The Truth-in-Negotiations Act (which we will call by the time-honored acronym “TINA” even though it is **no longer** officially called TINA in the FAR) is a tough compliance requirement. Essentially, it requires a bidder (or “offeror”) to disclose to the government negotiators all facts that would reasonably be expected to significantly affect price negotiations.
All facts
. And then the contractor has to certify that it has disclosed all facts and that its disclosure was current, accurate, and complete as of the date of final price agreement (or other specified date).

As we said, it’s a tough compliance requirement. If the government can prove that the contractor did not make a full disclosure, one that was accurate and complete and current, then it is entitled to a price reduction for the value of the “defectively priced” information.

Note, however, that the requirement is that the information must be *disclosed*. The information does not have to be used in the proposal. Indeed, the contractor can price its proposal in most any manner it believes complies with the pricing instructions, even though there is some piece of information it discloses that might be used by the government to negotiate a lower price. The contractor’s obligation is to disclose and, once it has met that obligation, it is no longer liable for any alleged violations of “defective pricing.”
[1]

The ASBCA recently offered us a lesson in the application of TINA in Judge McIlmail’s **decision** in the matter of Symetrics Industries, LLC (ASBCA No. 59297).

As the facts were related, in December, 2007, Symetrics submitted a firm fixed-price proposal to the U.S. Army for “improved modem units.” DCAA audited the proposal. Before submitting its proposal, Symetrics had obtained DCMA approval for indirect rates of 179.2% overhead on labor and 25.6% G&A. The Judge didn’t identify those rates as being provisional billing rates or forward pricing rates, but it doesn’t really matter. We assume that Symetrics used those indirect rates in pricing its proposal for the modems.

A month after submission of its modem proposal, Symetrics submitted a new Forward Pricing Rate Proposal (FPRP). This was on January 7, 2008. A few weeks later (January 23, 2008),

Symetrics submitted a revised modem proposal, which now used overhead rates of 182.45% for FY 2008 and 186.47% for FY 2009, as well as a G&A rate of 18.24% for both FYs 2008 and 2009. In other words, overhead was trending upward while G&A was trending downward.

DCAA audited the FPRP, which contained submitted rates of 170.38% (overhead) and G&A rates of 17.13%. Obviously, the FPRP rates were lower than the rates used to price the modem proposal.

The DCAA auditor was under the mistaken impression that Symetrics had used its FPRP rates to price its modem proposal. However, the DCAA audit report on the proposal clearly identified the rates used by Symetrics, and they did not match the FPRP rates.

Having received both DCAA audit reports, the Contracting Officers prepared a pre-negotiation memorandum. As the Judge stated, "Their prenegotiation memorandum expressly references both the 7 February 2008 FPRP and the DCAA audit report regarding overhead and G&A, but identifies the overhead and G&A rates that appear in the price proposal." The Army and Symetics came to a price agreement even though Symetics "had not revised its price proposal to reflect the FPRP overhead and G&A rates, nor had it transmitted those rates directly" to the two Contracting Officers.

A hair under six years later, the Contracting Officer issued a COFD demanding $121,824 in "excess cost" (plus interest) based on Symetrics' alleged failure to fully disclose all facts, including the fact that it had used indirect rates other than those in its FPRP to price its proposal. Symetrics appealed that final decision and its appeal was sustained.

Judge McIlmail's decision stated—

As their prenegotiation memorandum expressly memorializes, PCO Jones and Contract Specialist Coleman negotiated the contract price knowing of the 7 February 2008 FPRP [2] and relying upon what they understood were the FPRP-proposed rates. DCAA Auditor Hepfner evaluated the price proposal with the same knowledge and understanding. Although the three evidently (at least ultimately) misunderstood what rates the FPRP proposed, the government points to no evidence that Symetrics misrepresented the contents of the FPRP, and all PCO Jones, Contract Specialist Coleman, and Auditor Hepfner had to do to confirm their

understanding and discover their mistake was to double-check (or, perhaps, check in the first place) what rates the FPRP actually proposed against their stated understanding. In view of the foregoing, we find that the government was aware or should have been aware of the FPRP-proposed rates; this being so, the government has not proven that Symetrics did not disclose the FPRP rates within the meaning of the Truth in Negotiations Act.

(Internal citations omitted.)

Other government arguments did not persuade the ASBCA Board. Citing *Alliant Techsystems* (ASBCA Nos. 51280 and 47626), the Judge quoted –

Disclosure is not confined to a formal, written submission. Instead the contractor's disclosure obligation is fulfilled if the Government obtains the data in question in some other manner or had knowledge. It must be meaningful, regardless of the form it takes. Whether there has been meaningful disclosure depends upon application of a 'rule of reason' to the particular circumstances of [] each case.

Long story short: TINA is a disclosure requirement, not a use requirement. And disclosure can be broadly construed to include many avenues of communication, beyond a simple "data dump" to the government negotiators.

All that being said, it is important to make sure that you have disclosed all meaningful cost or pricing data, especially if (as here) you don't intend to use it in pricing your cost proposals.

1 On the other hand, we are not attorneys. You had better check with your government contracts attorney before you choose to ignore disclosed information when pricing your cost proposal.

2 The FPRP date seems inconsistent with the statement of facts. Any error is probably ours.