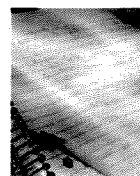


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Contract Pricing

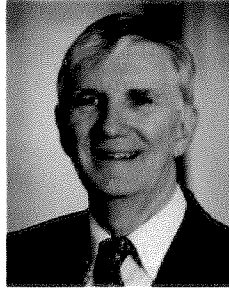
With

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30 April 2008
Kitsap Conference Center
Bremerton, WA

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CHAPTER 10

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CHAPTER 10
CONTRACT PRICING

I. INTRODUCTION.

A. Objectives. Following this block of instruction, the student should:

1. Understand the different types of contractor pricing information available for determining price reasonableness, and when to require their submission.
2. Understand the purpose of the Truth in Negotiations Act.
3. Understand what defective pricing is, and the remedies available to the government.

B. References.

1. Federal Acquisition Regulation 15.4, Contract Pricing.
2. DoD Contract Pricing Reference Guide, available at:
<http://www.acq.osd.mil/dpap/contractpricing/index.htm>.
3. The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a and 41 U.S.C. § 254b.
4. DCAA Contract Audit Manual (CAM). available at:
<http://www.dcaa.mil/cam.htm>.

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159th Contract Attorneys' Course
March 2008

II. INFORMATION REQUIRED TO DETERMINE PRICE REASONABLENESS.

- A. Requirement. Contracting officers are required to determine price reasonableness before making contract awards. FAR 14.408-2; 15.404-1(a). In sealed bid procurements, the contracting officer is directed to use the price analysis techniques in FAR 15.404-1(b) as a guideline.
- B. Definitions. FAR 2.101.
1. "Price Analysis" is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. FAR 15.404-1(b).
 2. "Cost analysis" is the review and evaluation of the separate cost elements and profit in an offeror's or contractor's proposal (including cost or pricing data or information other than cost or pricing data), and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. FAR 15.404-1(c).
 3. "Cost or pricing data" means 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 data requiring certification in accordance with 15.406-2. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. See also DCAAM § 14-104.4.
 4. "Information other than cost or pricing data" refers to information that the contractor (or subcontractor) is not required to certify IAW FAR 15.406-2, but the government needs to determine price reasonableness and/or cost realism (e.g., pricing, sales, or cost information). For commercial items, such data would include price, sales data, and terms & conditions of sales.

5. The term "cost realism" means that the costs in an offeror's proposal are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the various elements of the offeror's technical proposal.

C. Sealed Bidding: Determining Price Reasonableness

1. Along with determining contractor responsibility, contracting officers shall determine that the prices offered are reasonable before awarding the contract. The contracting officer is directed to use the price analysis techniques in FAR 15.404-1(b) as guidelines. FAR 14.408-2(a).
2. The price analysis shall also consider whether bids are materially unbalanced as described in FAR 15.404-1(g). FAR 14.408-2(b). Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more CLINs is significantly over or understated as indicated by the application of cost or price analysis techniques. (Cost analysis techniques would not be used in a sealed bid procurement.) The contracting officer will only reject a bid if there is a determination that the unbalanced prices pose an unacceptable risk in paying unreasonably high prices for contract performance. FAR 15.404-1(g).

D. Competitive Negotiations: Determining Price Reasonableness

1. The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable. The different analytical techniques of FAR 15.404-1 are used singly or in combination to ensure the final price is fair and reasonable. FAR 15.404-1(a).
2. The price analysis techniques of FAR 15.404-1(b) are used when cost or pricing data are not required. FAR 15.404-1(a)(2).
3. The cost analysis techniques of FAR 15.404-1(c) are used to evaluate the reasonableness of individual cost elements when cost or pricing data are required and also used when information other than cost or pricing data is required. FAR 15.404-1(a)(2) and (3).

E. FAR Pricing Policy.

1. FAR 15.402(a) provides that contracting officers shall not obtain more information than is necessary to establish the reasonableness of offered prices. The contracting officer should rely on information obtained from within the Government first, information obtained from sources other than the offeror second, and information obtained from the offeror last. If the contracting officer obtains information from the offeror, the contracting officer should obtain information on the prices at which the offeror previously sold the same or similar items. FAR 15.402(a)(2)(i).
2. The contracting officer should use every means available to determine whether a fair and reasonable price can be determined before requesting cost or pricing data. In fact, the FAR admonishes the contracting officer to avoid unnecessary requirements for cost or pricing data because it increases proposal preparation costs, extends acquisition lead-time, and wastes both contractor and Government resources. FAR 15.402(a)(3).

F. Order of Preference. FAR 15.402 To the extent cost or pricing data are not required by FAR 15.403-4, the contracting officer shall generally use the following order of preference to determine the type of information necessary to determine price reasonableness:

1. No additional information except in unusual circumstances, if the agreed upon price is based on adequate price competition. The additional information shall to the maximum extent practicable be obtained from sources other than the offeror.
2. Information other than cost or pricing data (e.g., established catalog or market prices).
3. Cost or pricing data.

