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Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and James F. Nagle

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¶ 12 DEFECTIVE PRICING AUDITS: Three Novel Negotiation Strategies To Protect Against DCAA Overreaching

A special column by Jerry Gabig, Wilmer & Lee, Huntsville, Alabama

As shown in the Defense Contract Audit Agency's Annual Reports to Congress, the DCAA has been increasing the number of defective pricing audits over the last few years. See DCAA, *Report to Congress on FY 2020 Activities* (Mar. 13, 2021), available at https://www.dcaa.mil/. Another indicator of increased attention being given to potential defective pricing has been the September 30, 2020 Under Secretary of Defense memorandum entitled "Delegation of Defective Pricing Authority to the Defense Contract Management Agency," https://www.acq.osd.mil/dpap/policy/policyvault/USA002090-20-DPC.pdf.

It is not uncommon for seasoned practitioners to have experienced DCAA defective pricing audits where the auditor has engaged in overreaching in making findings. These findings typically occur long after the deliverables have been accepted when contract close-out is pending. The nuisance and expense of having to defend against such audits warrant contractors being more proactive in negotiating terms involving certified cost or pricing data under Federal Acquisition Regulation Subpart 15.4.

This article addresses three novel negotiation strategies (NNS) that can better protect contractors should they encounter, years after contract award, DCAA assertions of defective pricing. Central to the three strategies is the "Price Reduction for Defective Certified Cost or Pricing Data" clause in FAR 52.215-10. The three NNS involve supplemental terms on matters not expressly addressed in that clause. In this regard, as shown in FAR 15.408(b), the "Price Reduction" clause is a mandatory clause. Hence, the Contracting Officer cannot agree to anything that alters or modifies the clause without receiving authorization for a deviation under FAR Subpart 1.4. Conversely, supplementing/tailoring a FAR clause in a manner that does not contradict the clause is permissible. For example, modifying existing clauses without contradicting them commonly occurs for clauses involving FAR Part 12, FAR Part 27, and Defense FAR Supplement Part 27. The authority for the Government to accept the requested supplemental provisions to the "Price Reduction for Defective

Certified Cost or Pricing Data" clause is FAR 1.102-4(d), which allows COs flexibility to agree to terms that are not "prohibited by law (statute or case law)."

As a practical matter, COs are reluctant to supplement/tailor FAR clauses for a variety of reasons including such negotiations can complicate the acquisition as well as take the CO outside of his or her comfort zone. Additionally, since each of the three NNS discussed below results in a Government concession, COs are even less motivated to agree. Nevertheless, because certified cost or price data is not required where adequate price competition exists, usually contractors have some leverage given that the Government's alternatives for acquiring the deliverables from another other vendor generally is limited.

● ***Novel Negotiation Strategy #1***: *The Government agrees to relinquish its rebuttable presumption that the consequence of any inadequate disclosure of cost or price data is an increase in the negotiated price.*

Soon after Congress enacted the Truth In Negotiations Act (TINA), the Armed Services Board of Contract Appeals eased the Government's burden of proof by adopting a rebuttable presumption that the "natural and probable consequence of the nondisclosure" would be to increase the negotiated price. The U.S. Court of Appeals for the Federal Circuit has held that the rebuttable presumption applies both to the element of reliance (e.g., whether the Government detrimentally relied upon cost or pricing data) and causation (e.g., whether defective pricing caused an increase in price). See *Wynne v. United Technologies. Corp*., 463 F.3d 1261, 1263 (Fed. Cir. 2006), 48 GC ¶ 338. NNS #1 seeks to have the Government relinquish its rebuttable presumption.

If the Government agrees to the terms of NNS #1, then if DCAA subsequently makes findings of defective pricing, the Government would be required to abide by its burden of proof that the defective pricing resulted in an increase in the negotiated price. Succinctly put, by relinquishing the court-imposed rebuttable presumption, the Government would be in the same position it is in when asserting other Government claims—the Government has the burden of proof on causation.

