

Cost or Pricing Data Requirements: Emerging Developments and Risk Areas

By ALEXANDER O. CANIZARES



One of the recurring challenges facing companies that do business with the government is having to turn over cost or pricing data to the government during contract negotiations. Under the Truthful Cost or Pricing Data Act, commonly referred to by its former name, the Truth in Negotiations Act or TINA,

the government may, in certain circumstances, obtain certified (or uncertified) cost or pricing data from contractors as a means of verifying that prices are reasonable. Enacted in 1962 in response to reports of widespread overcharging by defense contractors, TINA was intended to protect the taxpayer by giving contracting officers more information when negotiating prices with offerors. But cost or pricing data submissions may result in administrative burdens and delays in the acquisition system that can frustrate other policy goals.

This article focuses on four recent developments that bear upon the scope of cost or pricing data requirements and their impact on contractors:

- The increase in the TINA threshold from \$750,000 to \$2 million, which significantly narrows the scope of contracts subject to the statute;
- The Section 809 Panel's findings that the Department of Defense (DoD) overuses cost or pricing data and should change its practices to attract commercial companies to the federal market and help streamline the procurement process;
- A February 2019 DoD Inspector General (IG) report and DoD policy changes addressing prices charged by sole-source contractors; and
- Provisions in the FY 2020 National Defense Authorization Act (NDAA) that would amend TINA to incentivize companies to comply with requests for other than certified cost or pricing data, among other changes.

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TINA and Certified Cost or Pricing Data Requirements

TINA was enacted in 1962 in Public Law 87-653 in response to General Accounting Office (GAO)¹ findings of extensive overpricing by federal contractors.² In 1959, after audits of DoD negotiated contracts, GAO reported to Congress that some contractors overcharged the department and obtained unwarranted profits.³ Prompted by GAO's findings, in 1959, DoD revised its price negotiation policies and procedures in the Armed Services Procurement Regulation to require prime contractors to provide current, complete, and accurate cost or pricing data to the government to allow for a "thorough analysis of contractors' proposals."⁴ The revised regulations also required prime contractors to certify that, for all procurements over \$100,000, they were providing up-to-date cost data.⁵

Following a series of congressional hearings leading to TINA's passage, Congress ultimately determined that DoD's regulations did not go far enough. GAO identified additional instances in which insufficient cost or pricing data in the possession of the government, in GAO's view, undermined the government's ability to determine fair and reasonable prices and contributed to overcharging.⁶ As GAO's General Counsel, Robert F. Keller, testified in a hearing after TINA's enactment, "[t]he excessive prices disclosed by our audits resulted principally from the contractors' failure to submit, or the military departments' failure to obtain, accurate, current, or complete cost data upon which to establish prices."⁷ Based on audits of negotiated Army, Navy, and Air Force contracts from 1957 to 1962, GAO identified overcharges amounting to \$61 million, of which \$48 million was recovered.⁸ Representative Carl Vinson, chair of the House Armed Services Committee, argued that legislation was needed to address the problem.⁹ He declared during a congressional hearing: "When a contractor knows his costs from having performed similar work—and he alone knows what his books show to be the cost—he ought not to be permitted to pull the wool over the eyes of Government negotiators by withholding that information."¹⁰ TINA was signed into law by President Kennedy on September 10, 1962.

Under TINA,¹¹ when a specific dollar threshold is exceeded and if no exceptions apply, contracting officers must obtain certified cost or pricing data before awarding or modifying a negotiated contract (or, in certain situations, when a subcontract is awarded).¹² When such data are required, the contractor must execute a certification stating that, to the certifier's knowledge, the data being

submitted are “accurate, complete and current” as of a given date.¹³

The regulations governing contract cost or pricing data are set forth in FAR Subpart 15.4 and the Defense FAR Supplement (DFARS) Part 215.403. Generally, cost or pricing data consist of facts that prudent buyers and sellers would reasonably expect to significantly affect price negotiations.¹⁴ Under the FAR, such data must be factual, and not judgmental, and must be verifiable.¹⁵ Examples include vendor quotes, nonrecurring costs, data supporting business projections, and make-or-buy decisions.¹⁶ Offerors that submit price proposals must follow instructions set forth in Table 15-2 of FAR 15.408. The certification includes cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the government that are part of an offeror’s proposal.¹⁷