III. OTHER THAN COST OR PRICING DATA.

- A. General Requirements. 10 U.S.C. § 2306a(d); 41 U.S.C. § 254b(d); FAR 15.403-3(a).

1. The contracting officer must obtain enough information from the contractor (or subcontractor) to determine price reasonableness and/or cost realism.
2. The contracting officer can only require contractors (or subcontractors) to submit information other than cost or pricing data to the extent necessary to determine price reasonableness and/or cost realism.
3. At a minimum, the contracting officer should generally obtain information on the prices at which the same item or similar items were previously sold.¹
4. The contracting officer must ensure that information used to support price negotiations is sufficiently current to permit the negotiation of a fair and reasonable price.
5. The contracting officer should limit requests for updated information to information that affects the adequacy of the offeror's proposal (e.g., changes in price lists).

B. Adequate Price Competition. FAR 15.403-3(b).

1. Additional information is not normally required to determine price reasonableness and/or cost realism.
2. If additional information is required, the contracting officer must obtain the information from sources other than the offeror to the maximum extent practicable.
3. The contracting officer may request information to:
 - a. Determine the cost realism of competing offers; and/or
 - b. Evaluate competing proposals.

¹ This requirement does not apply if offeror's proposed price is: (1) based on adequate price competition; or (2) set by law or regulation.

C. Commercial Items. 10 U.S.C. § 2306a(d)(2); 41 U.S.C. § 254b(d)(2); FAR 15.403-3(c).

1. FAR 15.403-3(c)(1) advises contracting officers that existence of a price in a price list, catalog, or advertisement does not, in and of itself, establish a price to be fair and reasonable.² After using information from sources other than the offeror and the contracting officer is not able to make a determination that the price is fair and reasonable, the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis.³
2. Failure of the contractor to submit the requested information will make it ineligible for award unless the head of the contracting activity determines it in the government's interest to make award. FAR 15.403-3(a)(4).
3. The contracting officer must limit requests for sales data to sales for similar items during a relevant time period.
4. To the maximum extent practicable, the contracting officer must limit information requests to data that is in a form regularly maintained by the offeror as part of its commercial operations.
5. The government cannot disclose any information obtained under this authority if it is exempt from disclosure (e.g., pursuant to the Freedom of Information Act).

² 64 Fed. Reg. at 51,836 (amending FAR 15.403-3(c) and 13.106-3(a)(2)(iii)). This FAR provision had originally been an interim rule amending the FAR to implement sections of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, §§ 803, 808, 112 Stat. 1920 (1998). See Federal Acquisition Circular (FAC) 97-14, FAR Case 98-300, Determination of Price Reasonableness and Commerciality (visited 1 April 2003), available at <http://farsite.hill.af.mil>.

³ In 1999, the GAO issued a report reviewing how the DOD prices commercial items. In an evaluation of sixty-five sole-source commercial item purchases, the GAO identified problems with the government's price analysis. In more than half of the purchases, the contracting officer compared the offered price with the offeror's catalog price, or with the price paid in previous procurements. The government negotiated lower prices in only three of the thirty-three cases. GOVERNMENT ACCOUNTABILITY OFFICE, CONTRACT MANAGEMENT: DOD PRICING OF COMMERCIAL ITEMS NEEDS CONTINUED EMPHASIS, REPORT NO. GAO/NSIAD-99-90 (June 24, 1999). The GAO looked at contracts concerning aircraft spare parts.

- D. Submission of Other Than Cost or Pricing Data. FAR 15.403-3(a)(2); FAR 15.403-5(a)(3) and (b)(2).
1. The contracting officer must state the requirement to submit information other than cost or pricing data in the solicitation. See FAR 52.215-20 (Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data); FAR 52.215-21 (Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data -- Modifications).
 2. If the contracting officer requires the submission of information other than cost or pricing data, the contractor may submit the information in its own format unless the contracting officer concludes that the use of a specific format is essential and describes the required format in the solicitation.
 3. The offeror is not required to certify information other than cost or pricing data.

IV. TRUTH IN NEGOTIATIONS ACT.

- A. Evolution.
1. May 1959 – The Government Accountability Office (GAO) reported a large number of overpricing cases.
 2. October 1959 – DOD revised the Armed Services Procurement Regulation (ASPR) to require contractors to provide a Certificate of Current Cost or Pricing Data during contract negotiations. In 1961 DOD added a price reduction clause to the ASPR.
 3. 1962 – Congress passed TINA. Pub. L. No. 87-653, 76 Stat. 528 (1962) (codified at 10 U.S.C. § 2306f). TINA applied to DOD, the Coast Guard, and NASA. Public Law 89-369 extended TINA's reach to all Executive Branch Departments and Agencies.
 4. Significant amendments to TINA occurred in 1986 (Pub. L. No. 99-661, 100 Stat. 3946), 1994 (the Federal Acquisition Streamlining Act of 1994 (FASA)), and 1996 (the Clinger-Cohen Act of 1996, a.k.a. the Federal Acquisition Reform Act of 1996 (FARA)).