NNS #1 does not contradict the FAR 52.215-10 clause. There is nothing in the clause that addresses the rebuttable presumption. Hence, based on FAR 1.102-4(d), the CO ostensibly has the authority to agree to NNS #1.

● ***Novel Negotiation Strategy #2***: *The Government acknowledges that the final contract price was reached on "total price" without the Government relying on cost or pricing data. Hence, in consideration of the contractor reducing its final negotiated price by x% from its initial proposal and since the price for individual contract line items were not separately negotiated, the Government agrees that it will not seek a price reduction for any defective certified cost or pricing data as to any pricing that falls within the total price agreement.*

As stated in the header, NNS #2 begins with the Government acknowledging that the final contract price was reached on "total price" without the Government relying on specific cost or pricing data. In consideration for the contractor reducing its final price by X% from its initial proposal (and since the price for individual CLINs or components of CLINs were not individually negotiated), the Government agrees that it will not seek a price reduction for alleged defective certified cost or pricing data for any pricing that falls within the total price agreement.

The FAR 52.215-10 clause is more problematic for NSS #2 than it is for NSS #1. Specifically, the clause states at (c)(1)(iii) that:

> [T]he Contractor agrees not to raise the following matters as a defense. *** The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

Analysis supports that NSS #2 does not contradict FAR 52.215-10(c)(1)(iii). The contractor still remains contractually bound not to raise as a defense that the price was reached on a total price basis. Instead, NSS #2 contractually binds the Government not to bring an action for defective pricing where the alleged defective certified cost or pricing data involves pricing that falls within the total price agreement. Stated differently, the contractor's protection arising from a total price agreement is an affirmative contract right negotiated using NNS #2. This affirmative contractual right is legally distinguishable from the waiver of a defense in FAR 52.215-10(c)(1)(iii). Therefore, a credible argument can be made that NSS #2 does not contravene FAR 52.215-10(c)(1)(iii).

● ***Novel Negotiation Strategy #3***: *As to any allegation of defective pricing, the CO contractually agrees that the forthcoming documentation of reliance pursuant to FAR 15.406(a)(6) will succinctly address how he or she relied on the cost or pricing data and how the reliance impacted price. If the FAR 15.406(a)(6) documentation fails to succinctly address either the extent to which the CO relied on the alleged defective pricing or how the reliance impacted the final price, then there shall be a rebuttable presumption of no reliance.*

Reliance is an essential element of a defective pricing case, *Wynne v. United Technologies*. Unsupported assertions of reliance do not meet the Government's burden of proof, *Alloy Surfaces Co.*, ASBCA 59625, 20-1 BCA ¶ 37,574, 2020 WL 1896784, FAR 15.406-3(a)(6) states the if certified cost or pricing data is required, the documentation must explain the extent to which the CO "relied on the certified cost or pricing data submitted and used them in negotiating the price."

NNS # 3 seeks to convert FAR 15.406-3(a)(6) into a contractual right for the benefit of the contractor. In light of the fact that the CO has a preexisting duty to document the extent to which he or she relied on certified cost or pricing data, it is not unreasonable for the contractor to seek to hold the Government accountable for failure to abide by FAR 15.406-3(a)(6). The reasonableness of the contractor's position is based on the Government being more knowledgeable of the extent to which reliance occurred. Also, allegations of defective pricing are likely to occur years after contract award when memories have faded. The risk of a CO with a faded memory engaging in *post hoc* rationalization warrants the contractor seeking additional protection.

Under NNS #3, the contractor seeks a rebuttable presumption that the Government did not rely on any defective pricing data unless the contemporaneous FAR 15.406-3(a)(6) documentation succinctly addresses both the extent of reliance and how it impacted the final cost. There is nothing in the FAR 52.215-10 clause that contradicts a CO agreeing to such a rebuttable presumption. The rebuttable presumption arguably benefits both parties since it encourages the CO to full document reliance while it is fresh in his or her memory.

In summary, as shown in the above analysis, there are three novel negotiation strategies that a vendor could pursue to protect itself, years after contract performance, against DCAA overreaching in making findings of defective pricing. *Jerry Gabig*