According to the *Defense Contract Audit Agency Manual* (DCAAM), certified cost or pricing data puts the government and contractors on “equal footing” by allowing the government to independently analyze a contractor’s prices when negotiating contracts.¹⁸

Exceptions and Other Than Certified Cost or Pricing Data

The Federal Acquisition Streamlining Act (FASA) of 1994 narrowed the coverage of TINA by increasing the TINA threshold to \$500,000 and by exempting commercial items.¹⁹ Under current law, certified cost or pricing data are not required, even if the acquisition is above the dollar threshold, when (1) the price agreed upon is based on “adequate price competition,” (2) prices are set by law or regulation, (3) a commercial item is being acquired, (4) a waiver has been granted, or (5) a contract or subcontract for commercial items is being modified.²⁰ This means that in a competitive procurement with multiple offerors, contracting officers generally do not need to request cost or pricing data from the contractor to determine price reasonableness. Consistent with FASA’s purpose of revising and streamlining federal procurement laws, the commercial items exception was specifically intended to “relieve commercial contractors from what they consider their number one disincentive to participating in government procurements—the burden of collecting cost data for the government.”²¹

In June 2019, the FAR Council amended the “adequate competition” exception under TINA. Effective July 12, 2019, for contracts awarded by DoD, NASA, and the Coast Guard, in order to have adequate price competition, the government must receive two or more responsive offers.²² Thus, if there is an expectation of competition but only one offer is received (and if no other exception applies, the contracting officer will request certified cost or pricing data.)²³

When certified cost or pricing data is not required, the contracting officer may be able to obtain “other than certified” cost or pricing data to establish that prices are

reasonable.²⁴ Other than certified cost or pricing data may, but need not necessarily, include data supplied by the offeror. The FAR states that the contracting officer must obtain other than certified cost or pricing data from the offeror or contractor when there is “no other means for determining a fair and reasonable price.”²⁵ The FAR includes a nonexhaustive list of techniques that the government may use to determine price reasonableness.²⁶ Contracting officers shall obtain data other than certified cost or pricing data “if that is the contracting officer’s only means to determine the price to be fair and reasonable.”²⁷

When adequate price competition exists, price reasonableness generally can be determined without additional data.²⁸ In the “unusual circumstances” in which additional data are necessary to determine the price reasonableness, the contracting officer “shall, to the maximum extent practicable, obtain the additional data from sources other than the offeror.”²⁹ For example, such data may be used to determine the reasonableness of prices for sole-source contracts for which there is no price competition. Data might be derived from established catalog or market prices or sales to nongovernmental and governmental entities.³⁰

Audits and Consequences of Noncompliance

Compliance with the cost or pricing data statutes and regulations presents significant challenges and risks for contractors. The FAR provides that an offeror that does not comply with a requirement to submit other than certified cost or pricing data is ineligible for award unless the head of the contracting agency determines that it is in the government’s “best interest.”³¹

The prospect of a contractor’s data being audited by DCAA raises particular risks.³² In a defective pricing audit, DCAA will examine, post-award, whether a contractor’s cost or pricing data was defective and, if so, whether the defect resulted in a significant price increase.³³ If a defect (inaccurate, incomplete, or noncurrent data) is found, the government may seek to adjust the price under the clause at FAR 52.215-10(a) (Price Reduction for Defective Certified Cost or Pricing Data), which includes interest and penalty provisions.³⁴ Defective pricing is evidently receiving increased attention from DCAA. In FY 2020, DCAA is reportedly set to more than triple the number of defective pricing audits it conducts.³⁵

Inaccurate or misleading pricing submissions or other types of defective pricing can also potentially expose a contractor to liability under the False Claims Act (FCA), which imposes treble damages and penalties on violators that knowingly submit or cause the submittal of false or fraudulent claims to the government.³⁶ Defective pricing audits can develop into FCA investigations and potentially parallel litigation under both TINA and the FCA.³⁷