5. TINA is currently codified at 10 U.S.C. § 2306a and 41 U.S.C. § 254b.

B. Why have the TINA?

1. "The objective of these provisions is to require truth in negotiating. Although not all elements of costs are ascertainable at the time a contract is entered into, those costs that can be known should be finished currently, accurately, and completely. If the costs that can be determined are not furnished accurately, completely, and as currently as is practicable, the Government should have the right to revise the price downward to compensate for the erroneous, incomplete, or out-of-date information." S. REP. NO. 1884, at 3 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476, 2478.
2. TINA's purpose is to level the negotiation playing field by ensuring that government negotiators have access to the same pricing information as the contractor's negotiators. TINA requires contractors to submit cost or pricing data that is accurate, complete, and current as of the date of agreement on contract price. The purpose of TINA is not to detect fraud.

V. WHEN TO OBTAIN COST OR PRICING DATA.

A. Disclosure Requirements. Contractors submit cost or pricing data only for large-dollar, negotiated contract actions. Disclosure can be either mandatory or nonmandatory.

1. Mandatory Disclosure. 10 U.S.C. § 2306a(a)(1); 41 U.S.C. § 254b(a)(1); FAR 15.403-4(a)(1). Unless an exception applies, the contractor (or subcontractor) must generally submit cost or pricing data before the:
 - a. Award of a negotiated contract expected to exceed \$500,000⁴ (except an undefinitized action such as a letter contract);

⁴The threshold was adjusted effective October 2000 pursuant to the statutory requirement to keep it constant in terms of fiscal year 1994 dollars. See 65 Fed. Reg. 60,553. See also, 10 U.S.C. § 2306a(a)(7) and 41 U.S.C. § 254(b).

- b. Award of a subcontract at any tier expected to exceed \$500,000 if the government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data;
 - c. Modification of a prime contract involving a price adjustment⁵ expected to exceed \$500,000 (regardless of whether cost or pricing data was initially required); or
 - d. Modification of a subcontract at any tier involving a price adjustment expected to exceed \$550,000 if the government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data under the original contract or subcontract.
2. Nonmandatory. 10 U.S.C. § 2306a(c); 41 U.S.C. § 254b(c); FAR 15.403-4(a)(2).
- a. Unless prohibited because an exception applies, the head of the contracting activity (HCA) can authorize a contracting officer to obtain cost or pricing data for pricing actions expected to cost between \$100,000 and \$550,000 if the submission of such data is necessary to determine price reasonableness.
 - b. The HCA must justify the decision in writing, and cannot delegate this authority to another agency official.

B. Prohibition on Obtaining Cost or Pricing Data.

- 1. Simplified Acquisitions. FAR 15.403-1(a). A contracting officer cannot require a contractor to submit cost or pricing data for an acquisition that is at or below the simplified acquisition threshold (i.e., \$100,000).
- 2. Exceptions. FAR 15.403-1(b).

⁵ Price adjustment amounts shall consider both increases and decreases. For example, a \$150,000 modification resulting from a decrease of \$350,000 and an increase of \$200,000 qualifies as an adjustment necessitating cost or pricing data. FAR 15.403-4(a)(1)(iii).

- a. Adequate Price Competition. 10 U.S.C. § 2306a(b)(1)(A)(i); 41 U.S.C. § 254b(b)(1)(A)(i); FAR 15.403-1(b)(1) and (c)(1). A contracting officer cannot require a contractor to submit cost or pricing data if the agreed upon price is based on adequate price competition.
- (1) Two Offers Received. FAR 15.403-1(c)(1)(i).
- (a) Adequate price competition exists if two or more responsible offerors, competing independently, submitted responsive offers; and
- (b) The government awarded the contract to the offeror whose proposal represented the best value, and in which price was a substantial factor in the source selection. FAR 15.403-1(c)(1)(i); and
- (c) The contracting officer did not find the successful offeror's price unreasonable.⁶ See Serv-Air, Inc., B-189884, Sept. 25, 1978, 78-2 CPD ¶ 223, aff'd on recons., Mar. 29, 1979, 79-1 CPD ¶ 212 (holding that cost or pricing data was not required because there was adequate price competition); cf. Litton Sys., Inc., Amecom Div., ASBCA No. 35914, 96-1 BCA ¶ 28,201 (denying the contractor's motion for summary judgment because a dispute of fact existed regarding whether there was adequate price competition).
- (2) One Offer Received. FAR 15.403-1(c)(1)(ii).
- (a) Adequate price competition exists if the government reasonably expected that two or more responsible offerors, competing independently, would submit offers; and

⁶ The contracting officer must: (1) support any finding that the successful offeror's price was unreasonable; and (2) obtain approval at a level above the contracting officer. FAR 15.403-1(c)(1)(i)(B).

