



ACQUISITION
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

OCT 26 2006

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
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

SUBJECT: Annual Report to Congress for Commercial Item Exceptions from the Truth In Negotiations Act (TINA), and Exceptional Case Waivers from TINA and Cost Accounting Standards (CAS)

Submission for the subject commercial item exceptions and exceptional case waivers granted in Fiscal Year (FY) 2006 are due into DPAP, Attention: John McPherson, by November 30, 2006. Use the format at Attachment 2 for your submissions. Reference Defense Federal Acquisition Regulation Supplement 230.201-5 and the attached Defense Procurement and Acquisition Policy (DPAP) Memorandum, Exceptions and Waivers to the Truth In Negotiations Act, dated February 11, 2003 (Attachment 1). Reply with negative response if applicable.

The Federal Acquisition Regulation (FAR), FAR 15.403-1(b)(3), provides for an exception to the submission of certified cost or pricing data for acquisition of a commercial item. The statutory authority for this commercial item TINA exception is provided at 10 U.S.C. 2306a(b).

In addition to the TINA exception, FAR 15.403-1(c)(4) also authorizes the Head of the Contracting Activity (HCA) to waive, in "exceptional circumstances", 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. Furthermore, FAR 30.201-5, Waiver, provides for the head of an executive agency to waive, in "exceptional circumstances", the applicability of the Cost Accounting Standards (CAS) for a particular contract or subcontract.

The criteria for using "exceptional circumstances" as the basis for a TINA or CAS waiver was provided in the National Defense Authorization Act (NDAA) for FY 2003. The FY 2003 Act requires three conditions be met for granting a waiver due to "exceptional circumstances": (1) the property or services cannot reasonably be

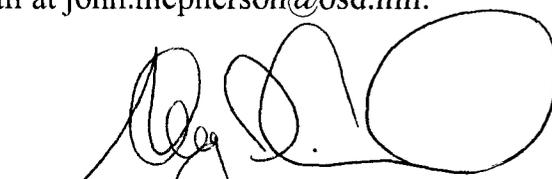


obtained under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver; (2) the price can be determined to be fair and reasonable without the submission of certified cost or pricing data or the application of cost accounting standards, as the case may be; and (3) there are demonstrated benefits to granting the exception or waiver.

The NDAA for FY 2003 also includes a requirement for the submission of an annual report to Congress that identifies the following three items:

- (1) A listing of commercial item exceptions granted during the previous FY (i.e., where TINA was not applied because the product or service was deemed a commercial item). This listing must include an explanation of the basis for the determination that the products or services to be purchased are commercial items, including an identification of the specific steps taken to ensure price reasonableness. Note that this reporting requirement does not apply to pricing actions for commercial items that were based on adequate price competition or prices set by law or regulation;
- (2) A listing of waivers to TINA granted on the basis of "exceptional circumstances" during the preceding FY. This listing must include an explanation of how the three conditions for exceptional circumstances (above) were met.
- (3) A listing of waivers to CAS granted on the basis of "exceptional circumstances" during the preceding FY. This listing must include an explanation of how the three conditions for exceptional circumstances (above) were met.

My point of contact for this memorandum is John McPherson and he can be reached on 703-602-0296 or via e-mail at john.mcpherson@osd.mil.



Shay D. Assad
Director, Defense Procurement and
Acquisition Policy

Attachments:
As stated



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

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.

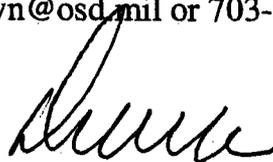
The FY 2003 Act also requires that the foregoing report include an identification of exceptions to TINA for contracts, subcontracts or modifications expected to have a price of \$15 million or more made pursuant to FAR 15.403-1(b)(3), because the item being acquired is commercial. Accordingly, please 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

SUMMARY OF <Insert Organization> FY 06 INPUTS

**TINA COMMERCIAL EXCEPTIONS/WAIVERS &
CAS WAIVERS**

	Number of Exceptions	\$ in Millions
Commercial Item Exceptions to TINA over \$15M	XX	\$X,XXX
TINA Exceptional Circumstance Waivers over \$15M	X	\$XX
CAS Exceptional Circumstance Waivers over \$15M	X	\$XX

FY 06 , <Organization>. (e.g. Navy, DLA, etc.)

