REDSTONE Government Consulting

Government Contract INSIGHTS

A MONTHLY PUBLICATION FOR GOVERNMENT CONTRACTORS

Volume 58

DECEMBER 2015

TINA (Truth in Negotiations Act) in the News

By Michael Steen, CPA, Senior Director at Redstone Government Consulting, Inc.

One of the least favored requirements of being a Government contractor involves compliance with TINA (Truth in Negotiations Act or *Truthful Cost or Pricing Data* as re-codified in 2014). As of October 1, 2015, FAR 15.403-4 increased the threshold for certified cost or pricing data from $700,000 to $750,000 which applies to prime contracts and subcontracts with no exemptions (e.g. not competitively awarded and/or not commercial items/services). Fundamentally, TINA involves a contractor certification that its cost or pricing data is current, accurate and complete as of the date the contractor and Government reach an agreement on price. Additionally, prime contractors must obtain subcontractor TINA certifications at a similar point in time (when the prime and the subcontractor reach an agreement on subcontract price). Oddly enough, most subcontract price agreements are after the prime contract price agreement in which case the subcontract TINA certification has no practical impact (factual data after the Government-prime contractor price agreement is obviously not factual data as of the prime contract price agreement and TINA certification). Even though the subcontractor TINA certification may not have any practical application to the prime contract price, it is a contractual requirement and prime contractors must obtain the subcontractor TINA certification else risk issues with CPSRs (Contractor Purchasing System Reviews). Two recent CPSR reports have reported prime contractors for failing to obtain the subcontractor TINA certifications and in both cases, the issue was reported as a significant deficiency (reference DFARS 252.244-7001).

In addition to recent CPSR reports which have implicated TINA, we've noted the following related to TINA in 2015 and projected into 2016.

- DCAA's 2016 Program Plan lists 29 post-award (TINA compliance) audits planned for government fiscal year 2016. That plan lists the contractors by name, the number of planned audits and the planned hours (1,250 hours each). DCAA does not explain why the specific audits have been planned; however, other sources suggest that these are based upon "audit leads", most likely customer (PCO) requests wherein the customer has data indicating "windfall profits" by the contractor. To be sure, windfall profits only implicate a risk of defective

THIS ISSUE:

pricing for which the burden of proof is on the government to prove defective pricing.

