



Sole Source Pricing Lessons Learned; A Preview

Defense Pricing and Contracting (DPC)

Ms. Janice Muskopf
Director, Price, Cost and Finance (PCF)

April 14, 2021



Agenda

- **Striking the Balance**
- **DoD Sole Source Streamlining Toolbox**
- **TINA Lite**
- **Introduction to Sole Source Pricing Best Practices & Lessons Learned**
- **Select Best Practices**
- **Questions?**



Striking the Balance

- **Today, more than ever before, DoD's acquisition workforce is faced with competing priorities:**
 - **Getting a good deal vs getting a deal quickly**
- **These two alternatives are often perceived as mutually exclusive: but does it have to be an "either/or" proposition? My answer is NO.**
- **Let's re-frame the challenge: instead of choosing between getting on contract quickly and negotiating a reasonable price, my challenge to you is to look for ways to "Strike the Balance"**
 - **Streamline while maintaining the quality of the deal**
 - **One of my overarching goals is to provide the acquisition workforce with tools and resources to help you do just that**



DoD Sole Source Streamlining Toolbox

- **The DoD Sole Source Streamlining Toolbox is an existing resource available to help COs and acquisition teams “Strike the Balance” between efficiency and quality of the deal**
 - Identifies 40+ techniques which can be leveraged to increase efficiency throughout the acquisition process; applicable to all dollar values
 - **Basic principles include:**
 - Obtaining the right info upfront; avoiding rework
 - Avoiding duplication of effort and taking advantage of all available resources
 - Considering materiality when making decisions about the level and depth of reviews
 - Elevating major issues in a timely manner
 - Promoting open communication with contractors
- **The Toolbox is:**
 - Not a “cookbook” to teach you how to do your job
 - *Not a substitute for critical thinking*



TINA Lite Pilot Program

- **FY19 NDAA, Sec 890*** authorized a DoD pilot program under which price reasonableness determinations are based on actual cost or pricing data for prior DoD purchases of the same or similar products
 - Tests whether prudent tailoring of the extent of data required under TINA can expedite the proposal, evaluation & negotiation processes, and still result in a fair and reasonable price
 - Gives the CO broad authority to strategically scope the extent, structure, & level of detail of the historical actual cost data the contractor must submit in lieu of complete certified cost/pricing data
 - Contractor only submits the cost or pricing data specifically identified in the RFP and amendments thereto
 - Contractor only certifies to the accuracy, currency, and completeness of data required to be submitted
 - Best suited for recurring acquisitions for which there is reliable, historical actual cost data
 - While not required, use of FPIF contract type can reduce the parties' cost risk and provide measurable results in relation to target cost
 - Preferable that the candidate contractor has approved business systems
 - Candidate contract actions for pilot participation must be valued > \$50 million

*As amended by Sec 825 of the FY20 NDAA



TINA Lite Pilot Program

- **Approval of the Director, DPC/PCF is required to participate in the pilot**
 - **Apply (before issuing RFP) using Request to Participate template, Atch 1 to Class Deviation 2020-00020**
 - **The Class Deviation also provides deviation versions of applicable FAR/DFARS provision/clauses (defining the reduced scope of data required; providing wording for the Certificate of Current Cost or Pricing Data to be submitted at completion of negotiations; requiring contractor to report time/\$ savings in proposal prep/negotiation)**

Asking for your help to identify opportunities to apply this authority



Sole Source Pricing Best Practices & Lessons Learned

- **New resource: DPC/PCF is publishing a collection of best practices and lessons learned culled from sole source Peer Reviews**
 - **Coming soon to the PCF webpage**
(<https://www.acq.osd.mil/dpap/DP/index.html>)
 - **Generally organized by phase of the acquisition process, from requirement definition to documentation of the negotiated outcome in the PNM**
 - **Applicable not just to actions which will be presented for Peer Review – most content is equally applicable to sole source acquisitions of all dollar values**
 - **PCOs/teams are encouraged to refer to the best practices/ lessons learned early in the process, to identify approaches that may be useful for your buy**
 - **If you have developed a repeatable approach that can address a common problem or improve acquisition outcomes, please share it at osd.pentagon.ousd-a-s.mbx.dpc-pcf@mail.mil**



Select Fixed Price Contract Type Strategically

- The appropriate contract type for a given acquisition should:
 - *Result in a reasonable degree and balance of risk between the Government and the contractor; and*
 - *Provide the contractor with the greatest incentive for efficient and economical performance (from Guidance on Using Incentive and Other Contract Types, March 2016)*
- For recurring requirements subject to TINA, teams should avoid moving to an FFP contract type prematurely. DFARS test:
 - Compare actual cost of performance for prior buys to the Government's negotiated cost line for those buys
 - If actuals for prior buys differ from the Government's interpretation of negotiated cost by more than 3 – 4%, the parties' understanding of the cost of performance is likely not refined enough to support use of an FFP contract type for the current requirement (See DFARS PGI 216.403-1(1)(ii)(B))
- The single-point FFP is inherently a “win/lose” proposition
 - Suitable only when both parties have a strong understanding of cost of performance



