

RINGING IN THE NEW YEAR WITH NEW AUDITS

THE RETURN OF TINA

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AGENDA

- ▶ INTRODUCTION
- ▶ CURRENT REGULATORY ENVIRONMENT
- ▶ TRUTHFUL COST OR PRICING DATA (“TINA”) - THE BASICS
- ▶ COST OR PRICING DATA
- ▶ RISK AREAS & OTHER CONTRACTOR IMPLICATIONS
- ▶ LEGAL DEFENSES & COMPLIANCE BEST PRACTICES
- ▶ QUESTIONS

REGULATORY DEVELOPMENTS

CURRENT REGULATORY LANDSCAPE

REGULATORY SNAPSHOT

- ▶ DCAA has finally cleared its backlog of incurred cost audits, and with the introduction of 3rd party independent public accountants (IPAs) to aid in these incurred cost audits, DCAA will now be able to refocus and reprioritize its resources moving into 2020.
- ▶ This means that DCAA will be turning back to its full portfolio of audits.
- ▶ According to Anita Bales, the deputy director of DCAA, this shift will include a renewed focus on defective pricing (i.e. “TINA”) audits, with the number of defective pricing audits expected to triple in FY 2020.
- ▶ DCAA’s prioritization of defective pricing signifies an important shift that highlights the risks for defense contractors that submit certified cost or pricing data to the Government.

CURRENT REGULATORY LANDSCAPE

REGULATORY SNAPSHOT

- ▶ This shift by DCAA and its renewed focus on contractors' cost or pricing data is significant for many reasons, and has a multitude of potential implications for contractors. These include the following:
 - It provides an indication that contractor profits, especially under contracts that are awarded through sole-source, are facing more intense scrutiny by the Department of Defense (DoD) and Congress.
 - As a result of increased claims and litigations, contractors are now subject to additional risk.
 - Matters related to defective pricing may be referred by DCAA to the OIG or DOJ for investigation and enforcement under the False Claims Act (FCA).

CURRENT REGULATORY LANDSCAPE

FUTURE AUDIT INCREASE

- ▶ DCAA intends to conduct 60 defective pricing audits of contractors in Fiscal Year (FY) 2020. That is three times as many audits as it performed in either 2018 (21) or 2019 (20).
- ▶ In 2015, DCAA formed a specialized 20-person unit to handle reviews of “high-risk” contracts.
- ▶ Government expected to see audits produce profit margins of 12%-15%; instead, auditors found profit margins between 25%-80% on some sole-source weapons contracts.
- ▶ Since 2015, the agency conducted audits of 108 high-risk contracts totaling \$74 billion. 79 of those, or nearly 75%, uncovered potential defective pricing totaling \$589 million (cases are in various stages of contesting and negotiating).
- ▶ DOJ continues to pursue FCA cases based on alleged defective pricing. Informatica Systems settled a \$22 million defective pricing suit in May 2019, and DOJ recently intervened in another defective pricing suit seeking \$1.3 billion from MRAP manufacturer.

TRUTHFUL COST OR PRICING DATA (“TINA”) *THE BASICS*

TRUTHFUL COST OR PRICING DATA (“TINA”) - THE BASICS

BACKGROUND & OVERVIEW

- ▶ The Truthful Cost or Pricing Data statute (commonly referred to by its historical name, the Truth in Negotiations Act or “TINA”) was originally enacted through Public Law 87-653 and incorporated at 10 U.S.C. § 2306(a) in 1962.
 - Implemented through FAR Subpart 15.4 and DFARS 215.403
- ▶ Purpose: to level the negotiation playing field by ensuring Government negotiators have access to the same pricing information as contractor’s negotiators.
 - Imposes no restriction on the proposal or proposed price.
- ▶ Requires contractors to provide “cost and pricing data” for negotiated contract actions above specified dollar threshold.
 - contracts actions include contract modifications, regardless of whether contract required submission of such data.
- ▶ Failure to properly provide cost or pricing data (i.e. “defective pricing”) may lead to contract price reduction and other sanctions.

