



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

OCT 12 2010

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION & LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Data Call for Annual Congressional Report on Exceptions and Waivers from the Truth In Negotiations Act (TINA) and Cost Accounting Standards (CAS)

The Secretary of Defense is required under section 817 of the National Defense Authorization Act for Fiscal Year (FY) 2003 to annually report to the congressional defense committees certain TINA and CAS exceptions and waivers valued at \$15 million or more.

The Act requires that the report include several elements. Therefore it is imperative that each Defense Component use the format and guidance in the attachment, and refer to the Defense Federal Acquisition Regulation Supplement (DFARS) 215.403-1 and 230.201-5 and the corresponding sections of the DFARS Procedures, Guidance, and Information (PGI), for their submissions. Since the report may be available to the public, care shall be used to not disclose any company proprietary information.

Pursuant to DFARS 215.403-1 and 230.201-5, the Defense Components submissions are due to my office by November 30, 2010. The submittal shall be signed by the Defense Component's Senior Procurement Executive or Senior Contracting Official, to the attention of the Deputy Director, Cost, Pricing, and Finance. Reply with negative response if applicable.

My point of contact for this memorandum is Mr. Matt Streeper, who can be reached at 703-602-0288 or via e-mail at Matthew.Streeper@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

**DoD Annual Congressional Report for
Commercial Item Exceptions from the Truth In Negotiations Act (TINA), and Exceptional
Case Waivers from TINA and Cost Accounting Standards (CAS) for FY 10**

Background:

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) authorizes the Head of the Contracting Activity (HCA) to waive, in “exceptional circumstances,” the requirement 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 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 FY03 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 FY03 NDAA 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. However, 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.

As a reminder, DFARS PGI 230.201-5(a)1(i) requires prior notification to the Director, Defense Procurement and Acquisition Policy of exceptional case waivers for CAS.

Annual Submission Format:

The Defense Components shall use the format and guidance in the subsequent pages for their annual submissions.

**SUMMARY OF <INSERT ORGANIZATION> FY 10
TINA COMMERCIAL EXCEPTIONS AND
EXCEPTIONAL CASE WAIVERS AND CAS WAIVERS**

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

FY 10 <Organization, e.g. Navy, DLA, etc.>
COMMERCIAL ITEM EXCEPTIONS TO TINA REQUIREMENT

(FAR 15.403-1(b)(3))

Only report Actions of \$15,000,000 or more. List separately each pricing action for which an exception was granted. Do not report if exception is based on adequate price competition or prices set by law or regulation. See PGI 215.403-1 for additional guidance on report content.

Exception No. X

1. Contract Number:

Include Modification number if applicable, e.g. Mod P00205 for \$50.1M, Mod P00206 for \$34.4M, Mod P00213 for \$17.2M, and Mod P00218 for \$66.0M.

2. Procurement/Program Name:

3. Contractor Name:

4. Contracting Activity:

5. Contracting Officer (Name, phone, and email):

6. Total Dollar Value of Exception: \$_____

For Mod example above, would be \$167.7M.

Include the expected value of the entire contract, e.g., include value of all contract options. See PGI 215.403-1 for more information on IDIQ contracts.

7. Briefly explain the basis for determining the item(s) is commercial:

Clearly describe how this procurement met the commercial item definition in FAR 2.101. It is not sufficient to state "this item meets the definition at FAR 2.101." Identify the specific characteristics of the item procured that make the item a commercial item in accordance with the FAR definition. Where appropriate, include a brief description of the extent to which non-government sales (or offered for sale) was verified.

8. Briefly describe the specific steps taken to ensure price reasonableness:

Include a brief description of the techniques employed and the results obtained. 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). If the proposed price was comparable to other prices used for price analysis, state how it was comparable, e.g., was lower, was within 10 percent, etc.

FY 10 <Organization>
EXCEPTIONAL CASE WAIVERS OF TINA REQUIREMENTS

(FAR 15.403-1(b)(4))

Only report Actions of \$15,000,000 or more. List separately each pricing action for which a waiver was granted. See PGI 215.403-1 for additional guidance on report content.

Waiver No. X

1. Contract Number: *Include Modification number if applicable*
2. Procurement/Program Name:
3. Date Waiver was Granted:
4. Date DPAP Notified (*see DPAP 3/23/07 memo*):
5. Contractor Name:
6. Contracting Activity:
7. Contracting Officer (Name, phone, and email):
8. Total Dollar Amount Waived: *Include the expected value of the entire contract, e.g., include value of all contract options. See PGI 215.403-1 for more information on IDIQ contracts and contract modifications.*
9. Briefly describe why this item(s) could not be reasonably obtained without a waiver:
Clearly describe why DoD could not obtain this item(s) without the waiver e.g., the best value contractor selection was a commercial company unwilling to accept TINA; requiring TINA for commercial contractors would significantly restrict competition, etc. Awarding faster, saving audit and other review time, and the fact that we could otherwise determine prices to be fair and reasonable are not sufficient reasons to meet this criteria.
10. Briefly describe the specific steps taken to ensure price reasonableness:
Clearly describe how the contracting officer determined the price to be fair and reasonable. Include a brief description of the specific price or cost analysis technique(s) used and the results obtained.
11. Briefly describe the demonstrated benefits of granting the waiver.
Clearly explain how the government benefited, e.g., increased competition of commercial contractors; significantly reduced delivery schedule on critical parts using a commercial contractor; etc.

FY10 <Organization>
WAIVER OF APPLICABILITY OF COST ACCOUNTING STANDARDS

(FAR 30.201-5)

Report Actions of \$15,000,000 or more. List separately each pricing action for which a waiver was granted. See PGI 230.201-5 for additional guidance on report content. Only include waivers granted in accordance with FAR 30.201-5. Do not include waivers granted by the CAS Board in this report.

Waiver No. X

1. Contract Number:
2. Procurement/Program Name:
3. Date Waiver was Granted:
4. Date DPAP Notified (Per PGI 230.201-5(a)(1)(i)):
5. Contractor Name:
6. Contracting Activity:
7. Contracting Officer (Name, phone, and email):
8. Total Dollar Amount of Award: *Include the expected value of the entire contract, e.g., include value of all contract options. See PGI 215.403-1 for more information on IDIQ contracts and contract modifications.*
9. Briefly describe why this item(s) could not be reasonably obtained without a waiver: *Clearly describe why, without the waiver, the Department 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, etc. If the contractor or subcontractor would not accept the contract or subcontract if CAS applied, include a statement to that effect. Awarding faster, saving audit and other review time, and the fact that we could otherwise determine prices to be fair and reasonable are not sufficient reasons to meet this criteria.*
10. Briefly describe the specific steps taken to ensure price reasonableness: *Clearly describe how the contracting officer determined the price to be fair and reasonable. Include a brief description of the specific price or cost analysis technique(s) used and the results obtained.*
11. Briefly describe the demonstrated benefits of granting the waiver. *Clearly explain how the government benefited, e.g., increased competition of commercial contractors; significantly reduced delivery schedule on critical parts using a commercial contractor; etc.*