ONE TRUTH ABOUT THE TRUTH IN NEGOTIATIONS ACT

By Richard D. Lieberman, Consultant and Retired Attorney

The Truth in Negotiations Act ("TINA") requires that contractors furnish cost or pricing data before an agreement on price for most negotiated procurements of more than $700,000. Cost or pricing data mean all facts that a prudent buyer or seller would reasonably expect to significantly affect price negotiations, and that were available at the time the contract price was agreed to. This data (which is factual and verifiable, such as vendor quotes, nonrecurring costs, unit cost trends—but not estimates or projections) must be certified by the contractor as "accurate, current and complete." The government uses the data to determine price reasonableness, and you can easily see how a contract price that relied on a subcontractor quote could be significantly reduced, based on the contractor's furnishing a more current (and lower) quote to the government before agreement is reached on price.

The consequences of failing to provide accurate, current and complete cost or pricing data may be substantial. TINA says that a contract action that was certified must contain a provision that the price of the contract, including profit or fee, shall be adjusted to exclude any significant amount by which …the price was increased because the contractor (or subcontractor) submitted defective [i.e., inaccurate, noncurrent or incomplete] cost or pricing data. However, TINA also states that the contractor shall have as a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

Lockheed Martin Aero. Co., ASBCA No. 56547, Jan. 22, 2013, is a rare example of a defective pricing case where the contractor won everything—and the Government's claim of defective pricing was fully rejected. In this case, Lockheed was developing a Common Configuration Implementation Program ("CCIPP") that made changes to hardware and software used on F-16 aircraft. One hardware item was the Modular Mission Computer ("MMC"). The Defense Contract Audit Agency ("DCAA") initially alleged $14.6 million of defective pricing for Lockheed's alleged failure to disclose significantly lower prices in purchase orders for MMC computer components. The Contracting Officer issued a final decision to that effect. While in trial, the Government first revised the defective pricing to $17.5 million, then changed it twice, to $9.9 million and an alternative figure of $9.3 million.

Here's why Lockheed won. In a defective pricing case, the Government is entitled to the *presumption* that any nondisclosure of data results in an overstatement of price. However, this presumption is *rebuttable* by the contractor, and the presumption is not a substitute for specific proof establishing the amount of such damages. The Government has the burden of showing the causal connection between incomplete or inaccurate data and an overstated contract price. The Board noted that the Government had developed four separate theories ($14.6, $17.5, $9.9 and $9.3 million) regarding the computation of the defective pricing. However, the government analysis suffered from numerous flaws:

- The recurring price used by DCAA and the Contracting Officer was inaccurate
- The audit and CO used a blended price without differentiating between the old and new systems, thereby distorting the price
- The defective pricing calculations were improperly based on a period of performance, but should have been based on the actually agreed delivery schedule, the two being different.
- The "new" defective pricing amounts offered at trial were not based on the facts (indeed, the original DCAA auditor refused to support the revised defective pricing amount)

There were some other harsh comments about the Government's case, but the Board concluded by saying that it

> recognized that proof of damages involves some degree of imprecision. Nevertheless, the presence of multiple damage theories, particularly where unsupported by evidence, detailed logic regarding causation and how the data specifically would have been used by actual government negotiators, make it unfeasible to conclude that the government suffered any damages.

The Board concluded that because the government suffered no damages from nondisclosure of the data in question, there was no defective pricing, and Lockheed owed the government nothing.

TIPS: The ability to show that the government's presumption of damages is wrong, is a rarely used defense, but in a case like Lockheed, where the government had four different theories, but couldn't prove any of them, demonstrates how important a defense it is. In most defective pricing situations, the contractor may fail to disclose a quote—and it is crystal clear that if disclosed, the negotiator would have demanded a price reduction. But the confusion about the facts and the improper application of the facts in the Lockheed case spelled the death-knell for both the DCAA auditors, and the Air Force Trial Attorneys who tried it.