Legal Times
WEEK OF OCTOBER 8, 2007 • VOL. XXX, NO. 41
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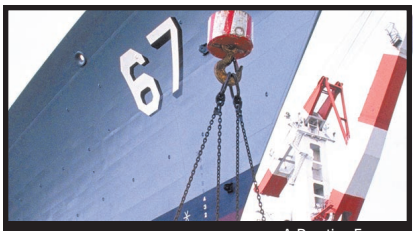

A Practice Focus
Government Contracts

Rolling Back Past Reforms

Those wanting more disclosure need to recall the reasons for earlier changes.

BY JOHN W. CHIERICHELLA AND MARKO W. KIPA

Reform is not always popular among those who enjoyed the old regime. The current push to strip away protections afforded to contractors participating in commercial-item acquisitions illustrates this struggle—and why the reforms were valuable in the first place.

The Truth in Negotiations Act was enacted in 1962 to ensure that the government had access to the same factual information as, and therefore stood on equal footing with, the contractor during price negotiations. For more than three decades, TINA posed a substantial bar to participation in the federal procurement process. It drove off companies that operated principally in the commercial sphere, did not maintain accounting systems or pricing models that lent themselves to an adequate TINA disclosure, and, quite frankly, had equal or better revenue opportunities with clients who did not retributively seek to reprice contracts years later because, for example, they had not seen a piece of paper about a quote from a vendor that the seller did not trust in any event.

The mid-1990s, however, ushered in reforms designed to attract commercial suppliers into the federal marketplace. In particular, the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1996 heralded a new era of pragmatic procurement. This included a broad exception to TINA regarding commercial items and a prohibition against obtaining cost or pricing data when the exception applied.

Contractors in commercial-item acquisitions would now be exempt from the submission of certified cost or pricing data, and they could ignore the previously applicable formula by which they could apply on a case-by-case basis for an exemption.

These laws were welcomed by the supply side of the procurement equation. The demand side, however—in particular, the enforcement hierarchy—found the reforms confining.

CRITICIZING THE REFORMS

It was perhaps only a matter of time until someone would issue a critical report, and in 2001 the predictable occurred. The Department of Defense's inspector general concluded that officials were not obtaining sufficient information to make adequate determinations that prices being offered, including prices of commercial items, were fair and reasonable.

Subsequently, the Inspector General's Office identified in 2006 a total of $3.5 billion in acquisition expenditures that, in its view, lacked an acceptable commercial-item determination. As a result, the government began to revisit both the scope of the commercial-item exception and the data the government can demand even when the exception applies.

In a proposed rule dated April 23, 2007, the government attributed the alleged procurement deficiencies to "ambiguity" and "misunderstanding" over the application of the terminology in FAR 15.4. To remedy the situation, the Federal Acquisition Regulatory Council, in pertinent part, adopted the position that, whether or not TINA applies, the pricing data a contractor is to submit under FAR 15.4 are essentially the same. Moreover, the government also sought to circumscribe the definition of commercial items and services and to require "certified cost or pricing data" in sole-source commercial-item acquisitions. As will be discussed, these changes would represent a marked departure from antecedent policies promoting the proliferation of commercial acquisitions.

The FAR Council's dissatisfaction with the current regime is evident immediately from the proposed rule's summary. The council makes it clear that a contracting officer should be entitled to "any cost or pricing data" and to "whatever pricing or cost information . . . necessary" to determine price reasonableness.

Although the FAR Council acknowledges that the informational hierarchy within FAR 15 would remain intact (i.e., requiring recourse in the first instance to information from within the government or from sources other than the offerer), it remains to be seen whether contracting officers will abide by the "order of preference," simply bypass certain sources of pricing information, or routinely find those sources "inadequate" and seek to obtain more detailed pricing data directly from the contractor. Certainly, the Defense Department inspector general's criticisms provide government contracting personnel with more than adequate incentives for choosing detailed contractor cost data as the default option in negotiations.

The FAR Council elaborated upon this broad grant of authority by proposing to revise the phrase "cost or pricing data" and to add two new terms: "certified cost or pricing data" and "data other than certified cost or pricing data." The FAR Council explained that the information subsumed under the latter term would be, in fact, the same (if not more) as under the former term. The "distinguishing characteristic" between the two concepts would be limited primarily to the act of "certification."

Such a definition could impose additional burdens because contractors obligated to submit data other than certified cost or pricing data may be required to submit the same detailed information that they would have submitted as certified cost or pricing data—merely absent the certification.

More Information

Now included in the officer's arsenal would be the authority to obtain "judgmental information" from the contractor when TINA does not apply. The FAR Council could not use the term "noncertified cost or pricing data" in its proposed reforms because TINA excludes judgmental information from cost or pricing data. The FAR Council therefore clarified that the information to be disclosed as data other than certified cost or pricing data would be broader than noncertified cost or pricing data and would encompass "detailed cost estimates" and judgmental information.

One can only guess as to the limits (if any) on government negotiators' ability to demand information under this formulation. Although TINA liability will not attach to this data, the Department of Justice is always lurking on the edges of the process with its False Claims Act prerogatives. So, with the expanded data submission comes an expanded base of data potentially subject to liability.

The FAR Council also addressed what pricing data would be required with sole-source commercial-item acquisitions. Although the Defense Department inspector general recommended that the regulations be amended to include a separate provision addressing these acquisitions, the FAR Council rejected this, reasoning that the current hierarchy within FAR 15.4, coupled with the FAR Council's "clarifications," would provide sufficient guidance. The FAR Council reasoned that further changes were not necessary because the contracting officer may, in sole-source commercial-item acquisitions, "obtain whatever data is necessary to determine whether the proposed prices are fair and reasonable, up to and including a detailed cost estimate and cost or pricing data."

In sum, contractors in commercial acquisitions should expect to encounter heightened disclosure requirements.

And in Congress . . .

One of the more significant threats to commercial-item acquisitions, however, comes from Section 811 of the National Defense Authorization Act for Fiscal Year 2008. The bill would let an officer require "certified cost or pricing data" in sole-source commercial-item acquisitions where "the contracting officer determines that commercial sales data is insufficient to determine a fair and reasonable price, and where the contractor's business segment has been required to submit certified cost or pricing data in connection with at least one contract award or modification."

Thus, in a complete abandonment of the reliance of the Federal Acquisition Streamlining Act and the Federal Acquisition Reform Act on market-based value pricing, the legislation would require contractors to certify that the data they submit are current, accurate, and complete, returning sole-source commercial-item contractors to the threat of TINA liability.

Section 801 seeks to require that specific services offered actually were "sold competitively in substantial quantities in the commercial marketplace"—a requirement eliminated more than a decade ago.

The House passed its version of the bill on May 17, 2007, with the Senate following on Oct. 1. The bills are currently slated for a conference committee to resolve any differences. It remains to be seen which provisions will be in the final version.

The legislation thus reflects yet a further desire to undo the statutory reforms and even to expand the government's negotiating prerogatives beyond those available to it before the mid-1990s.

The reforms enacted by the Federal Acquisition Streamlining Act and the Federal Acquisition Reform Act were among the more pragmatic and useful changes in the past two decades. Evening, however, is closing in on their day in the sun.

Before that occurs, the forces of retrenchment should stop and think about why the reforms were enacted and whether the government is willing to live without the increased participation of commercial suppliers in the acquisition process.

There is a popular bumper sticker that reminds us that "actions have consequences." The FAR Council and Congress might want to think about that.

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