- (b) even though the government only received one proposal, the contracting officer reasonably concluded that the offeror submitted its offer with the expectation of competition.⁷

- (3) Current or Recent Prices. FAR 15.403-1(c)(1)(iii). Adequate price competition exists if price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition. See Norris Industries, Inc., ASBCA No. 15442, 74-1 BCA ¶ 10,482 (concluding that there was not adequate price competition where only one recent previous contract was for a quantity comparable to current contract).

- b. Prices set by law or regulation. FAR 15.403-1(c)(2). Pronouncements in the form of periodic rulings, reviews, or similar actions of a government body, or embodied in the laws, are sufficient to set a price.

- c. Commercial items. Acquisitions of items meeting the commercial item definition in FAR 2.101 are exempt from the requirement for cost or pricing data. FAR 15.403-1(c)(3).

- d. Waivers. FAR 15.403-1(c)(4). The HCA, without power of delegation, may waive in writing the requirement for cost or pricing data in exceptional cases. The waiver must specifically identify the parties to whom it relates.

⁷ The contracting officer can reasonably conclude that the offeror submitted its offer with the expectation of competition if circumstances indicate that the offeror: (1) believed that at least one other offeror was capable of submitting a meaningful offer; and (2) had no reason to believe that other potential offerors did not intend to submit offers; and the determination that the proposed price is based on adequate competition is reasonable, and is approved at a level above the contracting officer. FAR 15.403-1(c)(1)(ii)(A)(B).

3. Requiring a contractor to submit cost or pricing data when there is adequate competition may be an abuse of the contracting officer's discretion. See United Technologies Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444 (rejecting Air Force's contention that the contracting officer had absolute discretion both to require certified cost or pricing data and to include a price adjustment clause where the price was negotiated based on adequate price competition).

VI. EXAMPLES OF COST OR PRICING DATA.

- A. Cost or pricing data includes:
 1. Vendor quotations;
 2. Nonrecurring costs;
 3. Information on changes in production methods and production/ purchasing volume;
 4. Data supporting projections of business prospects, business objectives, and related operational costs;
 5. Unit-cost trends such as those associated with labor efficiency;
 6. Make-or-buy decisions;
 7. Estimated resources to attain business goals; and
 8. Information on management decisions that could have a significant bearing on costs.

B. Board Guidance.

1. According to the Armed Services Board of Contract Appeals (ASBCA), the statutory and regulatory definitions “plainly denote” a more expansive interpretation of cost or pricing data than routine corporate policy, practice, and procedures. United Techs. Corp./Pratt & Whitney, ASBCA No. 43645, 94-3 BCA ¶ 27,241. See Plessey Indus., ASBCA No. 16720, 74-1 BCA ¶ 10,603 (applying the “traditional ‘reasonable man’ test” to determine whether data constitutes cost or pricing information).
2. Factual information is discrete, quantifiable information that can be verified and audited. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842.

C. Fact vs. Judgment.

1. These distinctions are often difficult to make. Information that mixes fact and judgment may require disclosure because of the underlying factual information. See, e.g., Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195; cf. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842 (holding that reports regarding estimated labor hours were not required to be disclosed because they were “pure judgment”).
2. Management decisions are generally a conglomeration of facts and judgment. See, e.g., Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722. To determine whether management decisions can be classified as cost or pricing data, one should consider the following factors:
 - a. Did management actually make a “decision?”
 - b. Was the management decision made by a person or group with the authority to approve or disapprove actions affecting costs?
 - c. Did the management decision require some sort of “action” affecting the relevant cost element, or was the “decision” more along the lines of preliminary planning for possible future action?

- d. Is there a substantial relationship between the management decision and the relevant cost element?
- e. Is the management decision the type of decision that prudent buyers and sellers would reasonably expect to affect price negotiations significantly?

D. Cost or Pricing Data Must be Significant.

1. The contractor must disclose the data if a reasonable person (i.e., a prudent buyer or seller) would expect it to have a significant effect on price negotiations. Plessey Indus., Inc., ASBCA No. 16720, 74-1 BCA ¶ 10,603.
2. Prior purchases of similar items may be “significant data.” Kisco Co., ASBCA No. 18432, 76-2 ¶ 12,147; Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.
3. The duty to disclose extends not only to data that the contractor knows it will use, but also to data that the contractor thinks it might use. 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, 76-2 BCA ¶ 12,121; P.A.L. Sys. Co., GSBCA No. 10858, 91-3 BCA ¶ 24,259 (holding that a contractor should have disclosed vendor discounts even though the government was not entitled to them).
4. The amount of the overpricing is not determinative of whether the information is significant. See Conrac Corp. v. United States, 558 F.2d 994 (1977) (holding that the government was entitled to a refund totaling one-tenth of one percent of the total contract price); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489 (holding that the government was entitled to a refund totaling two-tenths of one percent of the total contract price). But see Boeing Co., ASBCA No. 33881, 92-1 BCA ¶ 24,414 (holding that a \$268 overstatement on a \$1.7 billion contract was “*de minimis*”).

