

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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## The Cost Corner

# Government Contracts Cost and Pricing: The Truth in Negotiations Act, or Whatever the Kids Are Calling It These Days

*By Keith Szeliga\**

*Welcome back to the Cost Corner, addressing the complex cost and pricing regulations that apply to government contractors. The previous Cost Corner column provided an overview of the regulatory framework for government contracts cost and pricing, including the Truthful Cost or Pricing Data Statute,<sup>1</sup> the Federal Acquisition Regulation (FAR) Cost Principles,<sup>2</sup> and the Cost Accounting Standards (CAS).<sup>3</sup> This column takes a closer look at the Truthful Cost or Pricing Data Statute, commonly referred to by its former name, the Truth in Negotiations Act (TINA).*

Imagine you are hiring a contractor to build a deck. It is a busy time of year. Only one contractor is available. Would you demand that the contractor disclose all of its supplier quotes? What about quotes from suppliers it will not use? Quotes for materials you did not specify? Quotes from suppliers that cannot meet the schedule? Quotes from suppliers on other projects? Would you expect the contractor to disclose its internal analysis of the supplier quotes? What about its scrap rate or learning curve? Would you insist on a price reduction if you discovered, years later, that the contractor failed to provide any of this information?

Most of us would answer “no” to these questions. The government, however, plays by different rules and has far more demanding expectations. Those rules and expectations are set forth in TINA and its implementing regulations. The examples above are derived from cases in which the government was entitled to a price reduction for TINA violations.

TINA is a procurement statute that requires contractors to:

- (1) Disclose information – known as cost or pricing data – when negotiating certain types of contracts, subcontracts, and modifications;

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<sup>1</sup> 10 U.S.C. §§ 3701-3708; 41 U.S.C. §§ 3501-3508.

<sup>2</sup> FAR Part 31.

<sup>3</sup> 48 C.F.R. Ch. 99.

- (2) Certify that those data were accurate, complete, and current as of the date of agreement on price; and
- (3) Agree to a contract clause entitling the government to a price reduction if the contractor furnishes cost or pricing data that are defective, i.e., inaccurate, incomplete, or not current.<sup>4</sup>

Congress enacted TINA in 1962 in response to GAO reports of contractors receiving “unwarranted profits because the data used in establishing target costs or prices were inaccurate, incomplete, or out of date.”<sup>5</sup> TINA is intended to “level the playing field” by providing government negotiators the same cost or pricing data available to contractors.

### **DEFINING COST OR PRICING DATA**

TINA defines cost or pricing data to include “all facts that, as of the date of agreement on price . . . or . . . another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly.”<sup>6</sup> Cost or pricing data are “more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.”<sup>7</sup>

Examples of cost or pricing data include:

- (1) Vendor quotes;
- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit-cost trends such as those associated with labor efficiency;
- (6) Make-or-buy decisions;
- (7) Estimated resources to attain business goals; and
- (8) Information on management decisions that could have a significant bearing on cost.<sup>8</sup>

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<sup>4</sup> 10 U.S.C. §§ 3702, 3706; 41 U.S.C. §§ 3502, 3506.

<sup>5</sup> S. Rep. No. 1884, at 3 (1962).

<sup>6</sup> 10 U.S.C. § 3701(1); 41 U.S.C. § 3501(a)(1); see also FAR 2.101.

<sup>7</sup> FAR 2.101.

<sup>8</sup> FAR 2.101.

Cost or pricing data do not include information that is purely judgmental.<sup>9</sup> Unverified estimates are not cost or pricing data.<sup>10</sup> On the other hand, cost or pricing data include factual information from which judgments are derived.<sup>11</sup> They also include facts intertwined with judgments, such as engineering analyses and studies,<sup>12</sup> cost analysis of subcontractor quotations,<sup>13</sup> and even estimates derived from prior actual data.<sup>14</sup> Management decisions are cost or pricing data but management discussions are not. The authority of the decision maker is critical.<sup>15</sup>

