Published on *The National Law Review* https://natlawreview.com

Government Contracts Cost and Pricing – The Truth in Negotiations Act … or Whatever the Kids Are Calling It These Days (Part 2)

Article By:

Keith R. Szeliga

Katie A. Calogero

Welcome back to the Cost Corner, where we provide practical insight into the complex cost and pricing regulations that apply to Government contractors. This is the second installment of a two-part article on the Truthful Cost or Pricing Data Statute, commonly known by its former name, the Truth in Negotiations Act (TINA).[1] As a reminder, TINA is a procurement statute that requires contractors: (1) to disclose information – known as cost or pricing data – when negotiating certain types of contracts, subcontracts, and modifications; (2) to certify that those data were accurate, complete, and current as of the date of agreement on price or other date agreed to by the parties (the "relevant date"); and (3) to 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.[2]

Part 1 of this article, published last month, addressed the contractor's obligations under TINA, including the definition of cost or pricing data, the circumstances under which the contractor must disclose such data, and the adequacy of the contractor's disclosure.[3] Part 2 of the article, set forth below, focuses on the Government's remedies for alleged violations of TINA, including the elements of a defective pricing claim, the availability of certain defenses, and the calculation of damages and offsets.

Elements of a Defective Pricing Claim

There are five essential elements of a defective pricing claim. The Government has the burden to prove each element by a preponderance of the evidence.

First, the Government must establish the information at issue is "cost or pricing data" within the meaning of TINA.[4] We addressed this element in Part 1.

Second, the Government must prove that more accurate, complete, or current cost or pricing data were reasonably available to the contractor as of the relevant date.[5] The "reasonably available"

standard is less forgiving than the phrase suggests. Cost or pricing data may be considered "reasonably available" even where the Government establishes an extraordinarily short and arguably unreasonable deadline for proposal submission.[6] Cost or pricing data further may be considered reasonably available to the contractor even if it was not known to the contractor's negotiators.[7] Unreasonable lag time between availability of the data and transmission to the contractor's negotiators is generally not a defense.[8] In addition, a contractor must update its certified cost or pricing data between proposal submission and the relevant date.[9]

Third, the Government must prove the data were not submitted or meaningfully disclosed to the Contracting Officer or authorized representative. We addressed this element in Part 1.

Fourth, while the Government must prove it relied on the defective cost or pricing data, there is a rebuttable presumption that the Government relied on data.[10] A contractor can rebut the presumption by showing that the Government never reviewed the defective data,[11] or that the Government relied on other data, such as its own independent estimate, instead of the contractor's data.[12]

Fifth, the Government must prove its reliance on the defective data caused an increase in the contract price. Again, there is a rebuttable presumption in favor of the Government: that the submission of defective cost or pricing data causes a dollar-for-dollar increase in the contract price.[13] Contractors have rebutted this presumption where the defective cost or pricing data were irrelevant or unusable[14] and where the contractor passed on the full benefits of an undisclosed discount.[15]

Contractor Defenses

TINA prohibits contractors from asserting certain defenses to defective pricing claims. TINA specifically prohibits a contractor from claiming the Government's price would not have decreased because the procurement was the sole source or the contractor otherwise had superior bargaining power.[16] A contractor also cannot claim the Contracting Officer should have known the data were defective even though the contractor took no affirmative action to inform the Contracting Officer the data were defective.[17] A contractor cannot claim the price would not change because the parties agreed on a total price and not the cost of each item procured under the contract.[18] A contractor also cannot use as a defense its failure to submit a Certificate of Current Cost or Pricing Data.[19] Thus, the best strategy for combating a defective pricing claim is to negate the elements of a claim, as described above, i.e., show the data were not cost or pricing data, show the other data were not reasonably available, show the Government did not rely on the data, and/or show the data did not cause a price increase.

Damages

The calculation of the Government's damages in a defective pricing case is both speculative and subjective. There is no mandatory formula. Rather, the calculation of damages necessarily requires speculation regarding what price the parties would have negotiated if the data had been disclosed.[20] The Government has the burden to show "by some reasonable method" the amount it believes the final contract price was overstated.[21] There is a rebuttable presumption that the "natural and probable consequence" of defective cost or pricing data is a "dollar-for-dollar" increase in the contract price.[22] Thus, the Government's damages generally equal the baseline price minus the price in the undisclosed data plus indirect costs, profits, and interest. For example, if a contractor proposed a price for 85 parts based on a vendor quote of $37.82 per part (baseline) but the

contractor failed to disclose a lower quote for $16.50 per part (undisclosed data), the damages will be $37.82-$16.50 multiplied by 85 parts plus overhead, profit, and interest.[23]