5. Note: The DCAA CAM 7640.1, states that potential price adjustments of the lesser of 5 percent of the contracts value or \$50,000, should normally be considered immaterial. DCAA CAM ¶ 14-120.1. These materiality criteria do not apply when:
 - a. A contractor's deficient estimating practices results in recurring defective pricing; or
 - b. The potential price adjustment is due to a systemic deficiency which affects all contracts priced during the period. DCAA CAM ¶ 14-120.1.

VII. THE SUBMISSION OF COST OR PRICING DATA.

A. Procedural Requirements.

1. Format. FAR 15.403-5.
 - a. In the past, contractors used a Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet, to submit cost or pricing data; however, this form is obsolete.
 - b. Today, the contracting officer can:
 - (1) Require contractors to submit cost or pricing data in the format specified in FAR 15.408, Table 15-2;
 - (2) Specify an alternate format; or
 - (3) Allow contractors to use their own format.

2. Submittal to Proper Government Official.
 - a. Contractors must generally submit cost or pricing data to the contracting officer or the contracting officer's authorized representative. 10 U.S.C. § 2306a(a)(3); 41 U.S.C. § 254b(a)(3).
 - b. The boards often look at whether the person to whom the disclosure was made participated in the negotiation of the contract. See Singer Co., Librascope Div. v. United States, 217 Cl. Ct. 225, 576 F.2d 905 (1978) (holding that disclosure to the auditor was not sufficient where the auditor was not involved in the negotiations); Sylvania Elec. Prods., Inc. v. United States, 202 Ct. Cl. 16, 479 F.2d 1342 (1973) (holding that disclosure to the ACO was not sufficient where the ACO had no connection with the proposal and the contractor did not ask the ACO to forward the data to the PCO); cf. Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489 (holding that disclosure to the ACO was sufficient where the ACO was involved in the negotiation of the disputed rates and knew that the subject contract was being negotiated); Litton Sys., Inc., Amecom Div., ASBCA Nos. 34435, et. al., 93-2 BCA ¶ 25,707 (holding that disclosure of indirect cost actuals to resident auditor based on established practice was sufficient disclosure though auditor did not participate in negotiations).
3. Adequate Disclosure. A contractor can meet its obligation if it provides the data physically to the government and discloses the significance of the data to the negotiation process. M-R-S Manufacturing Co. v. United States, 492 F.2d 835 (1974).
 - a. The contractor must advise government representatives of the kind and content of the data and their bearing on the prospective contractor's proposal. Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195.
 - b. Making records available to the government may constitute adequate disclosure. Appeals of McDonnell Douglas Helicopter Sys., ASBCA No. 50447, 50448, 50449, 2000 BCA ¶ 31,082 (furnishing or making available historical reports to DCAA resident auditor and DLA in-plant personnel in connection to Apache procurement make-buy decisions held adequate).

- c. Knowledge by the other party of the data's existence is no defense to a failure to provide data. Grumman Aerospace Corp., ASBCA No. 35188, 90-2 BCA ¶ 22,842 (prime contractor's alleged knowledge of subcontractor reports not sufficient because subcontractor was obligated to physically deliver the data).

B. Obligation to Update Data.

1. The contractor is obligated to disclose data in existence as of the date of price agreement. Facts occurring before price agreement and coming to the negotiator's attention after that date must be disclosed before award if they were "reasonably available" before the price agreement date.
2. The contractor's duty to provide updated data is not limited to the personal knowledge of its negotiators. Data within the contractor's (or subcontractor's) organization are considered readily available.
3. Near the time of price agreement, a contractor sometimes conducts internal "sweeps" of cost or pricing data to ensure it meets its disclosure requirements.
4. Contracting officer responsibilities. See Memorandum from E. R. Spector, Deputy Assistant Secretary of Defense for Procurement, "Contractor Delays in Submitting Certificates of Current Cost or Pricing Data" (7 June 1989). Based upon this memorandum, the contracting officer must take the following actions when the contractor (or subcontractor) submits additional cost or pricing data:
 - a. Obtain a statement from the contractor summarizing the impact of the additional data;
 - b. Reduce the contract price if the data indicates that the negotiated price was increased by a significant amount; and
 - c. List the data in the price negotiation memorandum and identify the extent to which the contracting officer relied on the data to establish a fair and reasonable price.

C. Certification of Data.

1. Requirement. FAR 15.406-2. When cost or pricing data is required, the contractor must submit a Certificate of Current Cost or Pricing Data using the format found at FAR 15.406-2(a). See 10 U.S.C. § 2306a(a)(2) and 41 U.S.C. § 254b(a)(2)(requiring any person who submits cost or pricing data to certify that the data is accurate, complete, and current).
2. Due Date for Certificate. FAR 15.406-2(a). The certificate is due as soon as practicable after the date the parties conclude negotiations and agree to a contract price.
3. Failure to Submit Certificate. 10 U.S.C. § 2306a(f)(2); 41 U.S.C. § 254b(f)(2). A contractor's failure to certify its cost or pricing data does not relieve it of liability for defective pricing. See S.T. Research Corp., ASBCA No. 29070, 84-3 BCA ¶ 17,568.