Cost or pricing data are limited to information a reasonably prudent buyer or seller would expect to affect price negotiations significantly.<sup>16</sup> This is a “reasonable person” standard. The contractor’s subjective view of the significance of data is not dispositive.<sup>17</sup> The standard has been interpreted broadly. Vendor quotes upon which a contractor did not rely,<sup>18</sup> vendor quotes with unacceptable delivery dates,<sup>19</sup> and vendor quotes from untested sources have been found to constitute cost or pricing data that must be disclosed.<sup>20</sup> Even small impacts on price – less than two-tenths of a percent – have been found to be significant for TINA purposes.<sup>21</sup>

#### ADEQUATE DISCLOSURE

Cost or pricing data must be disclosed to the contracting officer.<sup>22</sup> Disclosure to other government personnel, such as auditors, may not be sufficient.<sup>23</sup>

<sup>9</sup> 10 U.S.C. § 3701(1); 41 U.S.C. § 3501(a)(1); FAR 2.101.

<sup>10</sup> Litton Sys., Inc., ASBCA No. 36509, 92-2 BCA ¶ 24,842.

<sup>11</sup> 10 U.S.C. § 3701(1); 41 U.S.C. § 3501(a)(1); FAR 2.101.

<sup>12</sup> Aerojet-Gen. Corp., ASBCA No. 12264, 69-1 BCA ¶ 7,664.

<sup>13</sup> Grumman Aerospace Corp., ASBCA No. 27476, 86-3 BCA ¶ 19,091.

<sup>14</sup> Lambert Eng’g Co., ASBCA No. 13338, 69-1 ¶ BCA 7,663.

<sup>15</sup> Lockheed Corp., ASBCA Nos. 36420, et al., 95-2 BCA ¶ 27,722

<sup>16</sup> 10 U.S.C. § 3701(1); 41 U.S.C. § 3501(a)(1); FAR 2.101.

<sup>17</sup> 10 U.S.C. § 2306a(h)(1); 41 U.S.C. § 254b(h)(1); FAR 2.101.

<sup>18</sup> Hardie-Tynes Mfg. Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.

<sup>19</sup> Aerojet-Gen. Corp., ASBCA No. 12873, 69-1 BCA ¶ 7,585.

<sup>20</sup> Cutler-Hammer, Inc. v. United States, 189 Ct. Cl. 76 (1969).

<sup>21</sup> American Bosch Arma Corp., ASBCA No. 10305, 65-2 BCA ¶ 5,280.

<sup>22</sup> 10 U.S.C. § 3702(c); 41 U.S.C. § 3502(c);

<sup>23</sup> Compare Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195 with Singer Co., Librascope Div. v. United States, 576 F.2d 905, 217 Ct. Cl. 225 (1978).

Making cost or pricing data available is not enough.<sup>24</sup> Physical delivery may be adequate.<sup>25</sup> Several cases have held that contractors also must explain the significance of the data.<sup>26</sup>

The Contracting Officer may require submission of cost or pricing data in the format prescribed in FAR 15.408, Table 15-2 – Instructions for Submitting Cost/Price Proposals, require an alternative format, or permit submission in the offeror's own format. The Defense Federal Acquisition Regulation Supplement (DFARS) contains a proposal adequacy checklist that provides additional guidance on the form and content of the submission.<sup>27</sup>

### TINA THRESHOLD

Unless an exception applies, TINA requires the disclosure of cost or pricing data before:

- (1) Award of negotiated prime contracts expected to exceed \$2 million;
- (2) Award of subcontracts expected to exceed \$2 million – if the prime contractor and each higher-tier subcontractor were required to furnish cost or pricing data; and
- (3) Prime contract and subcontract modifications expected to exceed \$2 million.<sup>28</sup>

The value of a modification for TINA purposes is the absolute value of all increases and decreases.<sup>29</sup> For example, a \$500,000 modification resulting from a reduction of \$1.5 million and an increase of \$1 million would be treated as a \$2.5 million pricing adjustment, which exceeds the TINA threshold.<sup>30</sup> This rule does not apply to unrelated, separately priced changes included for administrative convenience in the same modification.<sup>31</sup>

The government can require certified cost or pricing data for contract actions below \$2 million if the contract action exceeds the simplified acquisition

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<sup>24</sup> *M-R-S Mfg. Co. v. U.S.*, 492 F.2d 835, 203 Ct. Cl. 551 (1974).