TRUTHFUL COST OR PRICING DATA (“TINA”) | THE BASICS

PRICING ACTIONS SUBJECT TO TINA

- ▶ Current TINA threshold is \$2 million (changed 7/1/2018 from \$750,000).
- ▶ Contractor (or subcontractor) required to submit certified cost or pricing data when:
 - Award or modification of a contract expected to exceed \$2 million.
 - Award or modification of a subcontract at any tier expected to exceed \$2 million if the Government required the prime contractor and each higher-tier subcontractor to submit certified cost or pricing data.
 - Negotiated final pricing actions, such as termination settlements, where \$2 million threshold is met.
- ▶ Agency may also require certified cost or pricing data under the \$2 million threshold if the head of the contracting agency finds it necessary to determine whether price is fair and reasonable and factually supported.

TRUTHFUL COST OR PRICING DATA (“TINA”) | THE BASICS

APPLICABILITY & EXEMPTIONS

- ▶ ***Six Exceptions to Requirement of Certified Cost or Pricing Data***
 - Below **Simplified Acquisition Threshold (currently \$250,000)**.
 - The agreed-upon price is based upon **adequate price competition**.
 - The agreed-upon price is based on **prices set by law or regulation**.
 - The procurement is for a **commercial item**.
 - Minor **modifications to commercial items**.
 - A **waiver has been granted** by the head of contracting activity due to exceptional circumstances.

- * ***Exemptions granted for the last two items are extremely rare.***

TRUTHFUL COST OR PRICING DATA (“TINA”) | THE BASICS

ADEQUATE PRICE COMPETITION CHANGE

- ▶ Prior to July 12, 2019 - Adequate price competition per FAR 15.403-1(c)(1) existed if
 - (1) two or more responsible offerors, competing independently, submit priced offers (and the price is not otherwise unreasonable);
 - (2) there was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors would submit priced offers (even if only one offer actually was submitted); or
 - (3) price analysis clearly demonstrates the price is reasonable
- ▶ FAR 15.403-1(c)(1) was changed July 12, 2019 to say that for DoD, NASA and Coast Guard procurements, the Government must actually receive two or more responsive offers in order to have “adequate price competition” (and the price is not otherwise unreasonable). Under new rule, “No bids” can no longer be used to establish “adequate price competition.”

TRUTHFUL COST OR PRICING DATA (“TINA”) | THE BASICS

TINA SWEEPS

- ▶ On June 7, 2018, Defense Pricing/Defense Procurement and Acquisition Policy (DPAP) announced that contracting officers will request that contractors submit “additional cost or pricing data” (i.e. “sweep data”) and execute the Certificate of Current Cost or Pricing Data “as soon as practicable, but no later than five business days after the date of price agreements,” thereby significantly shortening the time between the date of agreement on price and contract award.
- ▶ For any cost or pricing data submitted after price agreement, DoD tells Contracting Officers to defer consideration until the post-award audit.
- ▶ DoD noted that while there is no statutory or regulatory requirement for contractors to perform a cost and pricing data “sweep”—because contractors are supposed to provide complete data available as of the date of agreement on price—the prevalence of additional data often revealed in sweeps “may be indicative of estimating system deficiencies.”

TRUTHFUL COST OR PRICING DATA (“TINA”) | THE BASICS

OBLIGATION TO SHARE PRICING INFO

- ▶ But note DPC’s recent warning re: circumstances where a contractor arguably has ability it to “set the market prices.” OIG investigated manufacturer of spare aircraft parts and found that manufacturer realized “unreasonable” profits (>15%) for 46 of 47 parts for which it was the sole manufacturer.
 - OIG noted that in many cases, multiple independent offerors submitted bids and thereby met the technical requirement of “adequate price competition.”
 - However, DPC Director warned that the offeror’s dominant market position gave rise to “rigged competitions” that DPC does not consider adequate price competition.
- ▶ On June 14, 2019, DoD issued a letter stating that in light of the supposedly “rigged competition,” KOs must require the manufacturer to submit *uncertified* cost or pricing data with future bids.
- ▶ In Section 803 of the FY 2020 NDAA, Congress decreed that contractor’s failure to make a good faith effort to comply with reasonable requests for uncertified cost or pricing data will render the contractor ineligible moving forward.