Recent Developments Related to Cost or Pricing Data Requirements

There have been several recent developments that,

taken together, indicate both an appreciation for the burdens that cost or pricing data requirements impose on contractors as well as a recognition of the role that such data can play in helping the government determine whether prices are reasonable. These developments echo a debate going back at least twenty-five years to the Federal Acquisition Streamlining Act of 1994 as to how to balance the goal of acquiring more goods and services from commercial sources against the need for oversight of contractor prices.³⁸

Increased TINA Threshold to \$2 Million

In a significant legislative change related to TINA, Section 811 of the FY 2018 NDAA increased the TINA threshold for obtaining certified cost or pricing data to \$2 million from \$750,000 for contracts entered into after June 30, 2018.³⁹

The purpose of the amendment was to streamline the acquisition process. According to the House Armed Services Committee's report on the FY 2018 NDAA, increasing the TINA threshold was intended to "reduce administrative burdens, improve process timelines for smaller contracts, and make thresholds approximately consistent with standard auditing thresholds."⁴⁰ The higher TINA threshold means that fewer contracts are subject to mandatory reporting requirements, a significant development given the substantial resources necessary to compile cost or pricing data for submission to the government. Also, because the Cost Accounting Standards (CAS) threshold is equated to the threshold for obtaining certified cost or pricing data, the threshold for the application of CAS was likewise increased to \$2 million, meaning fewer contractors are subject to CAS.⁴¹

In April 2018, DoD issued a deviation from the FAR directing that contracting officers start using the \$2 million TINA threshold effective July 1, 2018.⁴² On October 2, 2019, the FAR Council issued a proposed FAR rule that would implement the increase in the TINA threshold.⁴³ The period for public comment on the revision ended December 2, 2019. As the *Federal Register* notice announcing the proposed rule explains, businesses competing for negotiated contracts valued between \$750,000 and \$2 million "will no longer be required to submit certified cost or pricing data between those amounts" and, because of the higher CAS threshold, "fewer contractors will be required to comply with the FAR clauses" implementing CAS.⁴⁴

Section 809 Panel Urges Reducing the Use of Cost or Pricing Data

The impact of cost or pricing data requirements on the defense acquisition system was also addressed by the Advisory Panel on Streamlining and Codifying Acquisition Regulations, also known as the Section 809 Panel, which was tasked by Congress with identifying ways to streamline and improve the defense acquisition system.⁴⁵

Recognizing the burdens that cost or pricing data

requirements impose on the defense procurement process, the Section 809 Panel called for reducing the use of cost or pricing data.⁴⁶ In its Volume 3 Report, issued in January 2019, the Section 809 Panel wrote that DoD "must continue to improve its processes for determining price reasonableness" and "work to use a broader set" of techniques to make such determinations.⁴⁷ The Panel explained that although a "variety of tools and techniques are available" to analyze costs or prices, contracting officers "often rely solely on cost or pricing data . . . , passing over other available alternatives."⁴⁸ The Panel opined that this practice "adds a barrier to entry" because it "excludes new entrants to the market that may not have sufficient sales data for their products or a cost analysis system compliant with DoD practices (which is often inconsistent with private-sector practices)."⁴⁹ Companies that do have such sales data "may be unwilling to relinquish it" based on confidentiality concerns.⁵⁰ The Panel wrote that "many stakeholders inside and outside of DoD observed that DoD has never developed expertise in how the public sector determines pricing."⁵¹ According to the Panel, the absence of expertise in the government results in requests for certified cost or pricing data or similar data.⁵² This practice, the Panel wrote, "appears to be one of the factors contributing to reduced use of commercial buying procedures."⁵³

To combat this trend, the Panel recommended that the government be prohibited from requesting cost or pricing data from suppliers of "readily available products and services, including those being customized for DoD."⁵⁴ The Panel also recommended that, instead of using cost or pricing data to determine price reasonableness, DoD use "available market intelligence," technical analysis provided by the requirement owner, and other information.⁵⁵ The Panel also wrote: "DoD's focus on limiting profit margins—an odd focus in a capitalist society—creates a barrier to doing business with DoD according to many of the companies with which the Section 809 Panel spoke."⁵⁶

DoD IG Recommendations and DoD Policy Changes Scrutinizing Cost or Pricing Data Requirements for Sole-Source Contracts

DoD IG February 2019 Report

Notwithstanding the Section 809 Panel's calls to reduce reliance on cost or pricing data, the DoD IG has taken a diametrically opposite position.

