatever** the kids are calling it these days (I'm calling it TINA). Whatever you call it, it is really two statutes (10 U.S.C. 2306a and 41 USC 35) —that, together, require contractors to submit (1) accurate, (2) complete, and (3) current "cost or pricing data" under certain circumstances, and then to certify that they have done so. (The statutes define the term "cost or pricing data" but FAR 2.101 also defines that term, as well as the term "certified cost or pricing data".) The remedy associated with providing "defective" cost or pricing data—i.e., a failure to disclose accurate, complete, and current cost or pricing data when the contractor has certified that it has done so—is specified in the implementing regulations and associated contract clauses. However, as we've noted from time to time on this blog, the real kicker comes from being accused of liability under the civil (or perhaps even criminal) False Claims Act for any inflated invoices related to its defectively certified contract price. The False Claim Act penalties are far more severe than the administrative remedies for a mere defective certification.

A contract price that was increased from defective certified cost or pricing data is said to have been "defectively priced," to the extent that the government negotiators relied on that defective data to establish the contract price. (Our understanding of case law is that defective certified cost or pricing data is presumed to have led to an inflated contract price.) Thus, a common compliance concern is "defective pricing" and many government contractors implement some form of control to minimize their defective pricing risk. Many contractors have implemented "sweeps" to provide assurance that all cost or pricing data has been disclosed. The sweeps are efforts—via phone call and via email and other means—to survey the original cost proposal data inputs to identify any information that has since been updated, so that the updated data can be disclosed to government negotiators prior to certification.

The key requirement of TINA is that all cost or pricing data must be kept accurate, complete, and current not only at the time of proposal submission, but also through negotiations—right up until the "handshake" date upon which final price agreement has been reached. Thus, the risk of defective pricing exists until that date (it actually increases after proposal submission, because the proposal team is often disbanded); but there is no risk after the "handshake" date. Whatever new information comes to light after the date of price agreement is irrelevant to the negotiations, so long as it was not known before that date.

The government has implemented its own processes to identify contractor defective pricing. The most common effort is the "post-award" audit (or whatever they're calling it **these days**) conducted by DCAA. DCAA starts with looking at actual contract costs compared to proposed (and agreed-upon prices) and asks if any underruns were intentional—i.e., based on a lack of

disclosure of certified cost or pricing data. The risk from those audits has decreased markedly in recent years, since (as we've reported) DCAA's focus has been elsewhere. However, the risk of a civil False Claims Act case that originates with an allegation of defective pricing made by a whistleblower seemingly has increased at the same time, such that defective pricing remains a compliance concern.

But it's tough to develop a compliance program when you really don't understand the risks and the risk inflection points.

Vern Edwards recently said that there are not ten people in the United States (outside of attorneys who specialize in the area) who really understand TINA requirements and risks associated with defective pricing. Assuming he's correct, that means that there are a lot of contractors out there who may be basing compliance efforts on an incorrect understanding. They may be mitigating the wrong risks or they may be mitigating the rights risks but at the wrong time.

So we thought we'd devote an article (or two) to the topic. Not that we necessarily claim subject matter expertise such that we are one of those *rara avis* people who understand the topic completely. Still: we've been doing this for a number of years and have seen some things, and we've thought about this a bit. And we've had some discussions with top people such as Vern (and Don), who have helped us shape our thoughts into something that we believe will add some value.

The first thing we noticed is that compliance requirements differ between contractor and government personnel. The FAR establishes certain roles and responsibilities for government contracting officers and other personnel involved in negotiations, while applicable solicitation provisions and contract clauses establish another set of roles and responsibilities for the contractor. We thought it might be helpful to first focus on the government's roles and responsibilities, and then discuss the contractor's roles and responsibilities (in the second part of this article).

The Government's Role and Responsibilities

The government contracting officer is required to acquire goods and services at "fair and

reasonable prices." Thus, in a negotiated procurement the contractor's proposed costs must be evaluated reach a conclusion that the price is reasonable. Generally, the type of data a contractor is expected to provide will be either (1) certified cost or pricing data, or (2) information other than certified cost or pricing data. In competitive acquisitions, price analysis of the offers may be sufficient to determine that the awarded contract price is fair and reasonable, but in non-competitive acquisitions some type of cost data is very likely to be required. However, FAR 15-402(a)(3) cautions contracting officers to only require the minimum data necessary for their determination, stating: "Obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources."