COST OR PRICING DATA

COST OR PRICING DATA

WHAT IS COST OR PRICING DATA?

- ▶ **Cost or pricing data** is defined at FAR 2.101 as “all **facts** that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, **prudent buyers and sellers would reasonably expect to affect price negotiations significantly.**”
- ▶ Cost or pricing data are **factual**, not judgmental, and **verifiable**.
- ▶ Although cost or pricing data do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, they should include the data forming the basis for that judgment.
- ▶ Form of Disclosure - Contracting Officer can require submission of cost or pricing data:
 - (a) in the format specified in FAR 15.408, Table 15-2;
 - (b) in a specified alternate format; or
 - (c) in the contractor’s own format.

COST OR PRICING DATA

WHAT IS COST OR PRICING DATA?

- ▶ To whom must contractors disclose:
 - Generally submit to contracting officer or contracting officer's authorized representative.
 - Disclosures to ACOs and auditors not specifically involved in auditing a proposal may be insufficient.
 - Subcontractors disclose to prime contractors or submit to government.

- ▶ How data is disclosed:
 - Contractors may physically submit the data with their cost proposals.
 - Contractors may provide schedules and basic data to support price and explain that more data and supporting documentation will be made available upon request.

COST OR PRICING DATA

CERTIFICATION OF COST AND PRICING DATA

- ▶ FAR 15.406-2 requires contractors to certify submission of cost or pricing data:
 - To best of knowledge or belief
 - Data disclosed is accurate, complete and current



COST OR PRICING DATA

CERTIFICATION OF COST AND PRICING DATA

Certificate of Current Cost or Pricing Data (FAR 15.406-2)

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in Section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the Contracting officer or to the Contracting Officer's representative in support of _____* are accurate, complete, and current as of _____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm _____

Signature _____

Name _____

Title _____

Date of execution** _____

*Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identify number (e.g. RFP No.).

**Insert the day, month, and year when price negotiations were concluded and price agreement was reached, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

COST OR PRICING DATA

WHAT IS COST OR PRICING DATA?

- ▶ Cost or pricing data may include, but are not limited to, data related to the following:
 - Vendor quotations;
 - Changes to CBA;
 - Nonrecurring costs;
 - Information on changes in production methods and in production or purchasing volume;
 - Data supporting projections of business prospects and objectives and related operations costs;
 - Unit-cost trends such as those associated with labor efficiency;
 - Make-or-buy decisions;
 - Estimated resources to attain business goals; and
 - Information on management decisions that could have a significant bearing on costs.

COST OR PRICING DATA

COST OR FINAL PRICE GETS YOU IN TROUBLE?

- ▶ Although TINA requires contractors to submit cost or pricing data, it does not require that contractors use their cost or pricing data when preparing their price proposals.
 - In fact, the courts and administrative boards have repeatedly held that there need not be any relationship between a contractor's price and the cost or pricing data submitted under TINA.
- ▶ The purpose of the TINA is to place the government in an equal bargaining position by having contractors disclose any facts that would have a material effect on the negotiation of price.
 - Actual *price determination* still is determined by the *art of negotiation*.
- ▶ There is no requirement for contractors to actually use their cost or pricing data when preparing their proposal; likewise, there is no requirement that the lowest priced fact be used when preparing contractor proposals.
- ▶ The requirement is simply to disclose the existence of those facts and let the parties negotiate a mutually acceptable price based on the “knowledge of those facts.”

RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

KEY COMPLIANCE ISSUES

- ▶ Key compliance issues faced by contractors in relation to the requirements outlined in the Truthful Cost or Pricing Data statute include:
 - Submitting incorrect, incomplete, or noncurrent data
 - Utilizing inappropriate estimating techniques
 - Failure to consider or use all applicable factors
 - Apparent, deliberate concealment or misrepresentation of data supporting the estimates utilized
 - Failure to estimate in a manner consistent with disclosed or established accounting procedures
 - Inadequate policies and procedures
 - Inadequate record-keeping for proposals submitted
 - Misapplication of FAR Part 15 proposal standards

RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

DEFECTIVE PRICING RISK

- ▶ Occurs when a contractor, prior to reaching price agreement with the Government, fails to submit or disclose data that is accurate, complete, and current.
- ▶ In a defective pricing audit, DCAA will seek to determine, post-award, if the contract's negotiated price was defective and, if so, whether a significant price increase resulted.
- ▶ Large firm-fixed-price contracts are seen by DCAA as most prone to the risk of “excess profits” - as such, contractors can expect increased audit scrutiny for defective pricing in this area.
- ▶ M&A activity introduces risk: Planned organization changes, Home Office allocations, Supply Chain changes, Headcount actions, Facility consolidation, etc.