VIII. DEFECTIVE PRICING.

- A. Definition. Defective cost or pricing data is that data which is subsequently discovered to have been inaccurate, incomplete, or noncurrent. Under TINA and contract price reduction clauses, the government is entitled to an adjustment in the contract price, to include profit or fee, when it relied on defective cost or pricing data.
- B. Audit Rights. Subsequent to award of a negotiated contract under which the contractor submitted cost or pricing data, the government has several rights to audit the contractor's records.
 1. Contracting Agency's Right.
 - a. Statutory Basis. 10 U.S.C. § 2306a(g); 41 U.S.C. § 254b(g). The HCA has the same right to examine contractor (or subcontractor) records to evaluate the accuracy, completeness, and currency of the cost or pricing data that the HCA has under 10 U.S.C. § 2313(a)(2) and 41 U.S.C. § 254d(a)(2).

- b. Definition. 10 U.S.C. § 2313(i); 41 U.S.C. § 254d(i). The term “records” includes “books, documents, accounting procedures and practices, and any other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.”

- c. Examination Authority. 10 U.S.C. § 2313(a)(2), (e)-(f); 41 U.S.C. § 254d(a)(2), (e)-(f).
 - (1) The HCA, acting through an authorized representative, has the right to examine all records related to:
 - (a) The proposal for the contract (or subcontract);
 - (b) The discussions conducted on the proposal;
 - (c) The pricing of the contract (or subcontract); or
 - (d) The performance of the contract (or subcontract).
 - (2) The HCA’s examination right expires 3 years after final payment on the contract.
 - (3) The HCA’s examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.

- d. Contract Clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).

- e. Subpoena Power. 10 U.S.C. § 2313(b); 41 U.S.C. § 254d(b).
- (1) The Director of the Defense Contract Audit Agency (DCAA)⁸ can subpoena any of the records that 10 U.S.C. § 2313(a) gives the HCA the right to examine.
 - (2) The Director of the DCAA can enforce this subpoena power by seeking an order from an appropriate U.S. district court.
 - (3) DCAA's subpoena power does not extend to a contractor's internal audit reports. United States v. Newport News Shipbldg. and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988) (Newport News I).
 - (a) Internal audits are not related to a particular contract.
 - (b) Internal audits contain the subjective evaluations of the contractor's audit staff.
 - (4) DCAA's subpoena power is aimed at obtaining objective data upon which to evaluate the specific costs a contractor charged to government.
 - (5) DCAA's subpoena power extends to a contractor's federal income tax returns and other financial data. United States v. Newport News Shipbldg. and Dry Dock Co., 862 F.2d 464 (4th Cir. 1988) (Newport News II).
 - (6) DCAA's subpoena power is not limited to records relating to a contractor's pricing practices.

⁸ For civilian agencies, this right extends to the Inspector General of the agency and, upon the request of the HCA, the Director of the DCAA or the Inspector General of the General Services Administration. 41 U.S.C. § 254d(b)(1).

- (7) DCAA's subpoena power extends to objective factual records relating to overhead costs that the contractor may pass on to the government.
- (8) DCAA's subpoena power also extends to a contractor's work papers for its federal income tax returns and financial statements. United States v. Newport News Shipbldg. and Dry Dock Co., 737 F. Supp. 897 (E.D. Va. 1989) (Newport News III), aff'd, 900 F.2d 257 (4th Cir. 1990).

2. Comptroller General's Right.

- a. Statutory Basis. 10 U.S.C. § 2313(c), (e)-(f); 41 U.S.C. § 254d(c), (e)-(f). The Comptroller General (or the Comptroller General's authorized representative) has the right "to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."
- b. The Comptroller General's examination right only applies to contracts awarded using other than sealed bid procedures. The Comptroller General's examination right expires 3 years after final payment on the contract.
- c. The Comptroller General's examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.
- d. Contract Clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).
- e. Subpoena Power. 31 U.S.C. § 716.
 - (1) The Comptroller General has the power to subpoena the records of a person to whom the Comptroller General has access by law or agreement.

