Management Decisions: When Is Disclosure Required Under 'TINA?'

A nearly 30-year-old precedent still stands as the most authoritative guidance for determining when management decisions qualify as "cost or pricing data."

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During the past several years, the Defense Contract Audit Agency (DCAA) has ramped up defective pricing audits. This increased audit activity has the potential to kickstart new defective pricing claims brought by the government under the Truthful Cost or Pricing Data statute, which is still commonly referred to by its former name, the Truth in Negotiations Act (TINA).

TINA requires contractors to disclose "cost or pricing data" to the government during negotiations of certain contracting actions. Critically, contractors that must submit cost or pricing data are required to certify that such data are "accurate, complete, and current" as of the date the parties reach an agreement on price or "an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price."[1]

The law provides that the government is entitled to a price adjustment if it proves that the contractor furnished defective cost or pricing data.[2] To prevail in a defective pricing claim, the government must establish that: (1) the information at issue is "cost or pricing data" under TINA; (2) the contractor failed to meaningfully disclose the data prior to the agreement on price; and (3) the government detrimentally relied on the contractor's defective data.[3]

A contractor's first line of defense against a defective pricing claim is to establish that the government failed to meet its burden to prove that the information at the crux of the dispute is "cost or pricing data" within the meaning of TINA. The statute defines "cost or pricing data" to mean "all *facts* that ...a prudent buyer or seller would reasonably expect to affect pricing negotiations significantly."[4] But the "term does not include information that is *judgmental*."[5]

Some information, such as vendor quotations, is readily identifiable as factual data subject to disclosure. But other types of data are more difficult to classify as either factual or judgmental. Management decisions that could have a significant bearing on cost often fall within this legal gray area.

Nearly 30 years ago, in the *Appeal of Lockheed Corp.*, the Armed Services Board of Contract Appeals (ASBCA) issued a decision that remains the most definitive legal guidance regarding when management decisions must be disclosed under TINA.[6] Contractors that are required to disclose "cost or pricing data" must understand the *Lockheed* decision's legal framework and its implications for TINA disclosures.

Appeal of Lockheed Corp.

The *FAR* includes a non-exhaustive list of "factors" that may constitute "cost or pricing data," including "[d]ata supporting projections of business prospects and objectives and related operations costs;" "[e]stimated resources to attain business goals;" and "[i]nformation on management decisions that could have a significant bearing on costs."[7] The *FAR* does not offer any further specific guidance as to when this type of information becomes "cost or pricing data" subject to disclosure. Thus, for many years, contractors struggled to determine when the disclosure of management decisions was required under TINA.

The ASBCA's *Lockheed* decision established a legal framework for

making this determination that provided much needed clarification for contractors. To this day, *Lockheed* remains the most authoritative statement of the law regarding when management decisions and business plans constitute "cost or pricing data."

In *Lockheed*, the U.S. Air Force brought a defective pricing claim against the contractor for failure to disclose the existence of a major corporate initiative to lower its labor costs. The claim arose in connection with the negotiation of a modification under a contract for the C-5B aircraft.

The contractor's initiative consisted of established "goals" for a new collective bargaining as well as proposals to lower the entry wage rates for new hires and broaden the rate ranges for its workers. After the modification was awarded, the contractor entered into a new collective bargaining agreement (CBA) with the union that ultimately resulted in a substantial reduction in labor costs. The ASBCA was tasked with deciding whether an internal memorandum and presentation, which reflected the contractor's plan to lower labor costs, represented cost or pricing data that should have been disclosed during negotiations under TINA.

The ASBCA began its analysis by noting the general rule that, "whether a contractor has fulfilled its duty to disclose cost or pricing data is an objective one."[8] As a threshold matter, the ASBCA also explained that this "determination must be made from the perspective of the date of the certificate of cost or pricing data, not with the benefit of hindsight."[9]

The ASBCA concluded that, to constitute "cost or pricing data" under TINA, "there should be a substantial relationship between the decision and the relevant cost element," which "could be direct or indirect in a particular case."[10]

After reviewing the pertinent legislative history, the ASBCA determined "that a management decision to act, which has not been implemented, may be cost or pricing data."[11] Importantly, however, the ASBCA also clarified that "the decision should be taken at a level of management which has the authority actually to approve or disapprove actions affecting that cost element."[12]

Ultimately, the ASBCA found that the pre-negotiation documents reflecting the Lockheed's planned initiative to lower labor costs did not need to be disclosed. The ASBCA concluded that there was a direct relationship between the terms of the collective bargaining agreements and the contractor's direct labor rates.