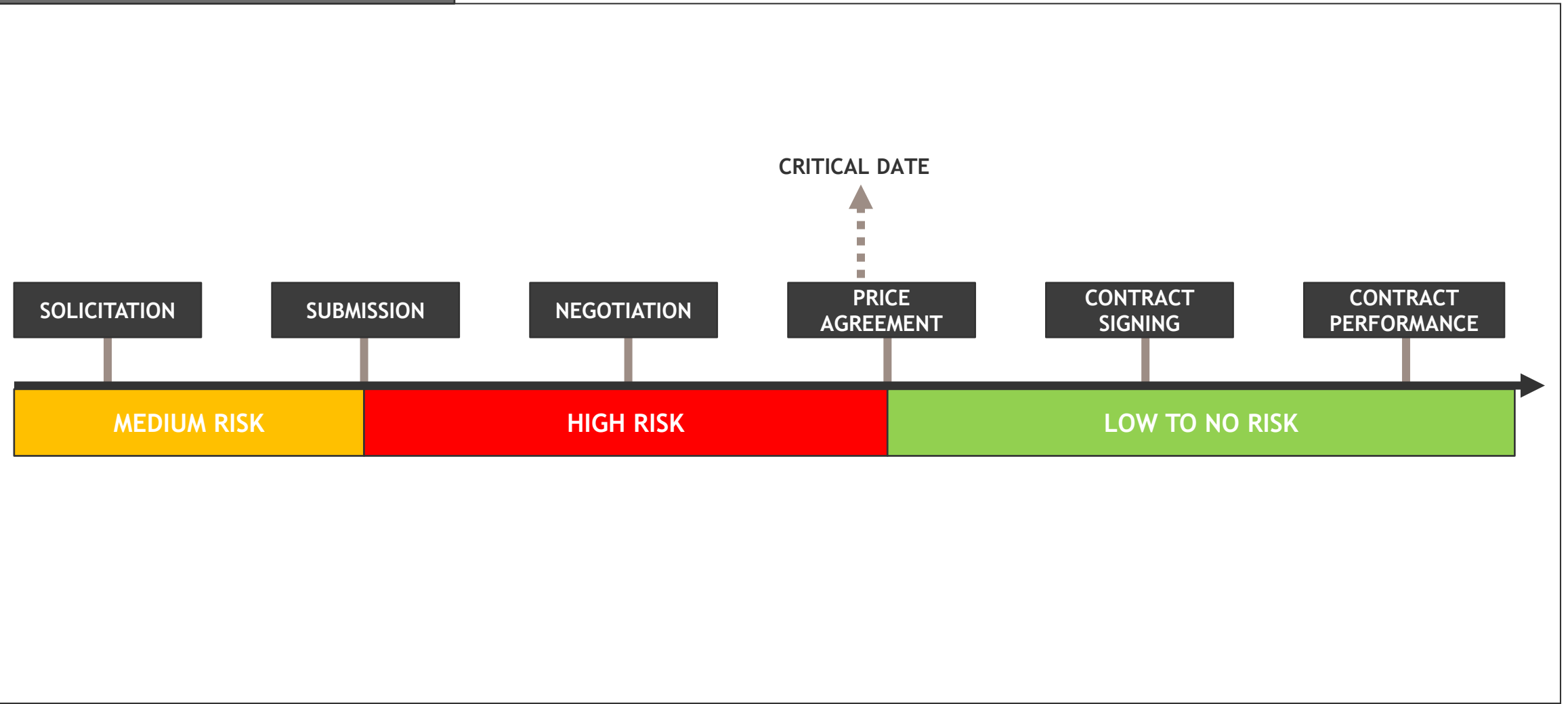
RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