- (2) The Comptroller General can enforce this subpoena power by seeking an order from an appropriate U.S. district court. United States v. McDonnell-Douglas Corp., 751 F.2d 220 (8th Cir. 1984).
- f. Scope of the Comptroller General's Examination Right.
- (1) The term "contract," as used in the statute, embraces not only the specific terms and conditions of a contract, but also the general subject matter of the contract. Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).
 - (2) For cost-based contracts, the Comptroller General's examination right is extremely broad; however, for fixed-price contracts, the books or records must bear directly on the question of whether the government paid a fair price for the goods or services. Bowsher v. Merck & Co., 460 U.S. 824 (1983).
3. Inspector General's Right. 5 U.S.C. App. 3 § 6.
- a. Statutory Basis. 5 U.S.C. App. 3 § 6(a)(1).
 - (1) The Inspector General of an agency has the right "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material . . . which relate to programs and operations with respect to which that Inspector General has responsibilities"
 - (2) This statutory right has no contractual implementation.
 - b. Subpoena Power. 5 U.S.C. App. B § 6(a)(4).
 - (1) The Inspector General has the power to subpoena all data and documentary evidence necessary to perform the Inspector General's duties.

- (2) The Inspector General can enforce this subpoena power by seeking an order from an appropriate U.S. district court.
 - c. Scope of the Inspector General's Right. The scope of the Inspector General's right is extremely broad and includes internal audit reports. United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3d Cir. 1986).
4. Obstruction of a Federal Audit. 18 U.S.C. § 1516.
- a. This statute does not increase or enhance the government's audit rights.
 - b. The statute makes it a crime for anyone to influence, obstruct, or impede a government auditor (full or part-time government/contractual employee) with the intent to deceive or defraud the government.

IX. DEFECTIVE PRICING REMEDIES.

A. Contractual.

- 1. Price Adjustment. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 254b(e)(1)(A); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification). The government can reduce the contract price if the government discovers that a contractor, prospective subcontractor, or actual subcontractor submitted defective cost or pricing data.
 - a. Amount. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 254b(e)(1)(A); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

(1) The government can reduce the contract price by any significant amount by which the contract price was increased because of the defective cost or pricing data. Unisys Corp. v. United States, 888 F.2d 841 (Fed. Cir. 1989); Kaiser Aerospace & Elec. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489; Etowah Mfg. Co., ASBCA No. 27267, 88-3 BCA ¶ 21,054.

(2) Profit or fee can be included in the price reduction.

(3) Interest. The government can recover interest on any overpayments it made because of the defective cost or pricing data. 10 U.S.C. § 2306a(f)(1)(A); 41 U.S.C. § 254b(f)(1)(A); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification). The contracting officer must:

(a) Determine the amount of the overpayments;

(b) Determine the date the overpayment was made;⁹
and

(c) Apply the appropriate interest rate.¹⁰

b. Defective Subcontractor Data. FAR 15.407-1(e)-(f).

(1) The government can reduce the prime contract price regardless of whether the defective subcontractor data supported subcontract cost estimates or firm agreements between the subcontractor and the prime.

⁹ For prime contracts, the date of overpayment is the date the Government paid for a completed and accepted contract item. For subcontracts, the date of overpayment is the date the Government paid the prime contractor for progress billings or deliveries that included a completed and accepted subcontract item. FAR 15.407-1(b)(7).

¹⁰ The Secretary of the Treasury sets interest rates on a quarterly basis. 26 U.S.C. § 6621(a)(2).

- (2) If the prime contractor uses defective subcontractor data, but subcontracts with a lower priced subcontractor (or fails to subcontract at all), the government can only reduce the prime contract price by the difference between the subcontract price the prime contractor used to price the contract and:
 - (a) The actual subcontract price if the contractor subcontracted with a lower priced subcontractor; or
 - (b) The contractor's actual cost if the contractor failed to subcontract the work.
 - (3) The government can disallow payments to subcontractors that are higher than they would have been absent the defective cost or pricing data under:
 - (a) Cost-reimbursement contracts; and
 - (b) All fixed-price contracts except firm fixed-price contracts and fixed-price contracts with economic price adjustments (e.g., fixed-price incentive contracts and fixed-price award fee contracts).
2. If the government fails to include a price reduction clause in the contract, courts and boards will read them in pursuant to the Christian Doctrine. University of California, San Francisco, VABCA No. 4661, 97-1 BCA ¶ 28,642; Palmetto Enterprises, Inc., ASBCA No. 22839, 79-1 BCA ¶ 13,736.
3. A defective pricing claim is not subject to the normal six-year statute of limitations. Radiation Sys., Inc., ASBCA No. 41065, 91-2 BCA ¶ 23,971.
4. A defective pricing claim can't be asserted as an affirmative defense to a contractor's money claim. Computer Network Sys., Inc., GSBCA No. 11368, 93-1 BCA ¶ 25,260.

5. Penalties. 10 U.S.C. § 2306a(f)(1)(B); 41 U.S.C. § 254b(f)(1)(B); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).
 - a. The government can collect penalty amounts where the contractor (or subcontractor) knowingly submitted defective cost or pricing data.
 - b. The contracting officer can obtain a penalty amount equal to the amount of the overpayment.
 - c. The contracting officer must consult an attorney before assessing any penalty.