<sup>25</sup> *Hardie-Tynes Manufacturing Co.*, ASBCA No. 20717, 76-2 BCA ¶ 12,121.

<sup>26</sup> *Sylvania Elec. Prods., Inc.*, ASBCA No. 13622, 70-2 BCA ¶ 8,387; *Singer Co. v. United States*, 576 F.2d 905, 217 Ct. Cl. 225 (1978).

<sup>27</sup> DFARS 252.215-7009.

<sup>28</sup> 10 U.S.C. § 3702(a); 41 U.S.C. § 3502(a); FAR 15.403-4(a)(1). The threshold for obtaining certified cost or pricing data is \$750,000 for prime contracts awarded before July 1, 2018.

<sup>29</sup> FAR 15.403-4(a)(1)(iii).

<sup>30</sup> FAR 15.403-4(a)(1)(iii).

<sup>31</sup> FAR 15.403-4(a)(1)(iii).



threshold (currently \$250,000) and the Head of the Contracting Activity (HCA) concludes that certified cost or pricing data are necessary to determine whether the price is fair and reasonable.<sup>32</sup> The HCA's determination must be in writing and cannot be delegated.<sup>33</sup>

### TINA EXCEPTIONS

Certain contract actions are exempt from TINA coverage.<sup>34</sup> TINA prohibits contracting officers from obtaining certified cost or pricing data when:

- (1) Prices agreed upon are based on adequate price competition;
- (2) Prices agreed upon are based on prices set by law or regulation;
- (3) Commercial products or commercial services are being acquired;
- (4) A waiver has been granted; or
- (5) Modifying a contract or subcontract for commercial products or services.<sup>35</sup>

The exception for adequate price competition applies when two or more offerors, competing independently, submit priced offers that satisfy the solicitation requirements, provided price is a substantial factor in the source selection and there is no finding that the successful offeror's price is unreasonable.<sup>36</sup> For agencies other than the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, adequate price competition also may exist when: (1) there was a reasonable expectation that two or more responsible offerors, competing independently, would submit price offers that meet the solicitation requirements (even if only one offer is actually received), and (2) when price analysis demonstrates that the proposed price is reasonable compared to current or recent prices for the same or similar items under contracts that resulted from adequate price competition.<sup>37</sup>

The exception for commercial products and commercial services, as defined in FAR 2.101, is subject to two limitations. For services that are "of a type" offered and sold competitively in substantial quantities in the commercial marketplace, the contracting officer must determine that the offeror has submitted sufficient information to evaluate price reasonableness through price

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<sup>32</sup> 10 U.S.C. § 3704; 41 U.S.C. § 3705; FAR 15.403-4(a)(2).

<sup>33</sup> 10 U.S.C. § 3704; 41 U.S.C. § 3705; FAR 15.403-4(a)(2).

<sup>34</sup> 10 U.S.C. § 3703(a); 41 U.S.C. § 3503(a); FAR 15.403-1(b).

<sup>35</sup> 10 U.S.C. § 3703(a); 41 U.S.C. § 3503(a); FAR 15.403-1(b).

<sup>36</sup> FAR 15.403-1(c)(1)(i).

<sup>37</sup> FAR 15.403-1(c)(1)(ii).

analysis.<sup>38</sup> For DoD, NASA, and the Coast Guard, minor modifications to commercial products that do not change the commercial product to other than commercial are exempt from the requirement to submit certified cost or pricing data only if the total price of all such modifications does not exceed the lesser of \$2 million or 5% of the contract value.<sup>39</sup>

The waiver exception permits the HCA to waive the requirement for certified cost or pricing data in exceptional cases.<sup>40</sup> The waiver must be in writing and cannot be delegated below the HCA.<sup>41</sup> A waiver does not apply to lower-tier subcontracts unless expressly stated in the waiver.<sup>42</sup>

### **SUBCONTRACTOR COST OR PRICING DATA**

Contractors and subcontractors that are required to submit certified cost or pricing data must obtain and analyze certified cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed \$2 million, unless an exemption applies.<sup>43</sup>

Subcontractor cost or pricing data must be submitted to the government for subcontracts valued at the lower of \$12.5 million or 10% of the prime contract price.<sup>44</sup> It is common for subcontractors to submit certified cost or pricing data directly to the government, rather than to the prime contractor, due to the sensitive nature of such information.

