

**DENTONS**



# Cost Estimating and Truthful Cost or Pricing Data Requirements

Steven M. Masiello  
Jeremiah J. McIntyre

May 9, 2017

# Agenda

- Cost Estimating
  - FAR cost estimating
  - DFARS cost estimating system rule
  - Government Proposal Analysis Techniques
  - Key compliance issues
- Truthful Cost or Pricing Data (TCPD) statute (f/k/a Truth in Negotiations Act or “TINA”)
  - Background and Overview
  - Purpose and Applicability
  - Certified Cost or Pricing Data
  - Best Practices

# Cost Estimating

- Estimating systems provide the mechanism for contractors to predict future costs based upon current and historical cost and performance data
- Underlying policy relating to estimating systems is to
  - Ensure accurate data is used for contract negotiations
  - Ensure estimating techniques are consistently applied
- Estimating systems may be used to
  - Prepare proposals for new offers or for modifications to existing work
  - Estimate future labor rates and indirect rates
  - Conduct should-cost analyses in order to validate subcontractor pricing
  - Assess business cases for seeking work
  - Prepare termination settlement proposals

# Cost Estimating

- Importance depends on the circumstance
  - Cost-type contracts
    - At award: estimated cost is used to determine fixed fee/award fee pools
    - During performance: government may disallow (not reimburse) costs that are unreasonable (FAR § 31.201-2(a)(1))
  - Fixed-price contracts
    - At award: failure to estimate accurate price may result in losses on contract
    - During performance: every dollar saved increases profit
  - Potential for fraud liability if contractor knows that an estimate is inaccurate
    - *United States ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012)

# Cost Estimating

- Government requirements for contractor estimating systems
  - FAR Part 15 (requirements for submission of proposals)
  - FAR Part 16
  - Solicitation terms/CO direction
  - DFARS 215.407-5
  - DFARS 252.215-7002 – Essentially incorporates FAR and DFARS estimating system requirements into single clause

# DFARS Cost Estimating System Rule

- Applicable to all contracts awarded based upon cost or pricing data
- Other agencies (e.g., DOE) adopting/applying DFARS criteria
- Overarching requirement – The Contractor must establish, maintain and comply with an “acceptable estimating system” (DFARS 252.215-7002(b))
- Estimating system includes (DFARS 252.215.7002(a))
  - Organizational structure
  - Established lines of authority, duties and responsibilities
  - Internal controls and managerial reviews
  - Flow of work, coordination and communication
  - Budgeting, planning, estimating methods, techniques, accumulation of historical costs and other analyses used to generate cost estimates

# DFARS Cost Estimating System Rule

- Rule targets contractor processes for
  - Budgeting/Forward Pricing Rate Development
    - Business base projections
    - Estimates of labor rates, fringes and pool expenses
    - Maintenance of up-to-date and “verifiable” forward pricing rates
  - Contract Proposal Development
    - Compliance with RFP and FAR Subpart 15.4
    - Bases of estimate/estimating methods
    - Subcontract and vendor pricing
    - Application of forward pricing rates and factors
  - System administration
    - Policies and procedures/internal audit
    - Management review of proposals
    - Training and qualifications of estimating staff
    - Integration of systems

# Government Proposal Analysis Techniques

- Proposal analysis techniques applied to estimated costs depends on procurement
- Cost vs. Price Analysis (FAR 15.404)
  - Cost analysis used to evaluate reasonableness of individual cost elements when certified cost or pricing data are required
    - Note: price analysis may be used to verify that the overall price offered is fair and reasonable
  - Price analysis used when certified cost or pricing data are not required
- Table 15-2 to FAR Part 15 provides detailed guidance on proposal submission when cost or pricing data are required
  - Requirements met when “all accurate certified cost or pricing data reasonably available” provided to government
  - Important Table 15-2 formalities
    - Proposed cost; profit or fee
    - Government property to be used?
    - Is contractor subject to CAS?
    - CASB Disclosure Statement submitted? Determined adequate?
    - Is any aspect inconsistent with your disclosed practices or applicable CAS?
    - Is the proposal consistent with established estimating and accounting principles and procedures and FAR Part 31?