In a February 2019 report finding that a defense contractor, TransDigm Group, Inc. (TransDigm), overcharged DoD for spare parts under sole-source contracts,⁵⁷ the IG characterized the government's inability to obtain such data as a systemic problem.⁵⁸ The IG stated that although using certified or uncertified cost data "is the most reliable way" to determine whether a price is fair and reasonable,⁵⁹ contracting officers are often unable to obtain cost or pricing data when they request it

from contractors.⁶⁰ The IG cited several reasons.

First, according to the IG, federal and DoD acquisition policies “lack consequences for contractors that refuse to provide uncertified cost data.”⁶¹ The IG appeared to criticize the TINA exception for commercial item contracts and contracts whose value falls below the Simplified Acquisition Threshold.⁶² The IG also opined that “new legislation is making it easier for contractors to avoid providing cost data to contracting officers.”⁶³ The IG cited the increase in the TINA threshold as an example.⁶⁴ During a May 2019 hearing, DoD Principal IG Glenn Fine testified that although the recent increase in the TINA threshold was intended “to streamline the acquisition process, which is a laudable objective,” it results in contracting officers “having less information” to use during negotiations with contractors, “especially when a contractor is the sole-source for parts.”⁶⁵ The IG’s report also noted that there “is no specific requirement” in the FAR or DFARS requiring contractors to provide certified or uncertified cost data when requested.⁶⁶

Second, the IG asserted that statutory and regulatory requirements “discourage” contracting officers from asking for other than certified cost or pricing data.⁶⁷ For example, the IG cited the FAR provision specifying that a contractor’s other than certified cost or pricing data should be obtained when there “is no other means” for determining price reasonableness.⁶⁸ The IG opined that existing federal and DoD acquisition pricing policies “give contractors the advantage when it comes to not providing uncertified cost data to contracting officers for sole-source parts[.]”⁶⁹

The IG made several recommendations for DoD.⁷⁰ The IG suggested that DoD examine the relevant statutes, regulations, and policies to “determine changes needed in the acquisition process of parts produced or provided from a sole-source to ensure that contracting officers obtain uncertified cost data when requested[.]”⁷¹ The IG also urged that DoD establish a team of functional experts to assess parts and contractors “deemed to be at high risk for unreasonable pricing and identify trends” and perform cost and price analysis of high-risk parts.⁷²

DoD Response to the IG Report and Policy Changes

DoD concurred with the IG’s recommendations⁷³ and initiated certain steps that collectively indicate that pricing under sole-source contracts is coming under scrutiny.

In a March 22, 2019, response to the IG’s report, Kim Herrington, Acting Principal Director, Defense Pricing and Contracting (DPC), explained that a review of existing statutes and regulations had been conducted but that DoD had “identified no panacea to force uncooperative contractors to provide uncertified cost or pricing data” absent legislative changes.⁷⁴

Mr. Herrington announced other specific steps that had been or would be taken in response to the IG’s report.

First, DPC instituted new reporting requirements

focused on companies that refuse to comply with requests for cost or pricing data.⁷⁵ An updated policy memorandum dated March 22, 2019, adopts “a quarterly reporting requirement” for all determinations by contracting officials that a contract may be awarded despite the contractor’s refusal to provide data requested by DoD during the negotiation process.⁷⁶ This change is meant to address situations in which the head of a contracting activity determines that it is in the government’s interests to award a contract despite the contractor’s refusal to provide such data. According to Mr. Herrington, the policy change will respond to “difficulties that contracting officers encounter” when seeking cost or pricing data, in particular when TINA does not apply.⁷⁷