- The DOD-IG issues semi-annual reports which include an Appendix E that summarizes contract audit reports issued (by DCAA) during the six month period. For the 18 months ending March 31, 2015 (three semi-annual reports) the DOD-IG reported 27 post-award audit reports with total recommended price adjustments of $120.7 million. Noting that DCAA auditors are encouraged to refer these for investigations (i.e. presumption that defective pricing also involves a violation of the FCA or False Claims Act), there is significantly more at stake than the $120.7 million (the FCA can invoke treble damages or three times the $120.7 million if each of these actions involved a violation of the FCA)). The DOD-IG reports also include an Appendix which lists significant contract audit reports and three of those listed involved defective pricing and recommended price adjustments. The summary explanations were typical (e.g. overstated material due to duplicated material costs, failure to disclose more current vendor quotes, misapplied escalation) and atypical (failure to disclose in a meaningful manner historical overstatement of forecasted overhead and G&A).
- In June 2015, the DOJ released its complaint against a large defense contractor for alleged violations of TINA as well as the FCA. The allegations are that the contractor misrepresented its final price revision (update for current cost or pricing data as of the date of agreement on price); specifically, that the contractor represented an increase of $16 million for direct materials (plus overhead and G&A). In contrast, the Government complaint alleges that the contractor's final price proposal (updated cost volume) represented a significant decrease in costs to the tune of approximately $50 million. Assuming the Government is pursuing treble damages, the dispute is at least $150 million plus the potential risk of debarment or suspension from future Government contracts for the period ending.
- ASBCA Case 59297, dated 13 August 2015, involved a Government allegation of defective pricing related to a contractor's forward pricing bid rates interrelated with a forward pricing bid proposal. Prior to reaching a price agreement on the bid proposal (contract), the contractor submitted to the Government a separately updated forward pricing bid rate proposal (FPRP). A few weeks later, the contractor submitted its updated FPR (final proposal revision) which inexplicably did not include the updated forward pricing rates. However, the Government, including a DCAA auditor, wrongly assumed that the FPR contained the more current rates which had been disclosed by the contractor, but not used in the FPR. The ASBCA rejected the Government's claim noting that the government personnel were all aware of the latest FPRP and they all purportedly relied on it in evaluating the FPR. The fact that the government personnel never actually determined what rates (FPRP) were actually in the latest) bid proposal update (FPR) does not equate to a TINA violation (although we would not recommend using this as a strategy).
- On November 20, 2015, the Federal Register posted a proposed rule (DFARS Case 2015-D030) *Promoting Voluntary Post-Award Disclosure of Defective Pricing*. This proposed rule will encourage contractors to voluntarily disclose defective pricing; in turn, the contractor is promised a limited scope audit "unless a full scope audit is appropriate for the circumstances". The proposed rule explicitly states that to determine the scope of the audit, the contracting officer will consult with the Defense Contract Audit Agency (DCAA) which has already gone on record of challenging DCMA requests for limited scope audits of contractor forward pricing rate proposals (see our November 2015 Government Contract Insights Newsletter, "DCAA and DCMA: Not Exactly Working Together"). DFARS Case 2015-D030 is open for public comment through January 19, 2016 and we can hardly wait for all of the contractor (public) comments juxtaposed with the government (public) comments. As a point of clarification, a government agency such as the DOD-IG or DCAA, have provided "public" comments in response to other proposed rules which would seem to be i) not exactly "public" comments and ii) a conflict of interest given that DCAA is known to assist the FAR Councils in drafting regulations and addressing public comments. At any rate, 2016 will most likely include a final rule promoting voluntary disclosure of defective pricing which will likely be anything but voluntary disclosure when one considers the mandatory disclosure requirements which already exist in FAR 52.203-13 (i.e. if a contractor actually determines that it has violated TINA, it will invariably mean that the contractor has overbilled and had been overpaid by the Government; thus a mandatory disclosure under FAR 52.203-13).

REDSTONE Government Consulting

In summary, TINA compliance (more negatively stated as avoiding defective pricing) should be a concern for government contractors who sign TINA certifications. DCAA has not been all that engaged with post-award audits; however, that appears to be changing based upon DCAA's 2016 Program Plan. Further, the fact that DFARS has a proposed rule for voluntary disclosures suggests that DOD is concerned that defective pricing is going undetected and who better to detect and to report it than government contractors themselves.

Six Year Statute of Limitations (FAR 33.206) and Untimely DCAA Audits

By Michael E. Steen, CPA, Senior Director at Redstone Government Consulting, Inc.

In FAR 33.206, Initiation of a Claim, includes a six year statute of limitations which applies to both contractors and to the government. In the case of the government, subparagraph (b) states that the government contracting officer (CO) shall issue a written decision on any Government claim against the contractor within 6 years after the accrual date of the claim. Accrual of a claim means that date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim were known or should have been known. For liability to be fixed, some injury must have occurred.

Over the last four years, the 6 year SOL (statute of limitations) has been linked to untimely DCAA audits of contractor indirect cost rate proposals (ICPs); specifically, DCAA audits completed more than six years after the ICP was submitted leading to a CO written decision more than six years after the ICP submission date. In addition to issues stemming from ICP audits, issues involving CAS (Cost Accounting Standards) and defective pricing have invoked the 6 year SOL including a 2012 Court of Federal Claims decision wherein the government claim for $80 million (CAS non-compliance) was rejected based upon the passage of time. Specific to ICP submissions, audits and CO final decisions, ASBCA No 57576, December 17, 2012, ruled that allegedly unallowable costs claimed in a contractor ICP were negated by the 6 year SOL (the "line in the sand" was the date of the contractor ICP as opposed to later dates when DCAA asserted that bonus compensation was unallowable).

