



DEPARTMENT OF THE AIR FORCE  
WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

26 MAR 2003

Contract Policy Memo 03-C-08

MEMORANDUM FOR ALMAJCOM/FOA/DRU (CONTRACTING)

FROM: SAF/AQC  
1060 Air Force Pentagon  
Washington, DC 20330-1060

SUBJECT: Exceptions and Waivers to the Truth in Negotiations Act

The attached memorandum from the Director, Defense Procurement and Acquisition Policy, describes changes in the Truth in Negotiation Act (TINA) based upon Section 817 of the FY 2003 National Defense Authorization Act. These changes define the term "exceptional case" in the justification of TINA waivers and provide for reporting of such waivers. Additionally, there is a requirement for the reporting of major procurements using the "commercial exception" for submission of cost or pricing data.

The new policy adds three stipulations that must be determined before the Head of the Contracting Activity (HCA) can grant a waiver. They are:

1. the property or service cannot reasonably be obtained without the waiver;
2. the price can be determined reasonable without submission of cost or pricing data and
3. there are demonstrated benefits to granting the waiver.

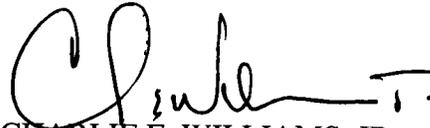
In the past, nearly all Air Force waivers were granted because we were able to determine the price as reasonable using price analysis and because the benefits of granting the waiver, usually saving proposal costs or time, were justifiable. This approach adheres to stipulations 2 and 3 above. However, stipulation 1 places greater emphasis, and possibly, limitations on our ability to grant future waivers. The stipulation is that waivers will be granted only when it is clearly demonstrated that the item or service cannot reasonably be obtained without the waiver. As such, merely showing that the procurement will be streamlined by granting a waiver is not sufficient. There must be compelling rationale and documentation that demonstrates that obtaining cost or pricing data is not reasonable, therefore a waiver is justified.

The Authorization Act also mandates two new Congressional reporting requirements pursuant to TINA exceptions: (1) TINA waivers over \$15 million that are based upon an exceptional case; and (2) all procurements over \$15 million in FY 2003, using an exception under FAR 15.403-1(b)(3) where a commercial item determination was issued. The listed

procurements must document the basis for determining the item commercial and a determination of price reasonableness.

HQ AFMC/PKPC is designated as the focal point for consolidation and further reporting to DoD of the above required actions. Therefore, in these specific instances, request that you provide them with a copy of the approved waiver. Each waiver must address the three stipulations listed in the Authorization Act. Also, it is very important that these actions are accurately and completely coded on the appropriate DD Form 350. For consistency in reporting, please use the format located at: <https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/pkpc/tina.htm>.

If there are any questions please contact Mr. Virgil Hertling, HQ AFMC/PKPC, DSN 986-0446, Commercial (937) 656-0446, or e-mail [virgil.hertling@wpafb.af.mil](mailto:virgil.hertling@wpafb.af.mil).



CHARLIE E. WILLIAMS, JR.  
Deputy Assistant Secretary (Contracting)  
Assistant Secretary (Acquisition)

Attachment  
OSD-DPAP/P memo, dated 11 Feb 03



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.

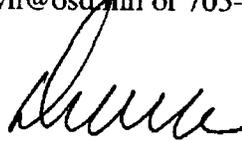
The FY 2003 Act also requires that the foregoing report include an identification of exceptions to TINA for contracts, subcontracts or modifications expected to have a price of \$15 million or more made pursuant to FAR 15.403-1(b)(3), because the item being acquired is commercial. Accordingly, please 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 IICA 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](mailto:Richard.G.Brown@osd.mil) or 703-695-7197.



Deidre A. Lee  
Director, Defense Procurement &  
Acquisition Policy