6. Government's Burden of Proof. The government bears the burden of proof in a defective pricing case. General Dynamics Corp., ASBCA No. 32660, 93-1 BCA ¶ 25,378. To meet its burden, the government must prove that:
 - a. The information meets the definition of cost or pricing data;
 - b. The information existed before the date of agreement on price;
 - c. The data was reasonably available before the date of agreement on price;
 - d. The data the contractor (or subcontractor) submitted was not accurate, complete, or current;
 - e. The undisclosed data was the type that prudent buyers or sellers would have reasonably expected to have a significant effect upon price negotiations;
 - f. The government relied on the defective data; and

- b. The contracting officer should have known that the cost or pricing data the contractor (or subcontractor) submitted was defective. FMC Corp., ASBCA No. 30069, 87-1 BCA ¶ 19,544.
 - c. The contract price was based on total cost and there was no agreement about the cost of each item procured under the contract.
 - d. The contractor (or subcontractor) did not submit a Certificate of Current Cost or Pricing Data.
11. Offsets. 10 U.S.C. § 2306a(e)(4)(A)-(B); 41 U.S.C. § 254b(e)(4)(A)-(B); FAR 15.407-1(b)(4)-(6); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).
- a. The contracting officer must allow an offset for any understated cost or pricing data the contractor (or subcontractor) submitted.
 - b. The amount of the offset may equal, but not exceed, the amount of the government's claim for overstated cost or pricing data arising out of the same pricing action.
 - c. The offset does not have to be in the same cost grouping as the overstated cost or pricing data (e.g. material, direct labor, or indirect costs).
 - d. The contractor must prove that the higher cost or pricing data:
 - (1) Was available before the "as of" date specified on the Certificate of Current Cost or Pricing Data; and
 - (2) Was not submitted.

- e. The contractor is not entitled to an offset under two circumstances:
- (1) The contractor knew that its cost or pricing data was understated before the "as of" date specified on the Certificate of Current Cost or Pricing Data. See United Tech. Corp., Pratt & Whitney v. Peters, No. 98-1400, 1999 U.S. App. LEXIS 15490 (Fed. Cir. July 12, 1999)(affirming in part ASBCA's denial of offsets for "sweep" data intentionally withheld from government).
 - (a) Prior to the 1986 TINA amendments, contractors could obtain offsets for intentional understatements. See United States v. Rogerson Aircraft Controls, 785 F.2d 296 (Fed. Cir. 1986) (holding that a contractor, under pre-1986 TINA, could offset intentional understatements that were "completely known to the Government at the time of the negotiations and in no way hindered or deceived the Government").
 - (b) Even under the pre-1986 TINA, the offset must be based on cost or pricing data. Errors in judgment can't serve as a basis for an offset. See AM General Corp., ASBCA No. 48476, 99-1 BCA ¶ 30,130 (characterizing contractor's decision to amortize nonrecurring costs of HMMWV production as "at most, errors of judgment" that failed to support an offset).
 - (2) The government proves that submission of the data before the "as of" date specified on the Certificate of Current Cost or Pricing Data would not have increased the contract price in the amount of the proposed offset.

B. Administrative remedies.

1. Termination of the Contract. FAR Part 49; Joseph Morton Co. v. United States, 3 Cl. Ct. 120 (1983), aff'd, 757 F.2d 1273 (Fed. Cir. 1985).
2. Suspension and Debarment. FAR Subpart 9.4; DFARS Subpart 209.4.

3. Cancellation of the Contract. 10 U.S.C. § 218; FAR Subpart 3.7.
- C. Judicial remedies.
1. Criminal.
 - a. False Claims Act. 18 U.S.C. § 287. See Communication Equip. and Contracting Co., Inc. v. United States, 37 CCF ¶ 76,195 (Cl. Ct. 1991) (unpub.) (holding that TINA does not preempt the False Claims Act so as to limit the government's remedies).
 - b. False Statement Act. 18 U.S.C. § 1001. See, e.g., United States v. Shah, 44 F.3d 285 (5th Cir. 1995).
 - c. The Major Fraud Act. 18 U.S.C. § 1031.
 2. Civil.
 - a. False Claims Act. 10 U.S.C. §§ 3729-33. Civil penalty between \$5,000 and \$10,000, plus treble damages. 10 U.S.C. §§ 3729(a).
 - b. The Program Fraud Civil Remedies Act of 1986. 31 U.S.C. §§ 3801-3812; DOD Dir. 5505.5 (Aug. 30, 1988).
- D. Fraud indicators. DOD IG's Handbook on Indicators of Fraud in DOD Procurements, No. 4075-1h, June 1987.
1. High incidence of persistent defective pricing.
 2. Continued failure to correct known system deficiencies.
 3. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.
 4. Failure to make complete disclosure of data known to responsible personnel.

5. Protracted delay in updating cost or pricing data to preclude possible price reduction.
6. Repeated denial by responsible contractor employees of the existence of historical records that are later found to exist.
7. Repeated utilization of unqualified personnel to develop cost or pricing data used in estimating process.

X. CONCLUSION.