Select Fixed Price Contract Type Strategically

- **When selecting contract type in the fixed-price family, consider the flexibility inherent in an FPIF pricing arrangement, as compared to FFP**
 - Under FPIF, a range of outcomes is possible, and cost risk is shared according to the terms of the incentive arrangement
- **All the points on the FPIF incentive share line, up to the point of total assumption (PTA), represent the same deal (assuming the share ratio and ceiling price are held constant)**
 - This gives the parties the option of choosing to interpret the negotiated settlement differently - this can facilitate conclusion of difficult negotiations
 - Contract geometry (share ratios in particular) can be instrumental in closing the deal
 - When the parties lack the cost insight needed to use FFP effectively, the more detailed cost insights available under FPIF can help both parties further their understanding of realistic pricing for future buys



Maximize Motivation Provided by Performance Incentives

- In a multiple incentive scenario, consider using a graduated approach to performance rewards when warranted. Example:
 - A performance incentive requiring delivery of an acceptable deliverable 3 months earlier than the contractual requirement would result in a ***binary outcome*** (the contractor earns all the performance incentive by meeting the target date, but loses out on the entire incentive associated with this event if they miss the date)
 - Once it is clear the contractor will miss the target date, this incentive provides no further motivation for the contractor
 - A performance incentive structured to provide 100% of the incentive amount associated with making delivery 3 months earlier than contractually required; 80% of the available incentive for delivery of an acceptable deliverable 2 months early; and 40% of the incentive for making delivery 1 month early represents a ***graduated approach***
 - A graduated approach could be useful if the Government will achieve a measure of benefit over a range of performance outcomes
- Focus on structuring performance incentives that recognize and reward benefit of incremental achievement to the USG



Requiring Data in a Sole Source Commercial Context

- **COs must use internal (e.g. purchase history) and secondary sources (e.g. market research) to support pricing before requiring submission of uncertified cost or pricing data from the contractor**
 - **Note: when looking at government price history, it is important to ensure previous prices were sufficiently analyzed and determined fair and reasonable**
- **If you are in a sole source “of a type” commercial item environment, the “data gap” issue comes up on a regular basis**
 - **Why? There is a very real difference between pricing a “smart phone” and pricing a military item that is similar to an item in the commercial marketplace**
 - **For military items, there may not be a commercial marketplace driving price reasonableness for the specific item you are procuring and there may be no other buyers for the item**
 - **This issue can arise at the subcontract level, where you will need to work proactively with the prime**



Requiring Data in a Sole Source Commercial Context

- **Be advised that DFARS 215.404-1 provides that cost information not be required unless pricing information (e.g. recent purchase prices under similar terms, different terms – see full list in PGI) is not sufficient to determine price reasonableness**
- **Requests should be limited to data in the format in which is regularly maintained by the company**
 - **For example, if you had to resort to requiring cost information to determine price reasonableness, do not ask for a Table 15-2 compliant proposal**
- **Requesting the right data the first time helps both parties**
 - **Contractor does not have to respond to iterative requests**
 - **CO has the data needed to conclude analysis and move on to negotiations (if needed) and contract award**
- **Data refusals should be elevated and may require a decision by the Head of the Contracting Activity regarding contract award (relevant references include FAR 15.403-3, DFARS PGI 215.403-3, DFARS 215.404-1)**



Encourage Competition at the Subcontract Level

- **Since competition at the subcontract level is vital for purposes of avoiding data denials and overpriced parts, acquisition teams should encourage prime contractors to compete subcontracts whenever possible**
 - **Especially in the context of follow-on acquisitions, the Government is well-positioned to begin discussions about this topic with the prime well in advance of RFP issuance**
- **Expect the prime contractor to be able to explain why sole source subcontracted items aren't being competed**
 - **Prime should be able to describe actions taken/in process to enable competition of those subcontracted requirements in the future**
- **If the prime has made a commercial item determination with respect to a subcontract requirement, there should be similar items available in the commercial marketplace**
 - **If the prime contractor is not competing the commercial requirements, it is ok to ask why not**
- **Competed subcontracts facilitate agreement on reasonableness of subcontract pricing, and reduce the subcontract analysis burden**



Timely TINA Data Disclosures During Negotiations

- **Prior to entering negotiations, COs are encouraged to clearly establish expectations with the contractor regarding timely data disclosures**
 - Discourage the contractor from holding data disclosures until pre-determined timeframes or until the end of negotiations
- **Disclosure of new or more current data as it becomes available will keep the parties on an equal footing**
 - Facilitates both speed of negotiation, and negotiation of a price that's fair to both parties
- **It is important to be aware that companies can provide “data handouts” as disclosures without having to provide a full up revised proposal every time there is new data**
 - Great example is the result of a subcontract negotiation



Timely TINA Data Disclosures During Negotiations

- **Timely data disclosures during negotiations should facilitate a quick turnaround on submission of the Certificate of Current Cost or Pricing Data, and minimize any sweep submissions**
 - **Best practice: the CO should include in the RFP an expectation that the contractor will submit the Certificate of Current Cost or Pricing Data within five business days after the conclusion of negotiations, consistent with DFARS PGI 215.406-2**
- **Timely data disclosures is a discussion that should take place not just before negotiations but at the beginning of the proposal process**
- **If timely data disclosures are an issue, this is something to bring to the attention of DCAA and DCMA**