DEFECTIVE PRICING RISK

- ▶ Government bears burden of proof for “five points” of defective pricing:
 1. ***Cost and pricing data*** - the information in question fit the definition of “cost or pricing data”;
 2. ***Reasonable availability of data*** - the information in question existed and was “reasonably available” prior to the price agreement;
 3. ***Not disclosed or known to the government*** - current, accurate, and complete cost or pricing data were not submitted or disclosed to the Government;
 4. ***Government reliance on data*** - the Government relied on the defective cost or pricing data when negotiating with the contractor;
 5. ***Causation of increased price*** - the Government’s reliance on the defective data caused an increase in contract price.

RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

DEFECTIVE PRICING TIMELINE



IMPACT OF DEFECTIVE PRICING

DEFECTIVE PRICING RISK

- ▶ The Government has a remedy for price reduction under TINA. *See* 10 U.S.C. § 2306a(f)(1)(A); FAR 52.215-10(a)), Price Reduction for Defective Certified Cost or Pricing Data.
- ▶ In addition to getting a price reduction, under current regulations, the Government is also entitled to:
 - Collect interest from the date of overpayment.
 - Assess additional penalties under the False Claims Act.

IMPACT OF DEFECTIVE PRICING

SUBCONTRACTOR RISK

- ▶ Liability is statutory, meaning that the prime contractor may be found liable in the absence of any data being submitted or certification being provided.
 - No direct liability for subcontractors.

- ▶ Subcontractors are still subject to defective price audits:
 - if a price reduction is necessary as a result of this audit
 - any price reductions will be leveraged against the prime contractor.

- ▶ Prime contractor's ability to pass price reductions on to its subcontractors depends on whether or not there are effective flowdowns and indemnities written into the subcontract terms and conditions.

RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

FALSE CLAIMS ACT LIABILITY

- ▶ Sometimes, defective pricing cases turn into fraud actions.
 - If a contractor **knowingly** submits cost or pricing data that are false, incomplete, or misleading, that contractor could be subject to treble damages and statutory penalties under the False Claims Act.

- ▶ A TINA violation on its own does not constitute fraud!

- ▶ To be found liable under the False Claims Act, the Government must prove that the contractor possessed the requisite scienter under the FCA - i.e., that the contractor “knowingly” failed to provide current, accurate, and complete cost or pricing data
 - ▶ NOTE: A violation need not be intentional to be “knowing”; under the FCA, a knowing violation includes a violation arising from “reckless disregard.”

CURRENT REGULATORY LANDSCAPE

FALSE CLAIMS ACT

- ▶ The civil False Claims Act punishes companies and individuals who defraud the Government by submitting inaccurate or inflated claims for payment. It is frequently used and involves harsh penalties - over **\$3 billion** recovered under FCA in FY 2019 alone.
- ▶ **Severe penalties:** Treble damages *plus* civil penalties of up to \$22K per false claim (which can mean per invoice!).
- ▶ **Severe collateral consequences:** administrative contract actions; parallel criminal investigation (Yates Memo); suspension & debarment.
- ▶ Recent years have seen an uptick in FCA enforcement activities based on defective pricing issues. Increased activity driven by both DCAA referrals *and* FCA *qui tam* actions brought by private individuals.

IMPACT OF DEFECTIVE PRICING

RECENT DEVELOPMENTS

- ▶ Recently unsealed FCA complaint against large military contractor alleges over \$1.3 billion in defective pricing damages in connection with procurement of MRAP vehicles.
 - *Qui tam* suit brought by former employee; DOJ now has intervened.
- ▶ Complaint allegations (nothing proven or admitted):
 - Commercial items so no requirement to submit “certified cost or pricing data,” but KO nonetheless requested “other than certified cost or pricing data” to validate fair and reasonable pricing.
 - Contractor’s cost or pricing data was incomplete and inaccurate because it concealed actual costs and cheaper commercial prices.
 - Contractor created forged sales histories to justify proposed prices and provided false records to USG.
 - Underscores risk of defective pricing-like issues even where certified cost or pricing data is *not* required.

