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TINA Changes Impact Cost and Pricing Compliance

By Paul E. Pompeo and Amanda J. Sherwood*

The Truthful Cost or Pricing Data Act requires contractors to submit certified cost or pricing data if a procurement's value exceeds the specified threshold and no exceptions apply. The authors of this article explain recent amendments that change the most important of these exceptions for Department of Defense procurements, when contractors are required to certify their data is complete, and the applicable contract dollar value over which the Act applies.

Summer 2018 brought several important compliance changes for contractors required to submit cost or pricing data in connection with federal awards. The Truthful Cost or Pricing Data Act (commonly referred to by its historical name, the Truth in Negotiations Act or "TINA")[1] requires contractors to submit certified cost or pricing data if a procurement's value exceeds the specified threshold and no exceptions apply. Recent amendments change the most important of these exceptions for Department of Defense ("DoD") procurements, when contractors are required to certify their data is complete, and the applicable contract dollar value over which TINA applies. Given these recent changes, contractors should revisit their TINA compliance systems to ensure they are up-to-date.

IMPORTANT COMPLIANCE CHANGES

First, on June 12, 2018, the government issued a proposed rule amending the TINA exception, only on defense contracts, when adequate price competition exists.[2] Presently, the same rule applies to defense and civilian agencies: cost or pricing data is not required "[w]hen the contracting officer determines that prices agreed upon are based on adequate price competition."[3] Currently, adequate price competition exists when:

- Two or more responsible offerors submit priced offers satisfying the

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1 10 U.S.C. § 2306a, 41 U.S.C. § 3506, and FAR 15.403.

2 *Available at* https://www.federalregister.gov/documents/2018/06/12/2018-12539/federal-acquisition-regulation-exception-from-certified-cost-or-pricing-data-requirements-adequate.

3 FAR 15.403-1(b)(1).

government's requirements, the award is to be made to the best value offeror and price is a substantial factor in the source selection, and there is no finding that the price of the successful offeror is unreasonable;

- There was a reasonable expectation that two or more responsible offers would be received even if only one was received, if the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition and if the determination of adequate price competition is approved at a level above the contracting officer; or
- Price analysis clearly demonstrates that the proposed price is reasonable.[4]

Adequate price competition contemplates actual or *anticipated* competition. The National Defense Authorization Act ("NDAA") for Fiscal Year 2018 changes this definition for DoD, NASA, and the Coast Guard procurements to only when "two or more responsible offerors, competing independently, submit responsive and viable offers." The government explains the amendment is designed to "provide[] a top-level framework to facilitate consistent implementation . . . at the agency level by DoD, NASA, and the Coast Guard," but because it eliminates the potential for the adequate competition exception based on anticipated competition, requiring actual competition, it will limit application of the exception. The original test, permitting both anticipated and actual competition, will continue to apply to civilian agencies. The elimination of anticipated competition as a basis for adequate price competition is inconsistent with the underlying policy that the marketplace drives price reasonableness. If the rule becomes final, no doubt it will eventually apply to civilian agency contracts for consistency.

Second, on June 7, 2018, DoD announced that contracting officers will request contractors to execute the Certificate of Current Cost or Pricing Data "as soon as practicable, but no later than five business days after the date of price agreements," thereby significantly shortening the time between the date of agreement on price and contract award.[5] The Director of Defense Pricing/Defense Procurement and Acquisition Policy ("DPAP"), Shay Assad, explained DoD was taking this step pursuant to Secretary Mattis' call to streamline acquisition processes. DoD attributes long delays between price agreement and contract award on "the contractor's submission of additional cost or pricing data (referred to as 'sweep data') concurrently with or after the submission of the Certificate of Current Cost or Pricing Data subsequent to price agreement." DoD found:

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[4] FAR 15.403-1(c)(1).

[5] *Available at* https://www.acq.osd.mil/dpap/policy/policyvault/USA000646-18-DPAP.pdf.

> Delays associated with contractor efforts to collect and submit cost or pricing data which should have been, but were not, provided to the Contracting Officer in a timely manner prior to agreement on price unnecessarily increase acquisition lead time, both by delaying submission of the Certificate of Current Cost or Pricing Data, and by requiring the Contracting Officer to review the 'sweep' data, assess the impact on the negotiated price, and come to an agreement with the contractor on that price impact.

DoD noted that while there is no statutory or regulatory requirement for contractors to perform such a "sweep"—because contractors are supposed to provide complete data available as of the date of agreement on price—the fact that so much additional data are often revealed in a sweep "may be indicative of estimating system deficiencies," as considered under Defense Acquisition Regulations System 252.215-7002(d)(4)(xiv), besides causing delays in contract award. This is a veiled threat.

The directive provides further that "Contracting Officers shall defer consideration of the impact of any cost or pricing data submitted by a contractor after price agreement is reached until after award of the contract action in order to avoid delays in awarding the contract." This places pressure on contractors to ensure they submit complete and accurate cost or pricing data before the agreement on price is reached, because:

> Any cost or pricing data submitted after price agreement shall be reviewed and dispositioned after award of the contract action, pursuant to FAR 15.407-1, to establish whether it is rendered that the certified cost or pricing data submitted up to the point of price agreement was defective, and to determine whether the Government is entitled to a price adjustment in accordance with FAR 52.215-10 or FAR 52.215-11.

The directive places undue burdens on contractors to secure current, accurate and complete cost or pricing data available as of the date of agreement on price. By truncating the time for submission of a sweep, contractors could be put at greater and inadvertent risk of defective pricing. And, contractors could be subjected to unjust determinations of estimating system deficiencies—thus, the government intends to swing a heavy hammer to accomplish its objective.

Third, effective July 1, 2018, the threshold for TINA application increased significantly from $750,000 to $2 million, as required by the 2018 NDAA. This means that contractors will have to provide current, accurate, and complete cost or pricing data related to any pricing action of at least $2 million. Although the final Federal Acquisition Regulation ("FAR") revision has not completed the rulemaking process, both DoD and the Civilian Agency

Acquisition Council have issued class deviations.[6] As the class deviations explain, because the cost accounting standard threshold is linked to the threshold for obtaining certified cost or pricing data, this change also increases the threshold for applicability of the cost accounting standards to $2 million.

CONCLUSIONS

These changes are ultimately a mixed bag for contractors. The increased TINA threshold means that fewer contracts will be subject to submission of cost or pricing data and defective pricing audits. However, the elimination of anticipated competition as a basis for proving the adequate competition exception narrows that exception for defense contractors and will increase obligations for submission of cost or pricing data. Although the original rule recognizes that the government will receive a fair price so long as contractors think there is competition, the revised rule requires there be actual competition for DoD procurements. Clearly, the concept of competition affecting price does not differ by agency, yet now defense contractors will be required to provide cost or pricing data where their civilian counterparts are not. Lastly, the requirement to certify the provision of complete, accurate, and current cost or pricing data within five days of agreement on price—and without provision of any additional data not available to the government before agreement on price—presents the greatest risk to contractors. The five-day rule is indicative of the government's oft misperception that contractors have a magic button that allows them to produce the cost or pricing data relevant to that particular document that is reasonably available as of the date of agreement on price. The sweep is never a five-day process. And, as discussed above, the government intends to wield the threat of estimating deficiencies—another unenviable prospect for contractors—to get what it wants.

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[6] *Available at* https://www.acq.osd.mil/dpap/policy/policyvault/USA000864-18-DPAP.pdf and https://acquisition.gov/sites/default/files/page_file_uploads/CAAC_Letter_2018-03.pdf.