But the ASBCA Board rejected the government's defective pricing claim because the corporate committee with "the authority to approve or disapprove proposing or rejecting terms in those agreements" had not made the decision on what goals to pursue with the union at the time the contractor and the government reached an agreement on price.[13]

The Board determined that "only the corporate cost committee, which was controlled by senior corporate management...had the authority to decide what terms could be proposed to the union."[14] Thus, although the contractor's human resources organization had begun planning based on the proposed initiative to lower labor costs, the ASBCA found that "only senior corporate management was in a position to, and did, make meaningful decisions on what goals to pursue with the union."[15] In the absence of approval by senior corporate management, the contractor's plans were "too attenuated to qualify as having a significant bearing on costs."[16]

The ASBCA rejected the government's argument that a contractor's disclosure obligation under TINA could be triggered prior to a decision to act on the plan in question.[17] In doing so, the ASBCA distinguished two previous decisions the government relied on in support of its position.[18]

In *Millipore*, a case decided by the former General Services Board of Contract Appeals (GSBCA), the government successfully argued that the contractor violated TINA by failing to disclose its plan to implement a change in its discount policy. Although the formal decision to implement this policy did not occur until after the agreement on price, the GSBCA found that the contractor was "strongly committed to overhauling the dealer program, and the discount structure" before that date.[19]

The ASBCA in *Lockheed* distinguished *Millipore* because it inferred from the GSBCA's decision "that the contractor's management had already decided to change dealer discount levels prior the critical date."[20]

The ASBCA also distinguished its prior decision in *Grumman*, which involved a claim that the contractor failed to disclose a draft cost analysis report. In *Grumman*, the ASBCA denied the contractor's motion for summary

judgment, noting that "the fact that [the contractor's] management did not formally approve the [draft report] approach until after the agreement on price is not necessarily determinative of when that decision might have been reached informally or should have been recognized as sufficiently likely to have required full disclosure."[21]

Although this statement seemed to suggest that informal plans could be "cost or pricing data," the ASBCA declined to adopt that interpretation of its prior decision. Instead, the ASBCA explained that "*Grumman* makes clear that on motion for summary judgment we will not foreclose a full exploration of the facts relating to whether a decision has been made."[22] The Board refused, however, to read *Grumman* "as a relaxation of the regulatory requirement (in this context) that there be a decision."[23]

Finally, the ASBCA confirmed that Lockheed's eventual negotiation of a new CBA after the modification in question was not determinative of whether a management decision had been made by the individuals with authority at the time of the agreement on price. In the ASBCA's view, "it is not reasonable to say that alleged data which have assumed significance as a result of subsequent events ...are cost or pricing data for that reason alone."[24]

Lessons From *Lockheed*

Despite the passage of nearly three decades, *Lockheed* still stands as the most reliable legal framework contractors can use to determine whether business plans or management decisions constitute "cost or pricing data" under TINA. By requiring that the decision must be made by the individuals with requisite authority, the *Lockheed* framework provides a bright-line rule that contractors can implement. Contractors can take several precautionary steps to ensure TINA compliance under the rule established in *Lockheed*.

As an initial matter, it is important for contractors to clearly identify the individuals who have authority to make decisions on any plans, strategies, or management initiatives that could have a bearing on price. By clearly identifying the responsible individuals in a company policy, the contractor will be in a better position to show that any plans that may be formulated by lower-level employees were not formal enough to require disclosure under TINA.

Contractors should also consider marking documents that reflect plans developed or proposed by individuals without requisite approval authority. Such documents can include "Preliminary Draft Proposal" or similar markings to clearly indicate that a formal approval decision has not been made.

Lastly, it is important for contractors to have policies and procedures for ensuring that their negotiators are promptly informed of formal decisions when they are made. It does no good for the contractor to have policies that specify who can make certain decisions if they are not communicated to the persons responsible for making TINA disclosures.

A contractor's failure to disclose a consequential management decision with significant cost implications can create substantial liability under TINA. By taking the protective measures outlined above, contractors can mitigate their potential legal exposure and put themselves in the best position to defend a TINA claim if that becomes necessary. CM

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ENDNOTES

1 FAR 15.406-2(a).
2 10 U.S.C. § 2306a(e)(1)(A)-(B).
3 Alloy Surfaces Co., Inc., ASBCA 59625, 20-1 BCA ¶ 37,574.
4 10 U.S.C. § 3701(1); 41 U.S.C. § 3501(a)(1). (emphasis added).
5 Id. (emphasis added).
6 Appeal of Lockheed Corp., ASBCA Nos. 36420, et al., 95-2 BCA ¶ 27,722.
7 FAR 2.101.
8 Appeal of Lockheed Corp., 95-2 BCA ¶ 27,722 at 138,179 (citing Hardie-Tynes Manufacturing Co., ASBCA Nos. 20367, 20387, 76-1 BCA ¶11,827 at 56,480).
9 Id.
10 Id. at 138,180.
11 Id. at 138,179.
12 Id. at 138,180.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id. at 138,179.
18 Id. (citing Millipore Corp., GSBCA No. 9453, 91-1 BCA ¶23,345; Grumman Aerospace Corp., ASBCA No. 35185, 92-3 BCA ¶25,059).
19 Millipore, 91-1 BCA ¶23,345 at 117,067.
20 Lockheed, 95-2 BCA ¶27,722 at 138,180.
21 Grumman, 92-3 BCA ¶25,059 at 124,886.
22 Lockheed, 95-2 BCA ¶27,722 at 138,179.
23 Id.
24 Id.