Subcontractor cost or pricing data must be current, accurate, and complete. The prime contractor is liable for defective subcontractor cost or pricing data.<sup>45</sup> The prime contractor's lack of knowledge that the data were defective is not a defense.<sup>46</sup> The standard is essentially strict liability. It is therefore beneficial from the prime contractor's perspective to demand audit rights (subcontractors generally resist) and indemnification.

### **SUBCONTRACTOR COST OR PRICING DATA**

When certified cost or pricing data are not required, the contracting officer must obtain whatever data are available from government or other secondary

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<sup>38</sup> FAR 15.403-1(c)(3)(ii).

<sup>39</sup> FAR 15.403-1(c)(3)(iii).

<sup>40</sup> 10 U.S.C. § 3703(a)(3); 41 U.S.C. 3503(a)(3); FAR 15.403-1(c)(4).

<sup>41</sup> FAR 15.403-1(c)(4).

<sup>42</sup> 10 U.S.C. § 3702(e); 41 U.S.C. 3502(e); FAR 15.403-1(c)(4).

<sup>43</sup> 10 U.S.C. § 3702(a)(4); 10 U.S.C. § 3502(a)(4); FAR 15.404-3(a)(1)(ii)-(iii).

<sup>44</sup> FR 15.404-3(c)(1).

<sup>45</sup> FAR 15.407-1(e).

<sup>46</sup> McDonnell Aircraft Co., ASBCA No. 44504, 03-1 BCA ¶ 32,154.

sources to determine price reasonableness.<sup>47</sup> If such data are not available or adequate, the contracting officer may require the contractor to submit data other than certified cost or pricing data, including data on the prices at which the same or similar items previously have been sold.<sup>48</sup>

Data other than certified cost or pricing data may include pricing data, cost data, and judgmental information.<sup>49</sup> They may include types of information identical to certified cost or pricing data but without the requirement for certification.<sup>50</sup> Contractors are generally permitted to submit data other than certified cost or pricing data in their own format rather than using Table 15-2.<sup>51</sup>

For commercial products and services, the contracting officer must request data other than certified cost or pricing data if price reasonableness cannot otherwise be determined.<sup>52</sup> Such data must include data on prices at which the same or similar items have been sold and may include sales history, cost data, and any other information.<sup>53</sup> Requests for sales data must be limited to products and services for the same or similar items during a relevant time period.<sup>54</sup> In addition, the contracting officer must, to the maximum extent practicable, request only data in a form that is regularly maintained by the contractor in its commercial operations.<sup>55</sup>

## CONCLUSION

This column has now covered what cost or pricing data is and when it must be disclosed. The next installment of the Cost Corner will focus on government claims for defective pricing under TINA. It will address the elements of a defective pricing claim, the limitations on contractor defenses, offsets, and the government's remedies for defective pricing.

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<sup>47</sup> 10 U.S.C. § 3705(a); 10 U.S.C. § 3505(a); FAR 15.403-3(a)(1)(i).

<sup>48</sup> 10 U.S.C. § 3705(a); 41 U.S.C. § 3505(a); FAR 15.403-3(a)(1)(ii), (iv).

<sup>49</sup> FAR 2.101.

<sup>50</sup> FAR 2.101.

<sup>51</sup> FAR 15.403-3(a)(2).

<sup>52</sup> FAR 15.403-3(c)(1).

<sup>53</sup> FAR 15.403-3(c)(1).

<sup>54</sup> 10 U.S.C. § 3705(c)(1); 41 U.S.C. § 3505(b)(1); FAR 15.403-3(c)(2)(i).

<sup>55</sup> 10 U.S.C. § 3705(c)(2); 41 U.S.C. § 3505(b)(2); FAR 15.403-3(c)(2)(ii).