This change updated an existing policy requiring contracting officers to notify the Director of Defense Pricing and Acquisition Policy (DPAP) of any contracts awarded without obtaining requested cost or pricing data.⁷⁸ During a May 2019 hearing before the House Committee on Oversight and Reform, Kevin Fahey, Assistant Secretary of Defense for Acquisition, testified that he concurred with “all” of the IG’s recommendations,⁷⁹ and that he had directed the heads of the contracting activities to report to the Principal Director of DPC all contractors who refuse to provide cost or pricing information.⁸⁰ “This will provide the Department holistic insight into such denials of requests for cost or pricing data[.]” Mr. Fahey said.⁸¹

Second, Mr. Herrington issued a policy memorandum dated March 22, 2019, announcing the formation of a cadre of experts to identify and share data regarding contractors deemed to be “at high risk for unreasonable pricing.”⁸² The group of experts is charged with, among other things, identifying sellers who routinely refuse to provide cost or pricing data.⁸³

DoD also agreed with the IG’s recommendation that DoD perform price analysis and cost analysis of “high-risk parts” to identify lower-cost alternatives or fair and reasonable pricing for future procurements.⁸⁴ Mr. Herrington indicated that the cadre of experts noted above would conduct this analysis with help from the Defense Contract Management Agency (DCMA).⁸⁵ DoD has indicated that it is investigating potential “reverse engineering possibilities” for more than 1,000 spare parts to create “competitive alternatives” and drive prices down.⁸⁶

Yet instances of overcharging by contractors are exceptional, according to Ellen Lord, DoD’s Under Secretary of Acquisition and Sustainment.⁸⁷ In a December 9, 2019, letter to Senator Chuck Grassley, Republican of Iowa and Chairman of the Senate Finance Committee, outlining the above steps, Ms. Lord wrote that, while instances of attempts by contractors to overcharge the Department “have occurred over the years,” DoD contracting officers have “successfully prevented most of them.”⁸⁸ Ms. Lord explained that “[i]f excessive pricing were so easy and lucrative to achieve, we would expect to see a

barrage of audit findings reporting such excesses. This is just not the case.”⁸⁹

Legislative Proposals and Responses

There have also been significant legislative changes in response to issues raised in the IG’s report, in particular in the FY 2020 NDAA, which President Trump signed into law on December 20, 2019. The FY 2020 NDAA revises TINA to make it easier for the government to obtain other than certified cost or pricing data from unwilling contractors.⁹⁰

The legislation amends TINA to provide that offerors who fail to make a “good faith effort to comply with a reasonable request” to submit other than certified cost or pricing data are ineligible for award, absent a waiver.⁹¹ It also provides that, when obtaining other than certified cost or pricing data, contracting officers should not look solely at the prices historically paid by the government when determining whether an offeror’s price is reasonable.⁹²

The NDAA also requires the Under Secretary of Defense for Acquisition and Sustainment to produce an annual report identifying offerors that have denied “multiple requests” for other than certified cost or pricing data over the preceding three years but nevertheless received an award.⁹³ The NDAA also requires the Secretary of Defense to assess the extent to which these offerors are sole-source providers and “develop strategies to incentivize new entrants” to increase the availability of supplies from other sources.


In addition, the statute requires GAO to report on the efforts of the Secretary of Defense to secure data relating to the price reasonableness of offers on contracts.⁹⁴

The final NDAA did not include the more sweeping changes to TINA included in a version of the NDAA passed by the House of Representatives in July 2019.⁹⁵ For example, the House-passed bill would have required that cost or pricing data be submitted for commercial items that are “solely procured by the Department of Defense[.]”⁹⁶ The House bill also would have allowed contracting officers to require contractors to submit certified cost or pricing data even for contracts below the TINA threshold if the contracting officer deemed such data necessary.⁹⁷

Notably, the Senate Armed Services Committee’s report for its version of the FY 2020 NDAA encouraged using alternatives to cost or pricing data.⁹⁸ The Committee noted that certified cost or pricing data are frequently required to achieve the “necessary goal” of ensuring that the government obtains “the best value and [is] paying a fair price” but that such data can create a “time and cost burden” and slow the procurement process.⁹⁹ Ultimately, the committee wrote, this “leads to operational systems and technologies being behind the pace of global innovation” at taxpayer expense and can create a “barrier to entry” for commercial and small business suppliers.¹⁰⁰ The Committee urged that experts “explore and develop alternatives to certified cost or pricing data.”¹⁰¹

Although the far-reaching House-passed provisions did not end up in the final NDAA, the fact that they passed the House initially suggests that further legislative proposals related to cost or pricing data are likely.

