OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
AND SUSTAINMENT

APR 2 5 2019

MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Implementation of Quarterly Reporting of Contractor Denials of Requests for Data Other than Certified Cost or Pricing Data to Evaluate Price Reasonableness for Department of Defense Contract Awards

This memorandum provides a standardized process and format to use in reporting information required by the memorandum, "Process and Reporting Requirements Pertaining to Contractor Denials of Contracting Officer Requests for Data Other than Certified Cost or Pricing Data," dated March 22, 2019, found at Attachment 1. Report data for procurements with a value above the Simplified Acquisition Threshold (SAT).

The Heads of the Contracting Activities (HCAs) are requested to consolidate and report data electronically using the format at Attachment 2 or https://www.acq.osd.mil/dpap/index.html. The first reports will cover the period April 1 - June 30, 2019. HCAs should send the reports to osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil, by July 30, 2019, and 30 days after the end of each quarterly reporting period thereafter.

This memorandum will remain in effect until incorporated in the Defense Federal Acquisition Regulation Supplement Procedures, Guidance, and Information or otherwise rescinded. My point of contact is Patricia Foley at patricia.g.foley.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated

OFFICE OF THE UNDER SECRETARY OF DEFENSE
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MEMORANDUM FOR COMMANDER, UNITED STATES CYBER COMMAND (ATTN: ACQUISITION EXECUTIVE)
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INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DEFENSE FIELD ACTIVITIES

SUBJECT: Process and Reporting Requirements Pertaining to Contractor Denials of Contracting Officer Requests for Data Other than Certified Cost or Pricing Data

The attached Defense Procurement and Acquisition Policy, now Defense Pricing and Contracting (DPC), memorandum, "Access to Records with Exclusive Dealers or Distributors," dated November 7, 2007, is hereby rescinded and replaced with this memorandum, which more broadly addresses difficulties that contracting officers encounter when seeking data to support price reasonableness determinations in the absence of competition, in particular when acquisitions are not subject to the Truth in Negotiations Act (TINA).

Contracting officers are charged with establishing that prices are fair and reasonable prior to making contract awards. Where competition exists, price reasonableness can usually be established without requiring any additional supporting data. However, for sole source acquisitions, contracting officers must obtain the data necessary to establish price reasonableness. For actions subject to TINA, certified cost or pricing data serves this purpose. For actions which are not subject to TINA, i.e., commercial acquisitions or those valued below the TINA threshold, Federal Acquisition Regulation (FAR) 15.403-3(a)(1) directs the contracting officer to:

(i) Obtain whatever data are available from Government or other secondary sources and use that data in determining a fair and reasonable price;

(ii) Require submission of data other than certified cost or pricing data from the offeror to the extent necessary to determine a fair and reasonable price if the contracting officer determines that adequate data from sources other than the offeror are not available. This includes requiring data from an offeror to support a cost realism analysis;

(iii) Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;

(iv) Require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price; and

(v) Consider the guidance in section 3.3, chapter 3, volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7) to determine the data an offeror shall be required to submit.

FAR 15.402(a)(2) clarifies that cost data should only be requested when data related to prices (catalog prices, prior sales data, etc.) are not adequate to support a price reasonableness determination. Defense Federal Acquisition Regulation System (DFARS) 212.209 and DFARS PGI 215.403-3 expand upon the order of preference and appropriate usage of the types of data addressed in FAR 15.

When a contractor fails to comply with a contracting officer's request for data other than certified cost or pricing data to support a price reasonableness determination, per FAR 15.403-3(a)(4) and Sec. 808 of P.L. 105-261, the contractor becomes ineligible for award unless the Head of the Contracting Activity (HCA) makes the determination that it is in the best interest of the Government to make an award to that offeror. DFARS PGI 215.404-1(a)(i)(A) provides an elevation process to be used in an attempt to resolve instances of contractor failure to provide requested data, and identifies documentation to be included in the contract file in support of an HCA determination, if the elevation process does not resolve the issue.

To provide DPC with a holistic view of the extent of the problem across DoD of offerors failing to comply with contracting officer requests for data adequate to support price reasonableness determinations, this memorandum initiates a quarterly reporting requirement for all HCA determinations accomplished in accordance with FAR 15.403-3(a)(4). The data collected via this quarterly report will assist DPC in identifying chronic issues and determining whether it is necessary to pursue statutory or regulatory changes to address the problem in an effective manner.

Commencing on June 30, 2019, and quarterly thereafter, all HCAs shall report the following information pertaining to denials of contracting officer data requests (which were not resolved through the DFARS PGI elevation process) to the Principal Director, DPC:

1. The name of the offeror/contractor;
2. The Commercial and Government Entity (CAGE) code;
3. The part number and NSN;
4. The number of requests that the contracting officer made to the offeror/contractor for uncertified cost or pricing data;
5. The number of denials that the contracting officer received from the offeror/contractor regarding its submission of uncertified cost or pricing data; and
6. Documentation in accordance with DFARS PGI 215.404-1(a)(i)(A)(v).

This memorandum will remain in effect until incorporated in the Defense Federal Acquisition Regulation Supplement Procedures, Guidance, and Information (DFARS PGI) or otherwise rescinded. My point of contact is Patricia Foley, who is available at patricia.g.foley.civ@mail.mil.

Kim Herrington,
Acting Principal Director,
Defense Pricing and Contracting

Attachment:
As stated

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.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Requests for Data Other than Certified Cost or Pricing Data

Heads of Contracting Activities must consolidate and report the following information quarterly to OUSD(A&S) Defense Pricing and Contracting (DPC) for all denials of contracting officer requests for data other than certified cost or pricing data to support a price reasonableness determination (that were not resolved through the elevation process described in DFARS PGI 215.404-1(a)(i)(A)).

Email this spreadsheet to DPC at <osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil> by 30 days after the end of each quarter: July 30 for April-June, October 30 for July-September, January 30 for October-December, and April 30 for January-March.
A sample of the information desired is shown in the first row.

Contracting Activity Organization	DODAAC	Name of PCO Requester	PCO's Email	PCO's Telephone Number	Offeror/Contractor Name	CAGE	C
Example: Washington Headquarters Services	*Example:* HQ0034	*Example:* Joanne Smith	*Example :* JoanneSmith.civ@mail.mil	*Example:* 571-372-9999	*Example:* ABC Company	*Example:* 1XYZ1	*Exam* HQ0(

Part Number	NSN	Is offeror /contractor an Exclusive Dealer for OEM?	Date of Initial Request	Type of Data Requested	Number of Requests Made	Number of Denials
Example: 12345678	*Example:* 5555-00-111-2222	*Example:* *Yes or No*	*Example:* 01/29/2019	*Example:* Previous sales of a similar product to the government	*Example:* 3	*Example:* 3

Reason for Denial	Reason Data is Needed	HCA Determination that it is in the Best Interests of DoD to Purchase from Supplier	Plan for Avoiding Situation in
Example: Contractor states that it would be too time-consuming to collect the data requested.	*Example:* There are no recent purchases for this exact product, so we need the pricing data for previous procurements of similar products to determine price reasonableness.	*Example:* There is only one company that currently makes this product due to the highly specialized nature of the manufacturing process.	*Example:* Expand the industrial base by work other DoD programs to increase de this product and incentivize other s invest in the necessary manufactur technology.