COMMERCIAL ITEM EXCEPTIONS TO TINA REQUIREMENT (FAR 15.403-1(b)(3))

(Actions of \$15,000,000 or more)

<List separately each pricing action for which an exception was granted.>

<Do not report if based on adequate price competition or prices set by law or regulation>

Exception 1

1. Contract Number; *<include Modification number if applicable>*
Procurement Name:
2. Contractor Name:
3. Activity:
4. Total Dollar Value of Exception: \$
5. Briefly explain the basis for determining the item(s) is commercial: *Note: Clearly describe how this procurement met the commercial item exception. It is not sufficient to state "this item meets the definition at FAR2.101." Describe why it was determined that this item(s) was a commercial item and that non-government sales (or offered for sale) was verified. Items should not be reported when the contracting officer determines that the prices agreed upon are based upon adequate price competition or set by law or regulation.*
6. Briefly describe the specific steps taken to ensure price reasonableness: *Note: Clearly describe whether or not the contracting officer was able to rely on non-government sales for comparable quantities to determine price reasonableness, specific price analysis or cost analysis techniques used and assistance from DCMA and/or DCAA if applicable. If prior government purchase prices were used, describe how the contracting officer ensured that those prices were based on adequate analysis (in lieu of only accepting a price from a database or automated system).*

Exception 2

1. Contract Number: *<include Modification number if applicable>*
Procurement Name:
2. Contractor Name:
3. Activity:
4. Total Dollar Value of Exception: \$
5. Briefly explain the basis for determining the item(s) is commercial: See Note above.
6. Briefly describe the specific steps taken to ensure price reasonableness: See Note above.

Etc.

FY 06 <Organization>

EXCEPTIONAL CASE WAIVERS OF TINA REQUIREMENTS (FAR 15.403-1(b)(4))

(Actions of \$15,000,000 or more)

<List separately each pricing action for which an exception was granted.>

Waiver 1

1. Contract Number: *<include Modification number if applicable>*
Procurement Name:
2. Company Name:
3. Activity:
4. Total Dollar Amount Waived:
5. Briefly describe why this item(s) could not be reasonably obtained without a waiver: *Note: Clearly describe why without the waiver we could not obtain this item(s), e.g., the best value contractor selection was a commercial company unwilling to accept TINA; requiring TINA for non-government contractors would significantly restrict competition and world class companies..., etc.*
6. Briefly describe the specific steps taken to ensure price reasonableness: *Note: Clearly describe how the contracting officer determined the price to be fair and reasonable and specific price or cost analysis techniques used.*
7. Briefly describe the demonstrated benefits of granting the waiver. *Note: Clearly explain how the government benefited, e.g., increased competition of world class commercial contractors...; significantly reduced delivery schedule on critical parts using a non-government contractor...; etc.*

Waiver 2

1. Contract Number: *<include Modification number if applicable>*
Procurement Name:
2. Contractor Name:
3. Activity:
4. Total Dollar Amount Waived:
5. Briefly describe why this item(s) could not be reasonably obtained without a waiver: See Note above.
6. Briefly describe the specific steps taken to ensure price reasonableness: See Note above.
7. Briefly describe the demonstrated benefits of granting the waiver.

Etc.

FY06 <Organization>

WAIVER OF APPLICABILITY OF COST ACCOUNTING STANDARDS (FAR 30.201-5)

(Actions of \$15,000,000 or more.)

Waiver 1

1. Contract Number:
Procurement Name:
2. Activity:
3. Total Dollar Amount of Award:
4. Brief description of why the property or service could not be reasonably obtained under the contract without granting the waiver:
5. Briefly describe why this item(s) could not be reasonably obtained without a waiver: *Note: Clearly describe why, without the waiver, we could not obtain this item(s), e.g., the best value contractor selection was a commercial company unwilling to accept CAS; requiring CAS for non-government contractors would significantly restrict competition and world class companies..., etc.*
6. Briefly describe the specific steps taken to ensure price reasonableness: *Note: Clearly describe how the contracting officer determined the price to be fair and reasonable and specific price or cost analysis techniques used.*
7. Briefly describe the demonstrated benefits of granting the waiver. *Note: Clearly explain how the government benefited, e.g., increased competition of world class commercial contractors...; significantly reduced delivery schedule on critical parts using a non-government contractor...; etc.*

Waiver 2

1. Contract Number:
Procurement Name:
2. Activity:
3. Total Dollar Amount of Award:
4. Brief description of why the property or service could not be reasonably obtained under the contract without granting the waiver:
5. Brief description of price reasonableness determination: See Note above.
6. Briefly describe the specific steps taken to ensure price reasonableness: See Note above.
7. Briefly describe the demonstrated benefits of granting the waiver.

Etc.