To determine the baseline for whether defective pricing exists, the Defense Contracting Audit Agency (DCAA) generally considers the contractor's last proposal before price negotiations began and any adjustment for additional cost or pricing data submitted up to the relevant date.[24] This determination is appropriate in simple cases where the Contracting Officer accepts the contractor's proposal at face value but problematic where the Government relied on other data and/or there were other factors at play in the negotiations. For example, it is inappropriate to ignore negotiated reductions to the final price.[25] But the contractor must establish that the negotiated reduction related to the same cost element as the undisclosed data.[26] The proposed price also is not the appropriate baseline where there have been material changes, such as new quantities or delivery schedules.[27] Additionally, the proposal price is not the appropriate baseline where there is evidence the Government relied on another analysis or recommendation from an outside source.[28] Thus, the baseline price should be based on the data actually considered in the negotiations.[29]

In some cases, contractors have been able to rebut the "dollar-for-dollar" presumption of damages by showing the undisclosed data would not have changed the final price:

- *Outdated pricing information* – The Board found no liability for failure to disclose a subcontractor price that had been revoked due to higher production costs.[30]
- *Changed market conditions* – The Board found no liability for failure to disclose purchases of less expensive supplies that had become unavailable.[31]
- *Supplies that require extra work by the contractor* – Where the undisclosed quote was for supplies that would have required the contractor to perform extra labor, the Board split the difference between the proposed price and the undisclosed price on a "jury verdict" basis.[32]
- *Materially different quantities* – Where the contractor disclosed an old purchase price for a quantity of parts similar to the contract quantity but failed to disclose a more recent purchase price for much larger quantities of parts, the Board found the Government failed to rebut the argument that the purchase history for a comparable quantity was more reliable.[33]
- *Change in supplier* – The FAR explains that when a prime contractor includes defective subcontractor pricing data in arriving at a price but then later awards the subcontract to a lower-priced subcontractor, any adjustment in the prime contract price due to the defective subcontract data is limited to the difference between the subcontract price used for pricing the prime contract and the actual subcontract price, provided the actual subcontract price is not based on defective data.[34]
- *Unreliable suppliers* – Where the price was based on a quote from the only subcontractor that had ever produced the product but there was an undisclosed lower quote from an alternative supplier that would have required substantial technical assistance, the Court remanded the case to determine what contingency factor would have applied to a quote from a less reliable supplier.[35]
- *Labor costs from truncated time periods* – Where the Government argued the damages should be calculated based on lower undisclosed labor costs for less than 3 months of an 18-month program, the Board found the undisclosed costs would not have had a significant impact on negotiations because the period was much smaller than the total program.[36] In another similar case, the Board found damages should be calculated by averaging disclosed costs and undisclosed costs.[37]

Offsets

In some cases, a contractor may be entitled to offset the Government's defective pricing damages for *overstated* costs based on defective cost or pricing data that *understated* the contractor's costs.[38] Similar to the elements of a defective pricing claim, to show entitlement to an offset, the contractor must prove: (1) the data qualified as cost or pricing data, (2) the data were available before the agreement on price, (3) the data were not disclosed, (4) the Government relied on the data, and (5) the data caused a decrease in the contract price.

Only cost or pricing data can establish a permissible offset. Errors in judgment or estimates cannot provide the basis for offsetting cost or price overstatements.[39] However, sometimes the line between a judgment and a fact can be blurry. In those cases, the question is whether the contractor is seeking to rectify the consequence of an erroneous estimating judgment.[40] Additionally, the error must have been unintentional. An offset will not be allowed if there is evidence the contractor knew about the understatement at the time it certified its cost or pricing data.[41] Additionally, a contractor cannot claim offsets from other contracts. Defective pricing claims and offsets must be viewed on a contract-by-contract basis.[42] Finally, offsets cannot exceed defective pricing damages. In other words, the contractor cannot obtain a net upward adjustment of the contract price, even where the errors caused a price decrease rather than a price increase.[43] In sum, offsets do not give the contractor a windfall, but rather should help set a negotiated price in an amount that reflects the true costs.[44]

Interest, Penalties, and Other Remedies

The Government is entitled to interest on its damages based on the amount of overpayment caused by the defective pricing. Interest accrues from the date of the Government's payment for completed and accepted items and it continues until repayment. Interest is calculated based on the quarterly overpayment rate established by the Treasury and it is compounded daily.

In addition to damages and interest, if the Government can prove a knowing submission of defective cost or pricing data, it may be entitled to a penalty equal to the amount of overpayment.

Finally, depending on the facts, the Government may also pursue remedies against a contractor under the False Claims Act, which imposes treble damages and penalties on contractors that knowingly submit false or fraudulent claims to the Government. Additionally, the Government may pursue remedies under the Major Fraud Act, False Statements Act, Withholding of Contract Payments, Forfeiture of Claims, Suspension and Debarment procedures, and Contract Termination.

Listen to this post

FOOTNOTES

[1] 10 U.S.C. §§ 3701-3708; 41 U.S.C. §§ 3501-3508.

[2] 10 U.S.C. §§ 3702, 3706; 41 U.S.C. §§ 3502, 3506.