Unfortunately for contractors, early successes in asserting the 6 year SOL based upon ICP submission dates have gone the opposite direction starting with ASBCA Nos 58945, 58946, Combat Support Associates v. Department of the Army (Government). In denying the contractor motion for summary judgment, the ASBCA gave significant consideration to a DCAA supervisory auditor declaration that she did not have the supporting data related to unallowable costs until after August 23, 2007 (specific to the case, the key date for purposes of the 6 year SOL). As recent as November 10, 2015, in ASBCA No 58992, the court came to a similar conclusion for very similar reasons, the declaration of a DCAA auditor that certain ICP schedules (not initially provided) were necessary to the audit and by implication, necessary before the accrual date for purposes of the 6 year SOL. Of passing interest, DCAA and the Government used a different strategy in the November 2015 ASBCA (asserting that certain schedules were required and the absence of those schedules precluded the auditor from initiating an audit which is different than earlier ASBCA cases wherein the DCAA auditor declaration pertained to underlying support). Although it is a rhetorical question, DCAA's changing strategies begs the question, why change when the first strategy worked? The rhetorical answer, consistency isn't exactly DCAA's strong-suit.

Regarding the 6 year SOL in application to untimely DCAA ICP audits, the issue is anything but dead given that the 2014-2015 ASBCA Cases involved motions for summary judgment wherein there were material facts in dispute which means that those material facts will be debated during subsequent trials. However, the 6 year SOL will become less of a potential (contractor) solution once DCAA gets current on its ICP backlog (a requirement under Section 893 of the 2016 National Defense Authorization Act). For this and other reasons, contractors facing DCAA cost questioned as a result of ICP audits should plan on rebutting the issues and not assume any silver bullet (6 year SOL).

REDSTONE
Government Consulting

Training Opportunities

2015 Redstone Government Consulting Sponsored Seminar Schedule

January 26, 2016 – Government Contractor Challenges in 2016
WEBINAR – REGISTER HERE

2015 Federal Publications Sponsored Seminar Schedule

February 24-25, 2016 – Cost and Price Analysis in Government Contracts
Sterling, VA

March 14-15, 2016 – Cost and Price Analysis in Government Contracts
Orlando, FL

April 18-19, 2016 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Arlington, VA

April 25-26, 2016 – Accounting Compliance for Government Contractors
Alexandria, VA

May 17-18, 2016 – Cost and Price Analysis in Government Contracts
La Jolla, CA

June 15-16, 2016 – Accounting Compliance for Government Contractors
Arlington, VA

July 18-19, 2016 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Hilton Head Island, SC

August 22-23, 2016 – Cost and Price Analysis in Government Contracts
Arlington, VA

August 25-26, 2016 – Government Contract Audits: Dealing with Auditors and Mitigating Audit Risk
Arlington, VA

September 19-20, 2016 – Cost and Price Analysis in Government Contracts
Fort Worth, TX

October 24-25, 2016 – Accounting Compliance for Government Contractors
Sterling, VA

November 3-4, 2016 – Cost and Price Analysis in Government Contracts
Sterling, VA

Instructors:

- Mike Steen
- Scott Butler
- Cyndi Dunn
- Asa Gilliland
- Sheri Buchanan
- Darryl Walker
- Courtney Edmonson
- Cheryl Anderson
- Robert Eldridge

Go to HUwww.fedpubseminars.comU and click on the Government Contracts tab.

Blog Articles Posted to our Website

Unanet Success Stories
Posted by Katie Donnell on Tue, Dec 22, 2015 – Read More

Alleviating Bid Proposal Stress
Posted by Courtney Edmonson on Wed, Dec 16, 2015 – Read More

ICE Model Version 2.0.1e (December 2015)
Posted by Kimberly Basden on Wed, Dec 9, 2015 – Read More

2016 Defense Authorization Act Section 893
Posted by Michael Steen on Thu, Dec 3, 2015 – Read More

REDSTONE Government Consulting

I'm Thankful That It's M&A Time Again for Small Businesses
Posted by Scott Butler on Mon, Nov 23, 2015 – Read More

Why Can't I charge G&A on Direct Travel?
Posted by Asa Gilliland on Mon, Nov 23, 2015 – Read More

Are you Ready for Contractor Purchasing System Review (CPSR)?
Posted by Cyndi Dunn on Thu, Nov 19, 2015 – Read More

DCMA and the Upcoming "Business Systems Tsunami"
Posted by Wayne Murdock on Fri, Nov 13, 2015 – Read More

