

The Truth in Negotiations Act — What is Fair and Reasonable?

TINA Waivers Can Streamline Procurement and Reduce Data Requirements

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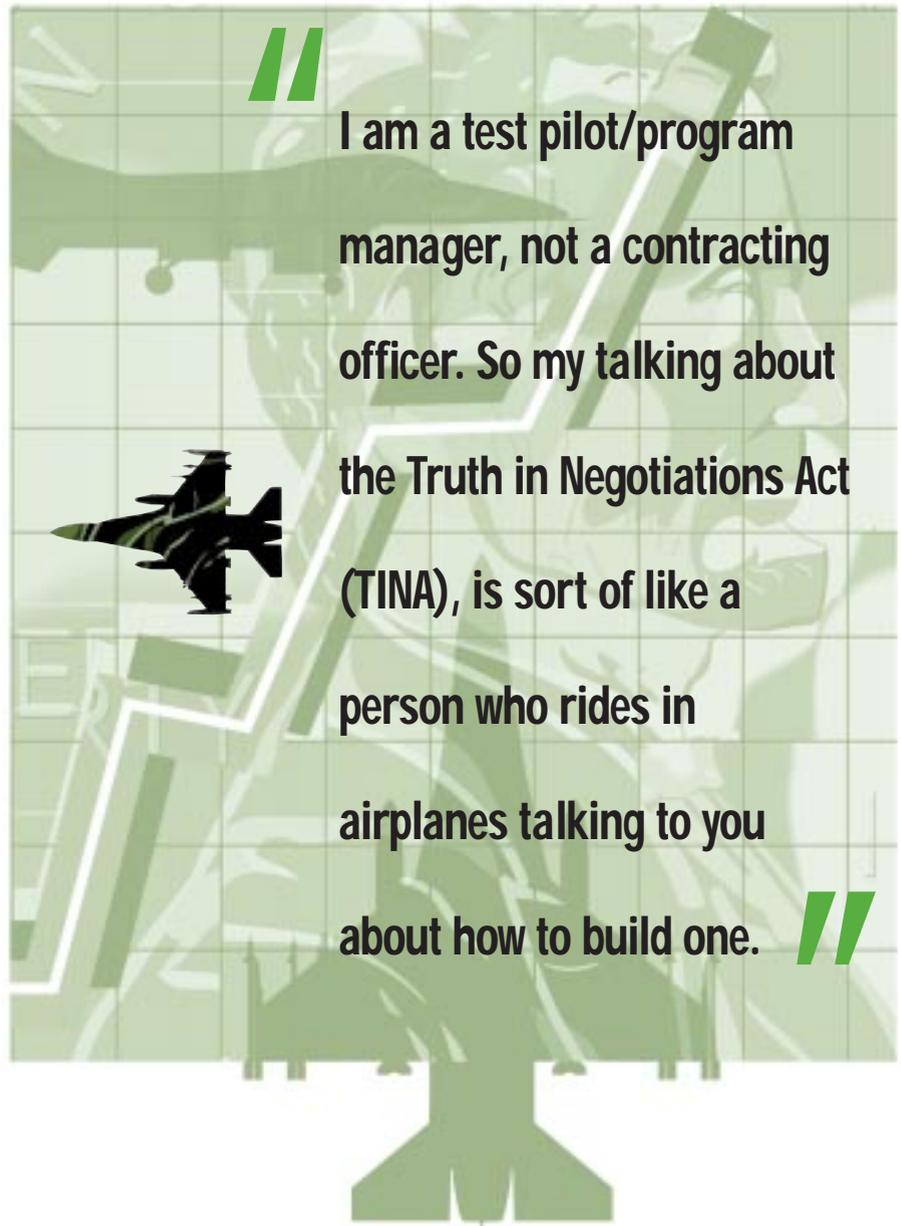
I am a test pilot/program manager, not a contracting officer. So my talking about the Truth in Negotiations Act (TINA), is sort of like a person who rides in airplanes talking to you about how to build one. Therefore, my purpose in writing this article is to heighten your awareness of TINA and its provisions, and show you, the reader, how recent initiatives and legislation generated by acquisition reform, may be of use to you in negotiating and developing government contracts.