Final Thoughts

These recent developments underscore the ongoing lack of consensus as to the proper balance between giving more information to the government to help it establish reasonable prices and other goals, such as attracting nontraditional companies to the defense market. The increase in the TINA threshold reflects Congress’s recognition that cost or pricing data requirements impose administrative burdens that can delay the acquisition process. The Section 809 Panel’s critique is broader: that DoD’s tendency to rely on cost or pricing data from contractors is to the government’s detriment and that regulatory requirements in this area deter commercial entities from doing business with DoD. The DoD IG report and recent legislative activity indicate that attention to contractors’ profits and sole-source contracting may increase. In this respect, the same concerns that motivated Congress to enact TINA nearly sixty years ago appear to be at work again. 

Endnotes

1. Effective July 7, 2004, GAO’s legal name was changed from General Accounting Office to Government Accountability Office.

2. See, e.g., *Hearings Pursuant to Section 4, Public Law 86-89 Before the Special Subcomm. on Procurement Practices of Dep’t of Defense of the House Comm. on Armed Servs.*, 86th Cong., 2d Sess. 64–70 (1960) (hereinafter 1960 Hearings).

3. *Id.* at 64–70.

4. *Id.* at 150.

5. *Id.*; see also *id.* at 214–15.

6. See *Weapons System Management and Team System Concept in Government Contracting: Hearing on H. Res. 19: Hearings on Weapons System Management Before the Subcomm. for Special Investigations of The House Comm. on Armed Servs.*, 86th Cong., 1st Sess. at 346–65, 360 (1959) (Statement of L.F. Powers, Gen. Accounting Office); see *id.* at 348 (“The principal weakness noted in Air Force control over prime contract prices was the failure of the Air Force to require its contracting officials and the prime contractors to give sufficient consideration, in establishing prime contractor prices, to cost data available at the time prices were negotiated, particularly with regard to subcontracted items”) (Statement of L.F. Powers, Gen. Accounting Office). See generally Herbert Roback, *Truth in Negotiating: The Legislative Background of P.L. 87-653*, 1 PUB. CONT. L.J., no. 2, July 1968, at 3.

7. *Relation of Cost Data to Military Procurement: Hearing on H. Res. 84 Before the Subcomm. for Spec. Investigations of H. Comm. on Armed Servs.*, 88th Cong., 1st Sess. 6 (1963).

8. *Id.*

9. *Amending Armed Services Procurement Act: Hearing on H.R. 5532 Before the Subcomm. for Spec. Investigations of H. Comm. on Armed Servs.*, 87th Cong., 2d Sess. 17, 108 CONG. REC. 9973 (1962) (Statement of Rep. Vinson).

10. *Id.*

11. 41 U.S.C. § 3502; 10 U.S.C. § 2306a.

12. 41 U.S.C. § 3502(a)–(b); 10 U.S.C. § 2306a(a); FAR 15.403-4(a)(1).