# FAR Table 15-2

- Basic cost elements include:
  - Materials and services
    - BOM
    - Indicate if there was adequate price competition
  - Direct Labor
    - Time-phased breakdown of labor hours, rates, and cost by appropriate category, and furnish bases for estimates.
  - Indirect Costs
    - How indirect costs were computed and applied, including cost breakdowns
  - Other Costs
    - List all other costs not otherwise included (e.g., special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and bases for pricing
  - Royalties
    - Exceeding \$1,500
  - Facilities Capital Cost of Money

# Cost Accounting Standards

- Cost estimates must be compliant with the cost accounting standards
- Failure to comply with CAS may result in retroactive price adjustment for any “increased costs” to Government
- Specific standards that address estimating include CAS 401 and 405
  - CAS 401: Consistency in Estimating, Accumulating and Reporting Costs
    - Practices used in estimating costs in proposals must be consistent with practices used in accumulating and reporting costs
    - Must accumulate and report actual costs at the same or greater level of detail than when estimating costs for a proposal
  - CAS 405: Accounting for Unallowable Costs
    - Proposals must identify and segregate expressly unallowable costs

# Cost Estimating – Key Compliance Issues

- Incorrect, incomplete, or noncurrent data
- Improper use of an estimating technique
- Failure to consider or use all applicable factors or necessary techniques
- Apparent deliberate concealment or misrepresentation of the data supporting the estimate either in the historical data from prior contracts or in the supporting documents prepared specifically for the proposal
- Failure to estimate in a manner consistent with the disclosed or established accounting procedures as required by CAS 401

# Cost Estimating – Key Compliance Issues

- Inadequate policies and procedures
- Inadequate record-keeping for proposals submitted
- Misapplication of FAR Part 15 proposal standards
  - DCAA applies non-competitive proposal requirements to competitive proposals
  - Non-compliance allegations based upon failure to comply with system and FAR Subpart 15.4 procedures
  - Compliance with DFARS proposal adequacy checklist (78 FR 18865 (March 28, 2013))

# TCPD Background and Overview

- Government on equal information footing with the contractor
- Improves government bargaining position and ability to negotiate contracts and modifications
- 10 U.S.C. § 2306a; 41 U.S.C. Chapter 35
- Implemented at FAR Subpart 15.4
  - Describes CO responsibility to purchase supplies and services at fair and reasonable prices
  - Establishes requirements for the submission of “certified cost or pricing data”
  - Establishes when contractors must certify cost or pricing data
- The obligation to provide “certified cost or pricing data” creates potential “defective pricing” liability and increased risk of fraud and false claims allegations for non-compliance

# TCPD Background and Overview

- General requirement:
  - Submit current, accurate, and complete cost or pricing data
  - Existing on date of agreement on price
  - For covered contract actions
  - Not subject to an exception
- TCPD does not dictate
  - What price is proposed or estimating practices
  - What support must exist

# TCPD Applicability

- Contracts
  - Negotiated prime contracts > \$750,000 (updated as of October 1, 2015)
  - Prohibited from requiring certified cost or pricing data below the simplified acquisition threshold
  - Agency head may require submission of cost or pricing data where the award or modification is below \$750k but above simplified acquisition threshold if required to determine fair and reasonable price
- Modifications – Prime contract modifications or changes > \$750,000
- Subcontracts
  - Negotiated subcontracts > \$750,000 at any tier, if prime contract and higher-tier subcontract(s) were required to provide certified cost or pricing data
  - Subcontract modifications

# TCPD Exceptions

- Government prohibited from obtaining certified cost or pricing data if an exception applies
- Four exceptions
  - Adequate price competition
  - Commercial item contract (or modification)
  - Price set by law or regulation (rare)
  - TCPD waiver (rare)

# TCPD Exception – Adequate Price Competition

- Two or more responsible bidders, competing independently, submit offers and price is substantial factor
- Reasonable expectation that there would be two or more offerors and CO can conclude offer was submitted with expectation of competition
- Price is reasonable in comparison with recent prices for same or similar items purchased in comparable quantities, under contracts resulting from adequate price competition
- Note: Section 822 of the 2017 NDAA has changed the definition of adequate price competition for DOD acquisitions