First, a word of caution. It is not my purpose to make you contracting officers. To preclude any unfavorable repercussions to yourself and your program, *do not* use this information without the direct supervision of your contracting expert.

Acquisition Reform and the Contracting Process

Public Law 87-653, Truth in Negotiations Act (TINA), was enacted on September 10, 1962. The law specifies, when dealing in a sole source environment, that each government procurement contracting officer (PCO) must certify as accurate, complete, and current all cost or pricing data associated with each government contract.

Originally, Congress enacted TINA to ensure a standard of measurement for “fair and reasonable” pricing when



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contracting in a non-competitive environment, and to provide a contractual remedy to defective pricing. The law, however, in my opinion, left contracting officers with very little discretion in deciding whether or not a legitimate requirement to provide cost and pricing data did, in fact, exist for a given contract. To prevent any second-guessing about their decisions, PCOs repeatedly used cost and pricing data to determine fair and reasonable prices. This conservative approach was the accepted way of doing business, and as a result, the government paid substantial sums of money in proposal preparation costs to produce required data. In addition to proposal preparation costs, the time to get “on contract” lengthened while contractors prepared data and the government subsequently analyzed it.

Not until the recent spate of acquisition reform initiatives and legislation, has the risk-aversion climate prevalent throughout the procurement and contracting community, literally reversed itself to now encourage stepping “outside the box” and approaching problems from another point of view.

During my previous assignment at the F-16 System Program Office (SPO), we applied for and received a waiver to TINA for the fiscal year 1996 purchase of six new F-16 aircraft. In my current position, we also applied for and received a TINA waiver to streamline our procurement process. Both initiatives significantly reduced the time to get “on contract” and saved money in proposal preparation costs. In addition, recent changes to the Federal Acquisition Streamlining Act (FASA) resulted in added relief from proposal preparation costs generated by a perceived need for cost or pricing data. In this article, I will discuss TINA waivers as well as what you should know about TINA-related changes in the FASA.

About TINA Waivers

As discussed previously, TINA requires the contractor to submit cost or pricing data; certify the data as current, accurate, and complete; agree to a

defective pricing clause; and agree to accept audit and subcontractor certification clauses. Further, the Federal Acquisition Regulation (FAR) mandates that the PCO determine whether or not negotiated prices are, in fact, fair and reasonable. To determine a fair and reasonable price, the PCO relies on two methods:

Cost Analysis. Cost analysis, which takes into account all elements of a proposal, requires that the PCO rely on certified cost or pricing data. For example, the direct labor, materials, subcontractor and supplier efforts, overhead rates and factors, and tooling costs are the types of items that receive detailed analysis. Several agencies—such as the Defense Contract Audit Agency (DCAA), the Defense Contract Management Command (DCMC), and the SPO—play an important role in the analysis. As you can imagine, ensuring that the government receives a fair and reasonable price upon which to base a decision to buy is a time-consuming process for the contractor as well as the government.

Price Analysis. Price analysis, on the other hand, provides no insight into the individual cost or price elements. This type of analysis (obtained by comparing previous buys, historic data, regression, and parametrics) primarily focuses on the bottom-line price. In contrast to cost analysis, price analysis *does not* rely on certified cost or pricing data.

The F-16 SPO executed its last U.S. Air Force aircraft production contract (prior to the fiscal year 1996 buy) in fiscal year 1994. The fiscal year 1994 buy of 12 Block 50 aircraft was based on cost analysis. This was to be the last U.S. Air Force buy of F-16s. However, in the fiscal year 1996 Defense Appropriations Bill, based on F-16 attrition rates, Congress added six F-16s to the U.S. Air Force F-16 procurement budget to address a projected shortfall in F-16s in the out-years.

The accelerated pace and progress of acquisition reform since execution of

the last U.S. Air Force F-16 production contract has resulted in expanded tolerance and increased opportunities for out-of-the-box thinking. As a result of its own out-of-the-box thinking, the F-16 SPO implemented several acquisition reform initiatives in a concerted effort to demonstrate the capability and potential cost savings from buying F-16 aircraft on an annual versus “as needed” basis.

