Monitoring and Defending Your TINA Cost or Pricing Data Disclosure and Certification Practices

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Topics

- Five TINA Audit Points
- Offsets
- Risk Areas
- Summary
Five TINA Audit Points / Elements of Defective Pricing

- Five Points:
  - Cost or pricing data
  - Data reasonably available to contractor
  - Information not submitted or disclosed to Government / no actual knowledge
  - Government relied on the data
  - Caused increased price
- Government bears ultimate burden of proof
Cost or Pricing Data

- All facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly
- Verifiable
- Not judgmental
- Includes the data forming the basis for judgments
- Examples:
  - Vendor quotes
  - Nonrecurring costs
  - Changes in production methods/volume
  - Information on management decisions
Cost or Pricing Data – Defending Your Practices

- When in doubt whether its cost or pricing data, disclose
  - Beware dynamic environments
  - Government RFIs
- TINA Sweep
  - But - "The auditor must assess whether a contractor's sweep practices reflect deficiencies in estimating practices or procedures" DCAM 14-120.4
- Hold on to judgments during audit phase
- Also, contest DCAA conclusions inconsistent with the circumstances of the negotiations
  - Fact intensive
The contractor must meaningfully disclose all reasonably available cost or pricing data

- Format specified by solicitation (for example, FAR Table 15-2)
- Actual delivery or specific (not generic) identification

Submission to the Contracting Officer or an authorized representative

Disclosure obligation is also fulfilled "if the Government obtains the data in question in some other manner or had knowledge . . . [It] must be meaningful . . ."

Appeals of Alliant Techsystems, Inc., ASBCA Nos. 51280, et al., 00-2 BCA ¶ 31,042 at 153,298.
Obligation to Submit or Disclose – Defending Your Practices

- Contractor need not use, analyze or re-organize the furnished data
- Contractor is not obligated to "lead the auditor by the hand" *Hardie-Tynes Mfg. Co.*, ASBCA No. 20717, 76-2 BCA ¶ 12,121 at 58,226
- Documentation of disclosures and Government knowledge is key
Reliance

- Rebuttable presumption of agency reliance
  - "natural and probable consequence"
- Common Governmental evidentiary bases
  - Price Negotiation Memorandum
  - Contracting Officer testimony
- Must be reasonable
- *Rebut presumption of reliance*
  - Government admissions
  - Conduct of parties or Government
  - Once contractor rebuts presumption, the Government must establish reliance  
    See *e.g.* *Wynne v. United Technologies Corp.*, 463 F.3d 1261 (Fed. Cir. 2006) (contractor rebutted presumption and Government failed to meet burden of proof)
Causation of Increased Price

- Rebuttable presumption of increased price
  - "dollar for dollar"
  - Includes associated costs and profit
- DCAA's approach to determining the defective data
  - "compare the cost or pricing data in the audit baseline to all accurate, complete, and current pricing data reasonably available to the contractor prior to agreement on price . . . Differences found identify potential defective pricing. For such differences the auditor must establish the five points . . ."
- "Price adjustments of 5 percent of the contract value or $50,000 whichever is less should normally be considered immaterial"
  - Exceptions – such as recurrent events or systemic deficiency
Quantum Analysis

<table>
<thead>
<tr>
<th>Audit Baseline</th>
<th>Accurate, current, complete data</th>
<th>Adjust for nonreliance, actual Gov't knowledge</th>
<th>Potential Damages / Penalty</th>
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</thead>
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- **Penalty**
- **Damages**
• Contractor underpricing
• Contractor bears burden of proof
  ▪ Cost or pricing data
  ▪ Available before agreement
  ▪ Not submitted
  ▪ Government may rebut causation and reliance
• Certification required
• Inadvertent undisclosed higher cost data
• Limited to same pricing action, but not same cost elements
• No net price increase
Opportunities at Key Milestones

- Audit entrance conference
- Audit exit conference
- Draft audit report
DCAA Possible Defective Pricing Indicators

- Actual costs lower than audit baseline
- Proposed operations not actually performed or costs not incurred
- Direct cost items in proposal priced higher than "appropriate"
- Closing dates for transactions or indirect rates do not match contract negotiation dates
- Failure to disclose decisions expected to lower costs on prospective contracts
Practical TINA Risk Areas

- Rushed or adversarial negotiations
- Undocumented understandings and disclosures
- Subcontracting issues
- Profit on FFP contracts
- Instances of prior TINA compliance problems drives demand for greater detail
  - Inability to provide documentation creates self-fulfilling prophecy
TINA and the False Claims Act

- TINA has been the basis of FCA cases using "Fraud-in-the-inducement" doctrine / false records and statements
- Contractor may be liable under TINA, but not the FCA
- Contractor can be liable under FCA, even though no TINA violation was found at ASBCA
Summary

- TINA is a disclosure statute
  - Procedures
  - Documentation
- Beware dynamic negotiation situations
- Take full advantage of opportunities to understand or address audit issues
- If Government brings counsel to defective pricing meeting, bring yours too
Questions or comments?

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