

# 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

# Obligation to Submit or Disclose

- 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

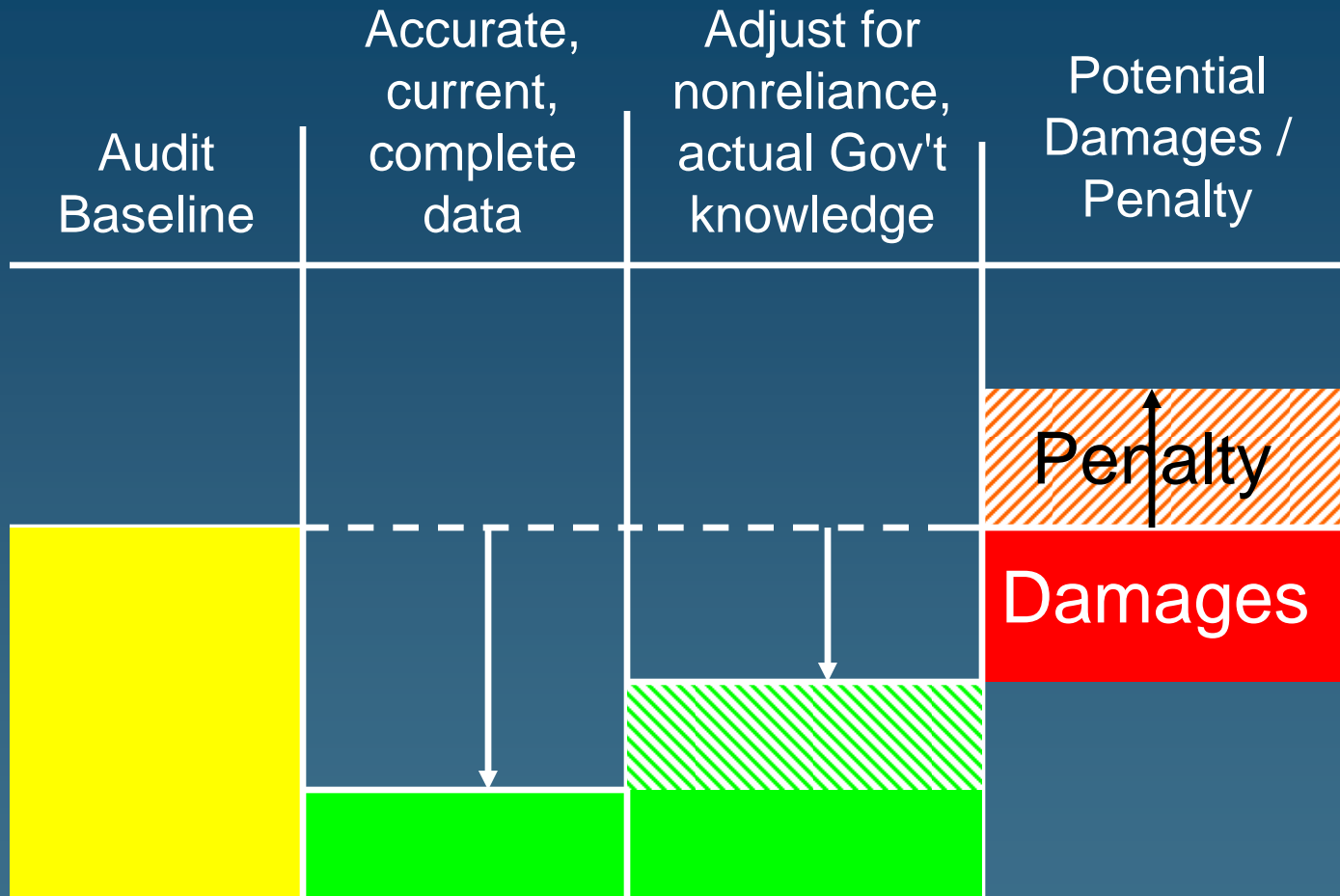
- Rebuttable presumption of agency reliance
  - "natural and probable consequence"
- Common Governmental evidentiary bases
  - Price Negotiation Memorandum
  - Contracting Officer testimony
- Must be reasonable
- *Rebut presumption of reliance*
  - Government admissions
  - Conduct of parties or Government
  - 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



# Offsets

- 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
  - *U.S. v. United Techs. Corp., Sikorsky Aircraft Div.*, 51 F.Supp. 2d 167 (D.Conn. 1999) (Government failed to prove FCA claims for lack of requisite intent, although defendant conceded that it committed one TINA violation)
- Contractor can be liable under FCA, even though no TINA violation was found at ASBCA
  - *U.S. v. United Technologies Corporation*, 2008 WL 3007997, Aug. 1, 2008 (S.D. Ohio), *aff'd in part, rev'd in part*, 626 F.3d 313 (6<sup>th</sup> Cir. 2011) (Government proved FCA claim even though in prior ASBCA action, defendant not liable under TINA for lack of Government reliance)

# 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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