To begin building a streamlined process, the SPO used the Single Acquisition Management Plan (SAMP), Statement of Objectives (SOO), and a joint proposal. In addition, they reduced military specifications 91 percent, reduced data deliverables 61 percent, and formally requested a TINA waiver to accelerate the process of awarding a definitized contract.

In pursuing the TINA waiver, the F-16 SPO was guided by the provisions of the FAR, paragraph 15.804-1(b)(5), which states, “a waiver may be considered if...the price can be determined to be fair and reasonable without submission of cost or pricing data.” The fiscal year 1996 aircraft was very similar to the aircraft procured in fiscal year 1994. Because of that similarity, the government and contractor database yielded sufficient price history and enough recent information to warrant price analysis on the fiscal year 1996 buy, which then allowed the F-16 SPO to make determinations of fairness and reasonableness.

This resulted in a much smaller proposal that produced a savings of \$1.5 million in proposal preparation costs. The contractor submitted a price for six aircraft, and the final result was an aircraft unit price \$300 thousand less than the price paid for the fiscal year 1994 aircraft (price and quantity decreased). In addition, the F-16 SPO awarded a definitized contract within 195 days from the first planning meeting. This reduced by 800 days the time required to definitize the fiscal year 1994 contract. As evidenced by the

end result, for the F-16 SPO, the TINA waiver approach was very successful.

My second experience in formally requesting a TINA waiver was in conjunction with the program for which I am currently program director. We employed streamlining initiatives similar to the F-16 program, and implemented a Review-Discuss-Concur process with our contractor to award the contract. We also reduced military specifications by 98 percent, data deliverables by 65 percent, and contracting span time by 50 percent. The cumulative effect resulted in a contract award in four months.

In these two cases, the TINA waiver was possible based on the availability and accessibility of information needed to support the waiver and the procurement content. Admittedly, a TINA waiver may not be applicable for everyone; however, it might be worth considering if the following conditions are present: recent historical cost or price data; a similar configuration; minimal changes to the Government Furnished Equipment versus the Contractor Furnished Equipment content; a preponderance of previously seen costs; and nominal non-recurring costs, or the existence of a validated parametric pricing model upon which to base a fair and reasonable price determination.

In addition to a TINA waiver, recent change to the FASA, resulting in more flexibility and tolerance of reasoned risktaking versus total risk aversion, now makes it easier for the PCO to do what is smart, and eliminates much of the second-guessing and scrutiny previously directed at the PCO's decisions.

The sidebar following this article includes excerpts from a Defense Acquisition University publication, summarizing how "changes in the Federal Acquisition Streamlining Act (FASA) of 1994 are implemented in the Federal Acquisition Regulation (FAR) rules. [These excerpts] also include anticipated FAR changes resulting from [passage of the] Federal

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Acquisition Reform Act/Information Technology Management Reform Act (FARA/ITMRA)."¹

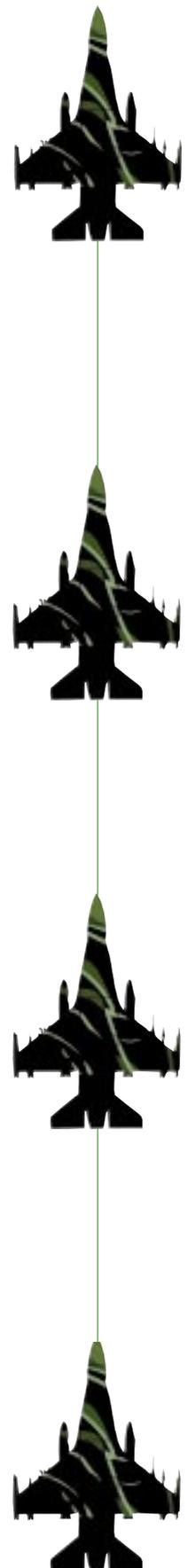
Summary

It is time to stop doing things the way we have always done them. The time is right to surface better ways of doing business at whatever level is necessary to effect change. The F-16 SPO boldly stepped out and received approval of the first-ever TINA waiver to buy fighters for the warfighter.² Some people said it could not be done – but it worked. Now others are following in the F-16 SPO's footsteps.