13. See FAR 15.406-2; 10 U.S.C. § 2306a(a)(2).
14. FAR 2.101.
15. *Id.*
16. *Id.*
17. FAR 15.406-2(a).
18. See DCAA CONTRACT AUDIT MANUAL, sec. 14-103.1, <https://www.dcaa.mil/Home/CAM> (last visited Nov. 3, 2019).
19. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §§ 1201, 1202, 1251, 108 Stat. 3243; see 10 U.S.C. §§ 2306a(a)–(b).
20. FAR 15.403-1(b); 10 U.S.C. § 2306a(b)(1)(A).
21. S. REP. NO. 103-258, at 6–7, 103d Cong., 2d Sess. (1994).
22. Federal Acquisition Regulation: Exception from Certified Cost or Pricing Data Requirements—Adequate Price Competition, 84 Fed. Reg. 27494, 27494–97 (June 12, 2019).
23. *Id.*
24. FAR 15.402(a)(1), 15.403-3.
25. FAR 15.404-1(b).
26. FAR 15.404-1(b)(2).
27. FAR 15.404-1(b); see also FAR 15.403-3(a)(1)(ii) (the contracting officer is required to request other than certified cost or pricing data from the offeror “to the extent necessary to determine a fair and reasonable price . . . if the contracting officer determines that adequate data from sources other than the offeror are not available”).
28. FAR 15.403-3(b).
29. *Id.*
30. FAR 15.402(a)(2)(ii)(A).
31. FAR 15.403-3(a)(4).
32. See FAR 52.215-2(c) (“If the Contractor has been required to submit certified cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor’s records, including computations and projections, related to” various aspects of the contract and performance).
33. See DCAA CONTRACT AUDIT MANUAL, *supra* note 18, sec. 14-100.
34. See FAR 52.215-10 (Price Reduction for Defective Certified Cost or Pricing Data); see also DCAA CONTRACT AUDIT MANUAL, *supra* note 18, sec. 14-100 (Truth in Negotiation Compliance Audits of Contractor Certified Cost or Pricing Data), https://www.dcaa.mil/Content/Documents/cam/Chapter_14_-_Other_Contract_Audit_Assignments.pdf.
35. Anthony Capaccio, *Pentagon Plans to Triple Audits Amid Surge in Defense Spending*, BLOOMBERG (Sept. 13, 2019), <https://www.bloomberg.com/news/articles/2019-09-13/pentagon-plans-to-triple-audits-amid-surge-in-defense-spending>.
36. 31 U.S.C. §§ 3729–3730; see, e.g., UMC Elecs. Co. v. United States, 249 F.3d 1337 (Fed. Cir. 2001) (affirming government counterclaims based on the False Claims Act, the Special Plea in Fraud, and the anti-fraud provision of the Contract Disputes Act where contractor knowingly submitted a false claim purportedly based on “actual costs” incurred).
37. See David Z. Bodenheimer, Brian Tully McLaughlin & Jason M. Crawford, *Defective Pricing & the False Claims Act*, 19 BRIEFING PAPERS (2d ser.), no. 5, Apr. 2019, at 1 (discussing TINA and the FCA).
38. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.
39. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017). Effective July 1, 2018, DoD contracting officers began using \$2 million as the threshold for obtaining certified cost or pricing data. Memorandum from Shay D. Assad, Dir. Def. Pricing/Def. Procurement & Acquisition Policy, to Commander et al. (Apr. 13, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000864-18-DPAP.pdf>.
40. COMM. ON ARMED SERVS., HOUSE OF REPRESENTATIVES, REPORT 115-200, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2018, at 63.
41. 41 U.S.C. § 1502(b)(1)(B); see Memorandum from Shay D. Assad, *supra* note 39.
42. *Id.*
43. Federal Acquisition Regulation: Modifications to Cost or Pricing Data Reporting Requirements, 84 Fed. Reg. 52420, 52428–30 (Oct. 2, 2019).
44. *Id.*
45. The Section 809 panel was established in section 809 of the 2016 NDAA, with the purpose of reviewing DoD acquisition regulations “with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense advantage” and making recommendations for the amendment or repeal of such regulations. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 809(c)(1)–(2), 129 Stat. 726, 889 (2015).
46. REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, VOL. 3, at 16 (Jan. 2019), https://section809panel.org/wp-content/uploads/2019/01/Sec-809Panel_Vol3-Report_JAN19_part-1_01-28.pdf [hereinafter Section 809 Report].
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 43.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* DoD also has acknowledged the impact of cost or pricing data submissions on acquisition lead times. Citing the goal of reducing delays in contract awards caused by untimely cost or pricing data submissions, on June 7, 2018, DoD adopted a policy requiring that offerors execute a cost or pricing data certificate within five business days of the date of price agreement. Memorandum from Shay D. Assad, Dir. Def. Pricing/Def. Procurement & Acquisition Policy, to Commander et al. (June 7, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000646-18-DPAP.pdf>.
57. INSPECTOR GEN., U.S. DEP’T OF DEF., REPORT NO. DODIG-2019-060, REVIEW OF PARTS PURCHASED FROM TRANSDIGM GROUP, INC. (2019), <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF> [hereinafter TRANSDIGM REPORT].
58. *Id.* at 20.
59. *Id.* at 13.
60. *Id.* at 38.
61. *Id.* at 31.
62. *Id.*
63. *Id.*
64. *Id.* at 31–32.
65. *Statement of Glenn A. Fine, Principal Deputy Inspector Gen., Performing the Duties of the Inspector Gen., Before the Comm. on Oversight & Reform, U.S. House of Representatives* at 3 (May 15, 2019).
66. TRANSDIGM REPORT, *supra* note 57, at 38.
67. *Id.* at 32.
68. *Id.*; see FAR 15.404-1(b)(1).
69. TRANSDIGM REPORT, *supra* note 57, at 33.
70. *Id.* at 40–42. TransDigm refunded agencies \$16 million in response to the report. See Press Release, House Comm. on Oversight & Reform, TransDigm to Refund \$16 Million to DOD as a