# TCPD Exception – Commercial Items

- Commercial items defined at FAR 2.101
- No cost or pricing data, but may rely on “other than cost or pricing data”
- Proposed DFARS commercial items rule would create preference for commercial items and provide guidance to COs on treating procurements as commercial item procurements
  - DFARS Case 2016-D006 (81 Fed. Reg. 53101 (Aug. 11, 2016))
  - DOD to establish a centralized commercial item determination capability
  - Specified information for procurement of major systems as commercial items
  - Creates a preference for commercial items
  - Requires COs to consider prior prices paid in determining price reasonableness of commercial items
  - Replaces DFARS Case 2013-D034, which was withdrawn

# What is “Cost or Pricing Data”?

- Defined – All facts that “prudent buyers and sellers would reasonably expect to affect price negotiations significantly”
- “Facts” defined
  - Verifiable
  - Judgments and pure estimates are not cost or pricing data
  - Includes factual data forming basis for contractor’s judgment of estimated future costs
- “Significantly affect” not defined in the FAR and often ignored by government auditors

# Examples of Cost or Pricing Data

- Actual labor rates and hours
- Indirect costs
- Vendor/subcontractor quotations and analyses
- Nonrecurring costs
- Information regarding changes in production methods or volume
- Unit cost trends (like those associated with labor efficiency)
- Data supporting projections of business prospects and related operations costs
- Data on management decisions that could have a significant bearing on the costs
- Schedule or workload changes that affect costs
- Make-or-buy decisions

# Cost or Pricing Data – Fact vs. Judgment

- Pure judgments are not subject to disclosure
- Facts supporting a judgment should be disclosed
- Problem areas are data that are a mix between fact and judgment
- Example – cost estimates
  - *United States v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324 (M.D. Fla. 2003)
    - Disclosure of preliminary findings on work performance was required
    - Rejected Lockheed Martin's arguments that:
      - Data constituted judgment/estimate because it analyzed work performed to predict future costs
      - Data was not relevant because it was for a different type of labor being performed

# TCPD– Meaningful Disclosure

- Affirmative Disclosure Obligation
  - Must produce data; cannot wait for the Government to “ask the right question” *f*
  - Disclosure should be to PCO or his authorized representative – disclosure to auditor or ACO can be risky
- Data cannot be buried/cannot just give access to files; must be useful
- Almost everything, anywhere in your company is assumed to be “reasonably available” to and known by the contractor’s negotiators

# TCPD– Liability for Defective Pricing

- Government recovery under “Price Reduction” clause (FAR 15.408(b); 52.215-10)
- Government entitled to
  - Amount by which contract price overstated due to defective data, plus
  - Interest from date of overpayment through date of repayment
- Contractors knowing submission of defective data may result in
  - Penalty equal to amount of overpayment
  - Civil False Claims Act litigation
  - Criminal prosecution
    - Criminal false claims
    - False Statements Act
- Lack of certification does not preclude liability

# TCPD– Defenses to Defective Pricing Allegation

- Not cost or pricing data
  - Not factual
  - Did not exist
  - Not significant
- **Non-reliance:** Government would not have relied on data
  - Defense is expressly recognized in the statute:
    - “[I]t shall be a defense that the United States did not rely on the defective data submitted by the contractor.” 10 U.S.C. § 2306a(e)(2)

# TCPD– Best Practices to Minimize Risk

- Seek commercial item exemption to greatest extent possible
- As prime contractor, include indemnification agreements with subcontractors
- Pay attention to forward pricing rates and potential changes
- Agree with government on cutoff date for disclosing data
- Make final sweep at time of price agreement
- Err on side of disclosure
- Keep records of negotiations and preserve all files
- Disclose mistakes as soon as known
- DOCUMENT, DOCUMENT, DOCUMENT

# Questions?



- **Steven M. Masiello**
- Partner  
Government Contracts
- 303.634.4355  
steven.masiello@dentons.com



- **Jeremiah J. McIntyre**
- Associate  
Government Contracts
- 303.634.4317  
jeremiah.mcintyre@dentons.com

# Thank you

DENTONS



Dentons US LLP  
1400 Wewatta Street  
Suite 700  
Denver, CO 80202-5548  
United States

---

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. [www.dentons.com](http://www.dentons.com)