The law is changing to facilitate acquisition reform. The changes related to TINA are just an example of many such changes, all supporting the F-16 SPO's contention that *the time is right*. If you think you have a good idea that will save the taxpayer money, then keep telling people about it until someone listens. To paraphrase Winston Churchill, *Never, never, never give up*.

REFERENCES

1. "Legislative Impacts on Acquisition Reform," Acquisition Reform Communications Center (Defense Acquisition University, Alexandria, Va.), 1996.
2. "F-16 TINA Initiative," Briefing, F-16 Contracts Division, F-16 System Program Office (Aeronautical Systems Center, Wright-Patterson Air Force Base, Ohio), 1996.



TRUTH IN NEGOTIATIONS ACT (TINA)

FASA and FARA/ITMRA Revisions Impacting TINA

What FASA Did

- Established a hierarchical preference for the types of information used to assess price reasonableness.
- Created a “bright line” between cost or pricing data and all the other information.
- Precluded requiring cost or pricing data if an exception applied. Encouraged a waiver even if an exception did not apply.
- Added a new exception for commercial items.
- Made cost or pricing data the method of last resort.
- Eliminated the SF 1412, the relational formula, government end use request, and most favored customer requirements.

What You Should Know

The fundamental obligation of the contracting officer to determine price reasonableness is unchanged. Consider FAR’s new order of priority to support analysis of price reasonableness as an inverted pyramid. The volume of information increases as you climb higher. The contracting officer shall “climb” only high enough to determine price reasonableness. There are three generally accepted levels:

- **Adequate Price Competition.** Generally, require no further information from the offeror if you determine the price is based on adequate price competition.
- **Information Other Than Cost or Pricing Data.** This new term means “any type of information that is *not required to be certified* but is needed to determine price reasonableness or cost realism.”

- **Cost or Pricing Data Are Data Requiring Certification.** This term replaces the “certified cost or pricing data” that was used inconsistently. Cost or pricing data shall be submitted on Standard Form 1411, Contracting Pricing Proposal Cover.

Exceptions to Cost or Pricing Data

- **Adequate Price Competition.** Adequate price competition based on two or more responsible offerors, competing independently, submitting priced offers responsive to the government’s requirement.
- **Established Catalog or Market Price.** Established catalog or market prices are prices recorded in a catalog or price list or other regularly maintained, verifiable record. Market prices are established in the course of ordinary trade between buyer and seller and can be substantiated from independent sources.
- **Prices Set by Law or Regulation**
- **Commercial Item.** There is a new commercial item exception when the contracting officer has insufficient information to determine another exception applies.
- **Modification of Contracts for Commercial Items.** Modification of contracts for commercial items are exempt when the original contract or subcontract was exempt from cost or pricing data.

A waiver may be considered if price reasonableness can be determined without submission of cost or pricing data, but no exception applies. The Head of the Contracting Agency or Activity (HCA) is the waiver authority

with no power to delegate. If a waiver is given, the contractor is considered as having been required to submit cost or pricing data. Any award to a subcontractor expected to exceed the threshold requires the submission of cost or pricing data unless an exception applies.

The threshold for cost or pricing data is now \$500,000. The contracting officer must still determine price reasonableness, but if no exception applies and a waiver is not appropriate, the HCA must determine that cost and pricing data are necessary to determine reasonableness below the TINA threshold but above the simplified acquisition threshold.

The FAR rule incorporates a definition of cost realism analysis. Cost realism means that costs in the offeror’s proposal are realistic for the work to be performed, reflect a clear understanding of the requirement, and are consistent with the technical proposal. The agency must perform a cost realism analysis whenever a cost type contract is contemplated, whether or not cost or pricing data are requested.

Anticipated Impact of FARA/ITMRA

- Makes the commercial item exception co-equal with other exceptions and obviates the need for exceptions based on Established Catalog or Market Price.
- Removes the government’s right to conduct a post-award audit of data submitted by commercial suppliers in lieu of cost and pricing data.*

* “Legislative Impacts on Acquisition Reform,” Acquisition Reform Communications Center (Defense Acquisition University, Alexandria, Va.), 1996, pp. 11-12.