Result of Committee Investigation (May 24, 2019), <https://oversight.house.gov/news/press-releases/transdigm-to-refund-161-million-to-dod-as-a-result-of-committee-investigation>.

71. TRANSDIGM REPORT, *supra* note 57, at 43.

72. *Id.* at 37. On July 8, 2019, DoD IG announced that it will conduct an audit to determine whether TransDigm's "business model affects the DoD's ability to pay fair and reasonable prices for spare parts." INSPECTOR GEN., DEP'T OF DEF., PROJECT ANNOUNCEMENT: AUDIT OF TRANSDIGM GROUP, INC.'S BUSINESS MODEL AND ITS AFFECT ON DoD SPARE PARTS PRICING (PROJECT NO. D2019-D000AT-0181.000) (July 8, 2019), <https://www.dodig.mil/reports.html/Article/1897880/project-announcement-audit-of-transdigm-group-incs-business-model-and-its-affect/>.

73. TRANSDIGM REPORT, *supra* note 57, at 39–45.

74. Memorandum from Kim Herrington, Acting Principal Dir., Def. Pricing & Contracting, to Assistant Inspector Gen. (Mar. 22, 2019) (attaching Department of Defense, Office of the Under Secretary of Defense, Process and Reporting Requirements Pertaining to Contractor Denials of Contracting Officer Requests for Data Other Than Certified Cost or Pricing Data (Mar. 22, 2019)), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019.03.22%20DPC%20Response%20to%20DOD%20IG%20recommendations.pdf>.

75. *Id.* at Attachment 1.

76. *Id.*

77. *Id.*

78. *Id.*

79. Statement by Kevin M. Fahey, Assistant Sec. of Def. for Acquisition, Before H. Comm. on Oversight & Reform on Managing Overpricing of Spare Parts at 3 (May 15, 2019), <https://docs.house.gov/meetings/GO/GO00/20190515/109477/HHRG-116-GO00-Wstate-FaheyK-20190515.pdf>.

80. Memorandum from Kim Herrington, *supra* note 74.

81. Statement by Kevin M. Fahey, *supra* note 79, at 5.

82. Memorandum from Kim Herrington, *supra* note 74, at Attachment 3.

83. Statement by Kevin H. Fahey, *supra* note 79.

84. Memorandum from Kim Herrington, *supra* note 74.

85. *Id.*

86. Letter from Ellen M. Lord, Under Secretary of Defense for Acquisition and Sustainment, to Senator Chuck Grassley, Dec. 9, 2019, enclosure at 6, <https://www.grassley.senate.gov/sites/default/files/2019-12-09%20DOD%20to%20CEG%20%28TransDigm%29.pdf>.

87. *Id.*, enclosure at 7.

88. *Id.*

89. *Id.*

90. National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. (2019–2020), <https://www.congress.gov/bill/116th-congress/senate-bill/1790> (last visited Feb. 10, 2020).

91. *Id.* § 803.

92. *Id.*

93. *Id.*

94. *Id.* § 804.

95. H.R. 2500, 116th Cong. (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/2500/text> (last visited Feb. 10, 2020).

96. *Id.* § 803(a).

97. *Id.* § 804.

98. S. REP. NO. 116-48, at 222 (2019).

99. *Id.*

100. *Id.*

101. *Id.*