RISK AREAS & OTHER CONTRACTOR IMPLICATIONS

FALSE CLAIMS ACT LIABILITY

- ▶ Examples of fraud indicators for defective pricing include:
 - Indications of falsification or alteration of supporting data.
 - Failure to update cost or pricing data even though it is known that past activity showed that costs or prices have decreased.
 - Failure to disclose specific knowledge to the Government regarding significant cost issues that will reduce a contractor's proposed costs.
 - Contractor refuses, delays, or is unable to provide supporting documentation for costs.
 - Prices presented are high compared to similar contracts, price lists, or industry averages.
 - Materials, supplies, or components used in production are different than those listed in the proposal or contract.
 - Failure to record rebates, discounts, and other credits.
 - Contractor records unrealistically high profit margins on completed work.
 - Failure to correct known system deficiencies that may lead to defective pricing.

LEGAL DEFENSES & COMPLIANCE BEST PRACTICES

LEGAL DEFENSES & TIPS FOR CHALLENGES

POSSIBLE LEGAL DEFENSES

- ▶ Possible legal defenses and challenges:
 - *TINA does not apply.*
 - Data at issue are *not factual*.
 - There *was* a disclosure of facts.
 - Government actually *knew of the facts*, even if they were not explicitly disclosed.
 - The Government *did not rely* on the “defective data.”
 - Undisclosed data were not significant and would have had *no impact on the price*.
 - Challenge DCAA’s use of data in calculating recommended reductions.
 - Challenge DCAA’s “sampling” techniques.
 - Double-check DCAA’s math & assumptions for consistency w/own or established in negotiations.
 - Insist on use of negotiated rate, overheads and profits to calculate refunds, rather than proposal rates. (This is consistent with DCAA Audit Manual.)

COMPLIANCE BEST PRACTICES

MINIMIZE TINA RISK

- ▶ Actions that minimize a contractor's risk may include:
 - Challenge or avoid applicability by seeking commercial item exemptions to the greatest extent possible.
 - Pursue an agreement with the Government on a cut-off date for disclosing data.
 - Pay attention to forward pricing rates and any potential changes.
 - Track costs and pricing estimates from the start and have an up-to-date estimating system.
 - Submit proposal requiring certified cost or pricing data in accordance with FAR Table 15-2.
 - Sign multiple certifications (i.e. certification pre-agreement and post-agreement).
 - Include the appropriate flowdowns and indemnification clauses in any subcontractor agreements executed under a TINA-covered contract.
 - Conduct a final "TINA" sweep at the time of price agreement.
 - Keep records of all negotiations and preserve all relevant files.
 - Be proactive about disclosing any errors as soon as they are identified.
 - Err toward more disclosure, not too little.

DEFECTIVE PRICING CASE STUDIES

CASE STUDY #1

➤ Fact Pattern:

- Contractor declined to disclose updated purchase orders because internal corporate policy precluded updating cost data on previously issued orders.

➤ Did these contractors fail to disclose cost and pricing data?

- Yes. “What a particular contractor, in a given case, in fact considered or would have considered significant, is not controlling.” *United Techs. Corp./Pratt & Whitney*, ASBCA No. 43645 (1994).
- “If a reasonable person would consider the data in determining cost or price, the data is significant and the contractor must disclose it.” *Hardie-Tynes Mfg., Co.*, ASBCA No. 20717 (1976).

CONTRACTOR JUDGEMENTS

CASE STUDY #2

➤ Fact Pattern:

- Contractor did not disclose a cost report including a narrative section analyzing the cost proposal of a major subcontractor.
 - Contractor's position is that the narrative analysis contained in the report does not constitute "facts" required to be disclosed because it contains contractor judgment and not just facts.
- Is the failure to provide the narrative analysis defective pricing?
- Yes. *See Grumman Aerospace Corp.*, ASBCA No. 27476 (1986).
 - "[T]he narrative analysis adds meaning to the raw figures and can not be said to lack factual content simply because it contains elements of judgment."

