OFFICE OF THE UNDER SECRETARY OF DEFENSE

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ACQUISITION, TECHNOLOGY AND LOGISTICS

February 11, 2003

DPAP/P

MEMORANDUM FOR DIRECTORS, DEFENSE AGENCIES
ACTING DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY AND PROCUREMENT), ASA(ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION MANAGEMENT), ASN(RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
EXECUTIVE DIRECTOR, ACQUISITION, TECHNOLOGY, AND SUPPLY (DLA)

SUBJECT: Exceptions and Waivers to the Truth In Negotiations Act

The Federal Acquisition Regulation, at FAR 15.403-1(c)(4), authorizes the Head of the Contracting Activity (HCA) to waive the requirement of the Truth in Negotiation Act (TINA) that contractors certify that cost or pricing data they have submitted in support of a proposed contract price is current, accurate, and complete. Such waivers may be granted by the HCA in exceptional cases. Section 817 of the National Defense Authorization Act for Fiscal Year (FY) 2003 directs that specific guidance be issued regarding the circumstances under which it is appropriate to grant such a waiver.

The FY 2003 Act stipulates that the grant of an exceptional case waiver shall be made only upon a determination that (1) the property or services cannot reasonably be obtained under the contract, subcontract, or modification, without the grant of the waiver; (2) the price can be determined to be fair and reasonable without the submission of certified cost or pricing data; and (3) there are demonstrated benefits to granting the waiver. Effective on the date of this memorandum, HCA's are hereby directed to comply with the foregoing guidance when granting exceptional case TINA waivers.

The FY 2003 Act also includes a requirement for the submission of an annual report to Congress that identifies all exceptional case TINA waivers granted during a given fiscal year for any contract, subcontract, or modification expected to have a value of $15 million or greater. Accordingly, no later than November 30, 2003, and in every subsequent year, the addressees shall submit a consolidated report to the undersigned that identifies all exceptional case waivers to TINA granted during the fiscal year just ended that are subject to this reporting requirement. The report shall identify each waiver, provide an explanation of the basis for the HCA's determination to grant the waiver, and

describe the specific steps taken to ensure that the price of the applicable contract, subcontract, or modification, was fair and reasonable.

The FY 2003 Act also requires that the foregoing report include an identification of exceptions to TINA for contracts, subcontracts or modifications expected to have a price of $15 million or more made pursuant to FAR 15.403-1(b)(3), because the item being acquired is commercial. Accordingly, please include a separate section in your report that lists exceptions made to TINA for actions $15 million and above where the exception is based upon a commercial item determination. This listing shall identify the basis for determining that the item is commercial, and the specific steps taken to ensure that a fair and reasonable price was negotiated for the requirement.

On a related matter, the GAO recently noted a wide spectrum in the quality of the data and analyses used to support TINA waivers, and recommended we address two situations in particular: (1) whether a TINA waiver can be granted for part of a proposed price, and (2) whether unpriced options can be the subject of TINA waivers.

A TINA waiver may be made applicable to part of a contractor's proposed price when it is possible to clearly identify that part of a contractor's cost proposal to which the waiver applies as separate and distinct from the balance of the contractor's proposal. In granting a partial waiver, in addition to complying with the guidance previously noted, the HCA must address why it is in the government's best interests to partially waive TINA, given that the contractor has no objection to certifying the balance of its cost proposal.

Because it has no price, an unpriced option cannot be subject to TINA certification requirements. The government cannot agree in advance to waive TINA certification requirements for an unpriced option, and can only consider a waiver at such time as the contractor proposes a price that would otherwise be subject to a TINA certification.

This guidance will eventually be superceded by its formal incorporation into the Defense FAR Supplement. Questions regarding this memorandum may be directed to Mr. Richard G. Brown, at Richard.G.Brown@osd.mil or 703-695-7197.

Deidre A. Lee
Director, Defense Procurement &
Acquisition Policy