A contracting officer is prohibited from requiring a contractor to certify its cost or pricing data in certain circumstances (see 15.403-1). Importantly, it is not the contractor who gets to determine whether or not those circumstances are present; that responsibility is given to the contracting officer. (However, if an exception applies but the contracting officer still requires contractor certification, then the certification doesn't matter: the cost or pricing data will be deemed to be uncertified cost or pricing data. See 15.403-4(c)). Further, even if obtaining certified cost or pricing data is prohibited, the contracting officer may still require the contractor to provide information other than certified cost or pricing data. But for purposes of this blog article we are going to focus on the requirements associated with certified cost or pricing data, because that is where the risk lies.

Unless an exception applies, a contracting officer must obtain certified cost or pricing data for every action (new contract award or modification to an existing contract) that is expected to exceed $750,000 in value. Frequently, contracts are awarded via competition but subsequent modifications are not; and thus the contractor may have to provide certified cost or pricing data at that later time. When a contracting officer is required to obtain certified cost or pricing data, it must be obtained not only from the prime contractor, but also from any subcontractor (at any tier) whose subcontract (or subcontract modification) exceeds $750,000, unless the subcontractor's contract action is valued at less than 10 percent of the total prime contract action. (See 15.404-3(c).) [Note: this is the contracting officer's responsibility. A prime contractor is required to obtain certified cost or pricing data for all actions that exceed $750,000--period. The prime is required to submit the subcontractor's certified cost or pricing data if the subcontract action exceeds 10 percent of the total prime contract value.]

When certified cost or pricing data is required, it is normally formatted in accordance with FAR Table 15-2 (as discussed at 15.403-5 and as found at 15.408). The format also applies to any subcontractor required to submit certified cost or pricing data. As we shall see, the prime contractor is responsible for updating any subcontractor certified cost or pricing data in addition

to its own, and may also be required to perform its own cost or price analysis on that data (and submit that analysis along with other certified cost or pricing data). But regardless of what the contractor does (or does not) do, the government contracting officer is still required to look at the certified cost or pricing data as part of their determination that the price is fair and reasonable. The FAR states (at 15.404-3(a)) that –

The contracting officer is responsible for the determination of a fair and reasonable price for the prime contract, including subcontracting costs. The contracting officer should consider whether a contractor or subcontractor has an approved purchasing system, has performed cost or price analysis of proposed subcontractor prices, or has negotiated the subcontract prices before negotiation of the prime contract, in determining the reasonableness of the prime contract price. This does not relieve the contracting officer from the responsibility to analyze the contractor's submission, including subcontractor's certified cost or pricing data.

The contracting officer is responsible for informing the contractor if they learn that any certified cost or pricing data is defective before the agreement on price—regardless of the impact that correcting the data will have on contract price. (See 15.407-1(a). "The contracting officer shall consider any new data submitted to correct the deficiency, or consider the inaccuracy, incompleteness, or noncurrency of the data when negotiating the contract price.")

In addition, the contracting officer is responsible for establishing and documenting the government's pre-negotiation objectives and the pertinent issues to be negotiated, as well as for documenting the negotiation via a Price Negotiation Memorandum (PNM). Importantly for this topic, the PNM is required to address the use of certified cost or pricing data. When certified cost or pricing data was obtained, the PNM must address whether the CO –

… relied on the certified cost or pricing data submitted and used them in negotiating the price; recognized as inaccurate, incomplete, or noncurrent any certified cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated; or determined that an exception applied after the data were submitted and, therefore, considered not to be certified cost or pricing data.

(See 15.406-3(a)(6).)

Critically, it is the responsibility of the government contracting officer to require the prime contractor to execute a Certificate of Current Cost or Pricing Data (CCCPD) whenever certified cost or pricing data is required. It is that CCCPD that turns mundane cost or pricing data into certified cost or pricing data. It is that CCCPD that creates defective pricing risk. Without a contractor certification, there can be no defective pricing. (But as we will see, a lack of certification, when one was required, is no defense to an allegation of defective pricing.) It is the contracting officer's responsibility to obtain the executed CCCPD from the contractor, using the exact language and format specified by 15.406-2.

The CCCPD has two important dates: the date it was signed (signing date) and the date it is effective (effective date). The signing date "should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to." The effective date is to be "the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price." Thus, the effective date can be the handshake date on which price agreement was reached, or it can be a different date if the parties agreed on one. But it is the effective date of the CCCPD that establishes the cut-off point, after which there is no risk of defective pricing.

One final responsibility of the government contracting officer: to insert the appropriate solicitation provisions and contract clauses as required by FAR 15.408. It is those provisions and contract clauses that establish the contractor's roles and responsibilities, which we will discuss in the next part of this article.