Partner with the Prime to Get Good Subcontract Deals

- **Since the prime is acting as our agent in negotiations with the subcontractor, it is in our best interest to provide the prime with timely insight into our positions on proposed subcontracts**
- **Be proactive, and put the prime on notice as to the Government's expectations regarding major subcontracts in advance of prime/subcontractor negotiations**
 - **Engage with the prime after RFP release/before proposal receipt to get insight into the anticipated timeline for major subcontract proposal evaluations and negotiations – facilitates timely input from USG**
 - **Communicate the need for the prime to keep the Government informed with respect to any issues occurring at the subcontract level, e.g. data that has been required but not received**
 - **Coordinate with respect to any DCAA/DCMA products**



Partner with the Prime to Get Good Subcontract Deals

- **Government team involvement is particularly critical when the subcontractor, citing competitive/proprietary data concerns, does not provide the prime with a fully supported, TINA-compliant proposal***
 - **Do not disclose the sub's proprietary data to the prime**
- **In these cases, the subcontractor must submit the fully detailed proposal to the CO in lieu of the prime contractor**
 - **While the prime is still required to analyze the sub's proposal and negotiate a fair and reasonable subcontract price, it would not be prudent for the CO to rely solely on the prime's analysis based on incomplete data**
 - **The CO should conduct appropriate cost/price analysis of the subcontract proposal, and share the results with the prime**
 - **Analysis results should be presented in a way that does not disclose the subcontractor's proprietary data (DFARS PGI 215.404-3(a))**
- **As arranged with prime, CO may participate in the negotiations**

** Note: as with prime contracts, for subcontracts subject to TINA, actuals from related prior buys are certified cost or pricing data 17 for purposes of the pending subcontract action*



Partner with the Prime to Get Good Subcontract Deals

- **Profit can be used to influence successful subcontract outcomes**
 - **Provide the prime with the Government's position on acceptable price ranges for major subcontracts, before prime/sub negotiations**
 - **Put the prime on notice: additional profit is warranted for "good" deals in comparison to the pre-established Government expectations, while negotiated subcontract prices that exceed the Government's acceptable range will result in reduced profit**

Partnering helps the prime get a good deal on behalf of the Government



Pricing Curves vs Pricing Bands

- Pricing quantities in advance for purpose of Indefinite Quantity/Indefinite Delivery Contracts or for Contract Options requires forethought
- Two common approaches to pricing future projected quantities are *pricing bands* (also known as range pricing) and *price/quantity curves*
- Pricing bands establish unit prices applicable to successive quantity ranges
 - E.g., the unit price for quantities of 1 - 5 is \$2,500; the unit price for 6 – 26 is \$2,375; the unit price for 27 – 75 is \$2,188
 - Unit pricing may be based on the quantity at the midpoint of the band, but contractors often propose based on the lowest quantity in each band
 - The band approach can result in pricing that is inherently overstated or understated for most quantities in each band – “win/lose scenario”
 - Bands are most well suited for items like large quantity piece parts
 - Ill suited for high priced end items that include support costs
- Price/quantity curves establish a pricing formula which calculates a representative price for any required quantity
 - Unit price decreases as quantity increases
 - *More equitable result at all possible quantities* – “win/win scenario”



Considerations with Respect to PBPs

- **When establishing PBP arrangements, COs must establish whether each event will be cumulative or severable**
 - In a production buy, given the logical sequence of events for building the item, it's expected that some events would be contingent on completion of prior events; thus, in production, not all events would be severable
 - Assigning the cumulative/severable designation to events has implications for valuing each event
 - Use of the expenditure profile is more meaningful for cumulative events
 - Because they may be performed out of sequence in relation to the expenditure profile, severable events may need to be separately priced to establish an appropriate value (FAR 32.1004(b)(3)(ii))
- **When the contractor requests PBPs, obtain a monthly cost expenditure profile that reflects costs**
 - This is not the same thing as termination liability
 - It takes effort to evaluate the realism of the profile, but this is critical in order to minimize instances of unintended advance payments or providing a cash flow that is not commensurate with what is needed to perform the contract



Considerations with Respect to PBPs

- **Importance of running the PBP model**
 - Provides the groundwork for negotiating win-win PBP scenarios
 - Provides both the Government and Company perspective on PBPs in terms of Net Present Value
 - When PBPs will be used, evaluate using the PBP Tool at https://www.acq.osd.mil/dpap/cpic/cp/Performance_based_payments.html to analyze cash flow.
- If use of PBPs is anticipated, the CO and team should review the Defense Pricing and Contracting (DPC)-sponsored training on this topic before entering negotiations



Mark your calendars to continue the discussion:

The next “Striking the Balance” webinar is coming up in May 2021. Presented by Ms. Leslie Overturf, of DPC/PCF, it will focus on using the flexibility inherent in the FPIF contract type to achieve balance

Questions?