THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

NOV 7 2007

DPAP/CPF

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY AND PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (ACQUISITON), SAF/AQ

SUBJECT: Access to Records with Exclusive Distributors/Dealers

The purpose of this policy memorandum is to (1) ensure that contracting officers are successful in obtaining the necessary information and data for determining fair and reasonable prices for purchases made from exclusive distributors/dealers when the Truth In Negotiations Act (TINA) does not apply and (2) require contracting activities to notify DPAP when an exclusive distributor/dealer did not provide cost data required by the contracting officer, but because of an exigent situation, an award was made to the exclusive distributor/dealer.

In some situations, Original Equipment Manufacturers (OEMs) use exclusive distributors/dealers to sell their products, and the Government must buy the products directly from the exclusive distributor/dealer. DoD has found that in many situations contracting officers are not adequately determining that prices from exclusive distributors/dealers are fair and reasonable because the distributor/dealer refuses to provide requested cost data when there is no other means to determine a fair and reasonable price and TINA does not apply. DoD found many situations where the products are made by a single source OEM and often the products are DoD specific; therefore, market research, commercial sales or other pricing techniques are not adequate to determine if the proposed price is fair and reasonable. In addition, exclusive distributors/dealers do not have direct access to the costs of products provided by OEMs.

Contracting activities are reminded that even when TINA does not apply, FAR 15.402, Pricing policy requires that contracting officers must obtain cost information, without requiring certification (FAR 15.402(a)(2)(ii)), when there is no other basis for

determining that proposed prices are fair and reasonable (e.g. through market research and price analysis techniques). In these situations when TINA does not apply, the distributor/dealer must provide its cost data when required by the contracting officer, as well as the distributor's/dealer's analysis of the reasonableness of costs of products provided by the OEM (FAR 15.404-3). Additional guidance is contained in Procedures Guidance and Information (PGI) 215.4. Moreover, if the contracting officer is relying on previous prices paid by the Government, the contracting officer must establish that a thorough price or cost analysis was performed on the previous buy (PGI 215.403-3(4)).

The distributor/dealer is responsible for supporting all costs contained within its proposal. Although we are not aware of situations when certified cost or pricing data were not provided when required by FAR 15.403-4, you are reminded that when an exclusive distributor/dealer is selling products to the government as a prime contractor, and TINA applies, the distributor/dealer and subcontractors (OEM in this case) are required to provide certified cost or pricing data in accordance with FAR 15.403-4.

FAR 15.402(a) states that contracting officers must purchase supplies and services at fair and reasonable prices. It is critical that all levels of management support the contracting officer in acquiring cost data necessary for determining fair and reasonable prices. When TINA does not apply, any distributor/dealer who does not comply with the requirement to submit cost information for a contract or subcontract is ineligible for award unless the Head of Contracting Activity determines that it is in the best interest of the Government to make the award to that offeror in accordance with FAR 15.403-3(a)(4).

Beginning January 2, 2008, in the event of an exigent situation when the HCA has approved award without obtaining requested cost data, the contracting activity will notify its Headquarters activity, and that Headquarters activity will then notify OUSD (AT&L) DPAP (CPF) 3060 Defense Pentagon, Washington, DC 20301-3060 and include the following information in the notice:

- Contractor name and DUNS number (Exclusive Distributor/Dealer)
- Subcontractor name and DUNS number (e.g., OEM/actual manufacturer)
- Contract Number, Modification or Order Number if applicable
- Date and amount of the contract action
- Steps taken to attempt price analysis without requiring cost data
- Contractor's rationale for refusing to provide the data
- Actions taken by the contracting activity to obtain the data
- Data used to determine price reasonableness and resulting determination
- Actions planned to avoid this situation in the future

The point of contact for this memorandum is Mr. McPherson, Senior Procurement Analyst, who can be reached at 703-602-0296 or via e-mail at john.mcpherson@osd.mil.

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Director, Defense Procurement
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