Do as I say, not as I do! DCAA's Internal Control Failure
Posted by Robert Eldridge on Thu, Nov 5, 2015 – Read More

2015 Halloween Costumes for Government Agencies
Posted by Michael Steen on Fri, Octo 20, 2015 – Read More

Yes, Small Businesses Do Need Written Policies and Procedures
Posted by Cheryl Anderson on Tue, Oct 27, 2015 – Read More

The Foreign Corrupt Practices Act
Posted by Glen Jenkins, Warren Averett, LLC on Thu, Oct 22, 2015 – Read More

For More Blog Articles: http://info.redstonegci.com/blog

Whitepapers Posted to our Website

The Audit World's Biggest Myths
A Whitepaper by Wayne Murdock – Read More

Government Contracting and Uncompensated Overtime
A Whitepaper by Wayne Murdock – Read More

DCAA Rejection of Incurred Cost Proposals
A Whitepaper by Michael Steen – Read More

Commercial Item Determination
A Whitepaper by Robert L. Eldridge – Read More

Limitation of Funds Clause Equals No Cost Recovery
A Whitepaper by Michael Steen – Read More

DFARS Business Systems
A Whitepaper by Michael Steen & Robert L. Eldridge– Read More

For More Whitepapers:
http://www.redstonegci.com/resources/white-papers

CFO Roundtable

Redstone Government Consulting, Inc., Radiance Technologies, Inc., & Warren Averett will be sponsoring a CFO/Controller roundtable for Government Contractors.

All Government contractor CFO's or Controllers are invited to participate. The meetings will be held quarterly beginning February 17, 2016 and will include lunch and networking from 11:30am – 1:00pm. The first meeting will be held in Research Park at the AEgis training facility located at 410 Jan Davis Drive, Huntsville, AL 35806. The second meeting will be held at Radiance Technologies located at 350 Wynn Drive Huntsville, AL 35805. Participants will be notified via email announcements for all future locations and seminar topics.

The CFO Roundtable is **free** to attend. All participants will be invited to share topics of interest and the group will be interactive. Redstone GCI, Radiance Technologies, and Warren Averett will strive to provide speakers on topics that are of interest to the group each quarter. Please provide us your email address and we will notify you 30 days in advance of each meeting. RSVP's are required.

Sign up for CFO Roundtable here

REDSTONE Government Consulting

About Redstone Government Consulting, Inc.

Our Company's Mission Statement: RGCI enables contractors doing business with the U.S. government to comply with the complex and challenging procurement regulatory provisions and contract requirements by providing superior cost, pricing, accounting, and contracts administration consulting expertise to clients expeditiously, efficiently, and within customer expectations. Our consulting expertise and experience is unparalleled in understanding unique challenges of government contractors, our operating procedures are crafted and monitored to ensure rock-solid compliance, and our company's charter and implementing policies are designed to continuously meet needs of clients while fostering a long-term partnership with each client through pro-active communication with our clients

In achieving government contractor goals, all consulting services are planned and executed utilizing a quality control system to ensure client objectives and goals are fully understood; the right mix of experts with the proper experience are assigned to the requested task; clients are kept abreast of work progress; continuous communication is maintained during the engagement; work is managed and reviewed during the engagement; deliverables are consistent with and tailored to the original agreed-to scope of work, and; follow-up communication to determine the effectiveness of solutions and guidance provided by our experts.

Specialized Training

Redstone Government Consulting, Inc. will develop and provide specialized Government contracts compliance training for client / contractor audiences. Topics on which we can provide training include estimating systems, FAR Part 31 Cost Principles, TINA and defective pricing, cost accounting system requirements, and basics of Cost Accounting Standards, just to name a few. If you have an interest in training, with educational needs specific to your company, please contact Ms. Lori Beth Moses at lmoses@redstonegci.com, or at 256-704-9811.

REDSTONE
Government Consulting

Redstone Government Consulting, Inc.

NEW ADDRESS
Huntsville, AL
4240 Balmoral Drive SW, Suite 400
Huntsville, AL 35802
T: 256.704.9800

Email: info@redstonegci.com
On the web: www.redstonegci.com