

Defective Pricing and Truthful Cost or Pricing Data Act (TINA)

Overview

Of all the statutes and regulations that apply to government contractors, the Truth in Negotiations Act, renamed the Truthful Cost or Pricing Data Act in 2013 (“TINA”), is one of the most difficult with which to comply. Additionally, the Defense Contract Audit Agency (“DCAA”) plans to increase the number of defective pricing audits from about 20 in 2019 to 60 in 2020, according to DCAA spokesman Christopher Sherwood. Sole-source contractor profits are facing more scrutiny from the Department of Defense (“DOD”), as recent increases in government spending are causing concerns of unjustified profits based on incomplete, flawed, or inaccurate cost or pricing data. The DCAA is anticipating that its focus on defective pricing may result in increased claims and litigation. Defective pricing has been labeled an indicator of fraud by the DOD Inspector General, and in very severe cases, contractors accused of defective pricing have been charged with crimes and/or threatened with suspension and debarment.

Chess Consulting (“Chess”) works with contractors to establish and implement policies and procedures to reduce the risk of noncompliance with TINA. We also help contractors respond to government audit reports alleging defective pricing, and in the event a dispute or litigation arises regarding compliance with TINA, we work with contractors and their legal counsel to achieve a satisfactory resolution of the matter.

Defective Pricing

Regulations set forth in Federal Acquisition Regulation (“FAR”) 15.403 and TINA require that when a contract exceeds \$2,000,000 (as of July 1, 2018), unless an exemption is met, contractors must submit pricing data to the Contracting Officer and certify that the data is accurate, complete, and current.

For contracts subject to TINA, defective pricing under FAR 52.215-10 is “any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, [that] was increased by any significant amount because –

1. The Contractor or a subcontractor furnished certified cost or pricing data that were not

- complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data;
2. A subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor’s Certificate of Current Cost or Pricing Data; or
3. Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly, and the contract shall be modified to reflect the reduction.”

According to Chapter 14, Section 102, of the *DCAA Contract Audit Manual*, if a potential violation is uncovered in a DCAA post-award audit, it will be reviewed to determine if:

1. “The information in question fits the definition of certified cost or pricing data.
2. Accurate, complete, and current data existed and were reasonably available to the contractor before the agreement on price.
3. Accurate, complete, and current data were not submitted or disclosed to the contracting officer or one of the authorized representatives of the contracting officer and that these individuals did not have actual knowledge of such data or its significance to the proposal.
4. The Government relied on the defective data in negotiating with the contractor.
5. The Government’s reliance on the defective data caused an increase in the contract price.”

It is critical these audits be performed within the proper context considering, for example, the active TINA threshold at the time of the contract’s executed Certificate of Current Cost or Pricing Data, and facts such as the materiality of defects and the extent of the government’s reliance on such data in its procurement decision. If a violation is alleged, it is imperative that the Contracting Officer provides the contractor the chance for a rebuttal to support the accuracy, completeness, and currency of the data in question. The rebuttal should examine whether the government audit procedures and findings were accurate and supported, and whether there are offsetting price impacts. Chess can help contractors and their legal counsel assess government audit findings. This can include, for example, assessing whether

the pricing data was accurate and complete as of the date of the final agreement.

The Chess Consulting Advantage

Chess Consulting's highly qualified team of government contract accounting, investigation, and regulatory compliance experts has worked with contractors and their legal counsel on a multitude of TINA compliance matters over many years. We can aid legal counsel in both assessing potential defective pricing and assisting with audit responses and settlement negotiations.

Our experience includes performing detailed defective pricing reviews, analyzing firms' cost buildup, calculating potential price adjustments, and automating forward-pricing models and processes to minimize defective pricing risk in the future. We can analyze indirect costs, labor records, and material costs, as well as potential offsetting omitted costs. Chess can work with your company to fully understand and minimize the impact of defective pricing cases as well as prepare you for ongoing compliance with TINA.

Risk Assessment, Compliance Reviews, and Monitoring

In addition to helping contractors and their legal counsel to respond promptly and effectively after a defective pricing allegation has been made, we also help contractors identify and remediate defective pricing compliance risks before they lead to a violation or alleged violation. Through comprehensive risk assessments, often conducted in conjunction with legal counsel, we give clients the tools and knowledge to understand their vulnerabilities and to design and implement policies, procedures, and controls to remediate and mitigate risks. We can educate contractor employees about causes for concern and response strategies, help ensure prompt detection through internal control assessments, and develop effective mechanisms for internal reporting of potential defective pricing violations. We help contractors meet compliance requirements, as well as their responsibilities to employees, shareholders, and other stakeholders.

Chess Consulting Differentiators

Deep industry knowledge and technical expertise which helps each client deal effectively with the complexities of the processes and issues facing its business.

Profitability focus concentrating on actions and solutions that create a competitive business advantage while fully complying with regulatory requirements.

Practical and creative solutions that effectively address difficult compliance and business issues.

Supportable positions that have been proven to withstand scrutiny from regulatory agencies such as the SEC, DCAA, DOJ, and GAO.