Recently we had an opportunity to point out to readers that the 2018 NDAA had changed the TINA threshold, moving it from $750,000 to $2 million effective June 18, 2018. We also noted that the micro-purchase threshold and the simplified acquisition threshold were also changing. We discussed whether contractors should update their policies, procedures, and instructions to the new thresholds based on changes to statute, or if they should wait until the DAR Council implemented those statutory changes in the DFARS.

We concluded that contractors should lean forward. We opined that contractors should implement the new thresholds in advance of any official rule-making.

However, at a recent industry meeting, we got some pushback. Respected colleagues, frenemies, and competimates pointed out that solicitations issued by DoD components were going to use the "old" TINA threshold of $750,000 to decide when to request certified cost or pricing data. (FAR 15.403-4(a)(1) states "The threshold for obtaining certified cost or pricing data is $750,000.") They asked if a contractor was supposed to push back and refuse to provide certified cost or pricing data based on the new threshold, and thus risk being found to be non-responsive to the solicitation requirements. When you put it like that, the answer is "no." (Though we think it would make for a quick bid protest.) If the solicitation contains the 52.215-10 or the 52.215-11 or the 52.215-12 or the 52.215-13 clauses, because the contracting officer followed the regulatory guidance instead of the statute, then obviously the low-risk path is to provide the required certified cost or pricing data in the required format of FAR Table 15.2.

What we are advocating is a change to the contractor's own policies, procedures, and instructions with respect to how it interacts with its subcontractors. We **concluded** that the contractor should adopt the statutory threshold changes in advance of any formal rule-making. In other words, the contractor should request certified cost or pricing data from its subcontractors only when necessary and when the value of the proposed subcontract is expected to exceed $2 million.

If a solicitation contains the "TINA clauses" (as listed above) then this may create a conflict. For example, the 52.215-12 provision states " Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4 … the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR
15.408
,

Table 15-2
… unless an exception under FAR
15.403-1
applies." In other words, the solicitation provision references the regulatory threshold and not the statutory threshold (even though FAR 15.403-4 clearly references the underlying statutes themselves). Thus, once again, the contractor may be found to be non-responsive if it uses the statutory threshold rather than the regulatory threshold when determining whether or not to obtain certified cost or pricing data from its subcontractors.

Obviously the more conservative and safer course of action is to wait for the FAR Councils to implement the statutory changes. However, if that's your plan you may have a very long wait. At that same industry meeting, we heard that certain DoD interests do not like the new TINA threshold, and are planning to drag their feet with respect to regulatory implementation, while working hard to convince Congress to rescind the change. If you don't implement the statutory change now, you may never implement it.

It's your call.

We will point out one more thing: *the CAS threshold is tied to the TINA threshold*.

It's hard to actually find the linkage, because when the CAS language was moved into 48 CFR Chapter 99, the government abandoned any pretense of maintenance. You can find the recent CAS Board preambles at FAR Chapter 99 on the acquisition.gov website (which is the official government website for acquisition regulations), but you can't find the CAS program rules or the Standards themselves. Instead, you get a link to "the official codified Cost Accounting Standards" at a Government Printing Office website (gpoaccess.gov/cfr/index.html)—but that link is broken. If you do a search on "48 CFR Chapter 99" you get a hit with the correct GPO address, but that GPO address contains an outdated version of the CAS rules. It says that the 9903.201-1(b)(2) CAS exemption is "Negotiated contracts and subcontracts not in excess of $500,000"—which is woefully out of date. Other CAS exemption language is similarly out of date. And this is the *official* language. You have to go over to the *unofficial* Hill AFB website (farsite.hill.af.mil) to get the correct language.

The correct 9903.201-1(b)(2) CAS exemption reads: "*Negotiated contracts and subcontracts not in excess of the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)).*

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You can confirm this by checking the DCAA Contract Audit Manual, at 8-103.2 (“CAS Exemptions”) which provides that “negotiated contracts and subcontracts (including interdivisional work orders) less than the Truth in Negotiations Act (TINA) threshold” are exempt from CAS.

Note that the CAS exemption is tied *directly to statute* and not to regulation. Thus, regardless of what you do for certified cost or pricing data coverage, you
must
change your policies, procedures, and instructions with respect to CAS administration of subcontractors. Any subcontractor proposal valued at less than $2 million is exempt from CAS, effective 18 June 2018. If you try to impose CAS on such contract actions, say (for example) by including any CAS clause in the subcontract, then you risk being found to have committed a Public Law violation in your next CPSR.

By “slow-rolling” the implementation of the 2018 NDAA threshold changes into the acquisition regulations, the FAR Councils have created a problem for contractors. If the contractors wait for the regulatory implementation, then they must disconnect CAS coverage from TINA coverage. They will end up requesting certified cost or pricing data from subcontractors that are, by statute, exempt from CAS. This helps nobody and may well lead to increased procurement costs.

In our view, the only rational approach is to apply the statutory threshold changes now. The FAR Councils should immediately issue a Class Deviation to FAR 15.403-4(a)(1) to implement the new TINA threshold, even if formal rule-making takes a bit longer. If you are a contractor, you should discuss this quandary with your cognizant contracting officer and try to get some relief. It’s the smart thing to do.