CONTRACTOR JUDGEMENTS (CONTINUED)

CASE STUDY #3

- **Fact Pattern:**
 - Contractor did not disclose a computer-generated report used for estimating system unit cost and forward pricing based upon unit cost per part.
 - Report contained both facts regarding cost history and contractor judgments on forward pricing, including estimated calculations on engineering cost elements.

- Was the contractor required to disclose the report?
 - Yes. *See Texas Instruments, ASBCA No. 23678 (1987).*
 - “We also hold that Run Cost 2 was itself cost or pricing data notwithstanding the fact that it was generated judgmentally and that it contained elements of judgment and estimates.”

MEANINGFUL DISCLOSURE

CASE STUDY #4

➤ Fact Pattern:

- Contractor submits initial proposal while DCAA audit of forward rate pricing proposal is pending.
- Final proposal submitted after audit complete but with old G&A/overhead rates.
- Government claims defective pricing based on failure to disclose that new FPRP rates were not used in final proposal.

➤ Is this defective pricing?

- No. *See Symetrics Indus., LLC, ASBCA No. 59297 (2015).*
- Government pre-negotiation memorandum showed that the PCO was aware of the FPRP. PCO could have checked the proposal against the FPRP.
- “Whether there has been meaningful disclosure depends upon application of a ‘rule of reason’ to the particular circumstances of [] each case.”

SUBCONTRACTOR RATES

CASE STUDY #5

➤ Fact Pattern:

- Subcontractor historical G&A rates were lower than the proposed rate.
- Subcontractor included “cost of facilities” in its G&A rate based on a misunderstanding of internal policy.
- PCO’s final decision claimed defective pricing due to failure to disclose subcontractor’s actual G&A rate. This was determined to be factually incorrect after live testimony in a hearing.
- The decision did not relate to “cost of facilities” specifically.

➤ Is the inclusion of “cost of facilities” in the G&A rate defective pricing?

- Yes. *See Martin Marietta Corp.*, ASBCA No. 48223 (1998).
- Government did not know of inclusion of cost of facilities in G&A rate until 1988 when it was explained by the ACS comptroller.
- Government relied upon prime contractor’s cost analysis of subcontractor proposals, memoranda of negotiations, and subcontract agreements.

➤ Fact Pattern:

- Contractor disclosed subcontractor proposals and prime contractor's evaluation/audit of sub proposals.
- Subsequent to disclosure, prime contractor issued additional purchase orders to subcontractors for material parts and labor.
- Prime contractor did not disclose new purchase orders.

➤ Is the failure to provide the new purchase order defective pricing?

- Yes. *See McDonnell Douglas, ASBCA No. 50341 (1999).*
- Later direct material costs and direct labor hours available prior to execution of certification must be updated

DISCLOSURE TO WHOM?

CASE STUDY #7

- **Two Fact Patterns:**
 - DCAA auditor who received cost or pricing data was not part of the government “should cost team” that was exclusively entrusted with contract negotiations.
 - ACO received new cost or pricing data, per standard practice between contractor and government of which the PCO was aware.

- Did disclosure of cost or pricing data to someone other than the PCO satisfy TINA disclosure obligation?
 - No. *See McDonnell Douglas*, ASBCA No. 50341 (1999).
 - Yes. *See FMC Corp.*, ASBCA No. 30069 (1986).

DISCLOSURE TO WHOM?

CASE STUDY #8

- **Two Fact Patterns:**
 - DCAA auditor who received cost or pricing data was not part of the government “should cost team” that was exclusively entrusted with contract negotiations
 - ACO received new cost or pricing data, per standard practice between contractor and government of which the PCO was aware

- Did disclosure of cost or pricing data to someone other than the PCO satisfy TINA disclosure obligation?
 - No. *See McDonnell Douglas*, ASBCA No. 50341 (1999).
 - Yes. *See FMC Corp.*, ASBCA No. 30069 (1986).

CONCLUSION

- TINA and defective pricing create significant risk for contractors and subcontractors.
- Contractors should carefully document data disclosed to contracting officer and during pre-award audits, as well as contract negotiations.
- Remember that the certification is of the *disclosure* of accurate, complete and current *data*, not of the proposal.
- When in doubt, consult your in-house counsel.

QUESTIONS?