[3] Part 1 also addressed the requirement to furnish subcontractor cost or pricing data and the Government's ability to require data other than certified cost or pricing data in procurements to which TINA does not apply.

[4] *Lockheed Corp.*, ASBCA Nos. 36420, 37495, 39195, 95-2 BCA ¶ 27,722; *Boeing Co.*, ASBCA No.

32753, 90-1 BCA ¶ 22,426; see also 10 U.S.C. § 3706(a)(1); 41 U.S.C. § 3506(a)(1); FAR 15.407-1(b).

[5] *LTV Electrosystems, Inc., Memcor Div*., ASBCA No. 16802, 73-1 BCA ¶ 9957; *Sperry Rand Corp*., *Univac Div*., ASBCA No. 15289, 73-2 BCA ¶ 10,165.

[6] *Baldwin Elecs., Inc.*, ASBCA No. 19683, 76-2 BCA ¶ 12,199.

[7] *Aerojet-Gen. Corp.*, ASBCA No. 12264, 69-1 BCA ¶ 7,664

[8] *Sylvania Elec. Prods., Inc. v. United States*, 202 Ct. Cl. 16, 479 F.2d 1342 (1973)

[9] *Hughes Rivercraft Co.*, ASBCA No. 46321, 97-IBCA, ¶ 28,972

[10] *Wynne v. United Techs. Corp.*,463 F.3d 1261 (Fed. Cir. 2006)

[11] *Wynne v. United Techs. Corp.*,463 F.3d 1261 *(*Fed. Cir. 2006)

[12] *General Dynamics Corp.*, ASBCA No. 32660, 93-1 BCA ¶ 25,378

[13] *United Techs. Corp.*, ASBCA Nos. 53349, 53089, 51410, 05-1 BCA ¶ 32,860

[14] *Paceco, Inc.,* ASBCA No. 16458, 73-2 BCA ¶ 10,119

[15] *Sperry Univac, Div., Sperry Rand Corp.*,DOTCAB No. 1144, 82-2 BCA ¶ 15,812

[16] FAR 52.215-10(c)(1)(i).

[17] FAR 52.215-10(c)(1)(ii).

[18] FAR 52.215-10(c)(1)(iii).

[19] FAR 52.215-10(c)(1)(iv)

[20] *United States v. United Technologies Corp., Sikorsky Aircraft Div*., 51 F. Supp. 2d 167 (D. Conn. 1999)

[21] *Boeing Co.*, ASBCA No. 33881, 92-1 BCA ¶ 24,414

[22] *Boeing Co.*, ASBCA No. 33881, 92-1 BCA ¶ 24,414

[23] *Hardie-Tynes Mfg. Co.*, ASBCA No. 20717, 76-2 BCA ¶ 12,121

[24] DCAM 14-116.2(a)

[25] *Sperry Corp. Computer Sys., Def. Sys. Div.*, ASBCA No. 29525, 88-3 BCA ¶ 20,975

[26] *McDonnell-Douglas Corp.*, ASBCA No. 12786, 69-2 BCA ¶ 7,897

[27] *Sperry Corp. Computer Sys., Def. Sys. Div.*, ASBCA No. 36089, 88-3 BCA ¶ 20,975

[28] *Aerojet Ordinance Tenn.,* ASBCA No. 36089, 95-2 BCA ¶ 27,922

[29] *McDonnell Douglas Helicopter Sys., ASBCA No. 50341, 99-2 BCA* ¶ 30,546

[30] *Grumman Aerospace Corp.*, ASBCA No. 27476, 86-3 BCA ¶19,091

[31] *Norris Indus., Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482

[32] *Muncie Gear Works, Inc.*, ASBCA No. 18184, 75-2 BCA ¶ 11,380

[33] *Am. Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶ 5,280

[34] FAR 15.407-1(f)(1)

[35] *Cutler-Hammer, Inc. v. United States*, 189 Ct. Cl. 76, 416 F.2d 1306 (1969)

[36] *Boeing Co.*, ASBCA No. 20875, 85-3 BCA ¶ 18,351

[37] *Lambert Eng'g Co.*, ASBCA No. 13338, 69-1 BCA ¶ 7663

[38] *Hughes Aircraft Co.*, 97-1 BCA ¶ 28,972

[39] *Hardie-Tynes Manufacturing Co.*, ASBCA Nos. 20367, 20387, 76-1 BCA ¶ 11,827

[40] *Norris Indus., Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482

[41] FAR 52.215-10(c)(2)(ii)(A)

[42] *Minnesota Mining & Mfg. Co.*, ASBCA No. 20266, 77-2 BCA ¶ 12,823

[43] *Minnesota Mining & Mfg. Co.*, ASBCA No. 20266, 77-2 BCA ¶ 12,823

[44] *Lockheed Aircraft Corp., Lockheed-Georgia Co. Division v. United States,* 432 F.2d 801, 807 (Ct. Cl. 1970)

National Law Review, Volumess XIII, Number 145