



OFFICE OF THE UNDER SECRETARY OF DEFENSE

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ACQUISITION,
TECHNOLOGY
AND LOGISTICS

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)

JUN 21 2016

SUBJECT: Pilot Program Regarding Risk-Based Contracting For Smaller Contract Actions
Under The Truth In Negotiations Act

Section 899 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 (attached), authorizes the Secretary of Defense to conduct a pilot program to demonstrate the efficacy of using risk-based techniques to require the submission of cost and pricing data on a sampling basis under section 2306a of title 10, United States Code (frequently referred to as "Truth in Negotiations Act"). This authority affords the Department a unique opportunity in a pilot setting to assess the impact(s) of raising the threshold for obtaining certified cost or pricing data from \$750,000 to \$5,000,000 on prime contracts or subcontracts.

I strongly encourage each of you to look across your contracting organizations for at least one opportunity to fully utilize/test this authority. Once you identify a candidate program, submit your nomination for my approval using the attached template. I will then issue an individual deviation for the specific purpose and prime contract identified in your submission and provide a contract clause for your use, similar to the attached draft clause. Per section 899, this pilot authority may not be used prior to October 1, 2016, but you may wish to identify candidate programs now for sole source requests for proposals you intend to issue later this year. Deviation requests should be sent to OSD Pentagon OUSD ATL Mailbox CPIC, osd.pentagon.ousd-atl.mbx.cpic@mail.mil.

I look forward to your participation in this pilot program. If you have questions or need assistance, my point of contact is Mr. Roy D. Smith, who may be reached at 703-697-0895 or Leroy.d.smith3.civ@mail.mil.

Claire M. Grady
Director, Defense Procurement
and Acquisition Policy

Attachments:
As stated

potential unfair competitive advantage conferred to technical advisors to acquisition programs.

SEC. 896. SURVEY ON THE COSTS OF REGULATORY COMPLIANCE.

(a) *SURVEY.*—The Secretary of Defense shall conduct a survey of contractors with the highest level of reimbursements for cost type contracts with the Department of Defense during fiscal year 2014 to estimate industry's cost of regulatory compliance (as a percentage of total costs) with Government-unique acquisition regulations and requirements in the categories of quality assurance, accounting and financial management, contracting and purchasing, program management, engineering, logistics, material management, property administration, and other unique requirements not imposed on contracts for commercial items.

(b) *REPORT.*—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the congressional defense committees a report on the findings of the survey conducted under subsection (a). The data received as a result of the survey and included in the report shall be aggregated to protect against the public release of proprietary information.

SEC. 897. TREATMENT OF INTERAGENCY AND STATE AND LOCAL PURCHASES WHEN THE DEPARTMENT OF DEFENSE ACTS AS CONTRACT INTERMEDIARY FOR THE GENERAL SERVICES ADMINISTRATION.

Contracts executed by the Department of Defense as a result of the transfer of contracts from the General Services Administration or for which the Department serves as an item manager for products on behalf of the General Services Administration shall not be subject to requirements under chapter 148 of title 10, United States Code, to the extent such contracts are for purchases of products by other Federal agencies or State or local governments.

SEC. 898. COMPETITION FOR RELIGIOUS SERVICES CONTRACTS.

The Department of Defense may not preclude a non-profit organization from competing for a contract for religious related services on a United States military installation.

SEC. 899. PILOT PROGRAM REGARDING RISK-BASED CONTRACTING FOR SMALLER CONTRACT ACTIONS UNDER THE TRUTH IN NEGOTIATIONS ACT.

(a) *PILOT PROGRAM AUTHORIZED.*—The Secretary of Defense may conduct a pilot program to demonstrate the efficacy of using risk-based techniques in requiring submission of data on a sampling basis for purposes of section 2306a of title 10, United States Code (popularly known as the “Truth in Negotiations Act”).

(b) *INCREASE IN THRESHOLDS.*—For purposes of a pilot program under subsection (a), \$5,000,000 shall be the threshold applicable to requirements under paragraph (1) of section 2306a(a) of such title, as follows:

(1) *The requirement under subparagraph (A) of such paragraph to submit cost or pricing data for a prime contract entered into during the pilot program period.*

(2) *The requirement under subparagraph (B) of such paragraph to submit cost or pricing data for the change or modification to a prime contract made during the pilot program period.*

(3) *The requirement under subparagraph (C) of such paragraph to submit cost or pricing data for a subcontract entered into during the pilot program period.*

(4) *The requirement under subparagraph (D) of such paragraph to submit cost or pricing data for the change or modification to a subcontract made during the pilot program period.*

(c) *RISK-BASED CONTRACTING.—*

(1) *AUTHORITY TO REQUIRE SUBMISSION OF COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—Subject to paragraph (4), when certified cost or pricing data are not required to be submitted pursuant to subsection (b) for a contract or subcontract entered into or modified during the pilot program period, such data may nevertheless be required to be submitted by the head of the procuring activity, if the head of the procuring activity—*

(A) *determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract; or*

(B) *requires the submission of such data in accordance with a risk-based contracting approach established pursuant to paragraph (3).*

(2) *WRITTEN DETERMINATION REQUIRED.—In any case in which the head of the procuring activity requires certified cost or pricing data to be submitted under paragraph (1)(A), the head of the procuring activity shall justify in writing the reason for such requirement.*

(3) *RISK-BASED CONTRACTING.—The head of an agency shall establish a risk-based sampling approach under which the submission of certified cost or pricing data may be required for a risk-based sample of contracts, the price of which is expected to exceed \$750,000 but not \$5,000,000. The authority to require certified cost or pricing data under this paragraph shall not apply to any contract of an offeror that has not been awarded, for at least the one-year period preceding the issuance of a solicitation for the contract, any other contract in excess of \$5,000,000 under which the offeror was required to submit certified cost or pricing data under section 2306a of title 10, United States Code.*

(4) *EXCEPTION.—The head of the procuring activity may not require certified cost or pricing data to be submitted under this subsection for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of section 2306a(b)(1) of title 10, United States Code.*

(5) *DELEGATION OF AUTHORITY PROHIBITED.—The head of a procuring activity may not delegate functions under this subsection.*

(d) *REPORTS.—Not later than January 1, 2017, and January 1, 2019, the Secretary of Defense shall submit to the congressional defense committees a report on activities undertaken under this section.*

(e) *DEFINITIONS.—In this section:*

(1) *HEAD OF AN AGENCY.*—The term “head of an agency” has the meaning given the term in section 2302 of title 10, United States Code.

(2) *PILOT PROGRAM PERIOD.*—The term “pilot program period” means the period beginning on October 1, 2016, and ending on September 30, 2019.

TITLE IX—DEPARTMENT OF DEFENSE ORGANIZATION AND MANAGEMENT

Sec. 901. Update of statutory specification of functions of the Chairman of the Joint Chiefs of Staff relating to joint force development activities.

Sec. 902. Sense of Congress on the United States Marine Corps.

SEC. 901. UPDATE OF STATUTORY SPECIFICATION OF FUNCTIONS OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF RELATING TO JOINT FORCE DEVELOPMENT ACTIVITIES.

Section 153(a)(5) of title 10, United States Code, is amended by adding at the end the following new subparagraph:

“(F) Advising the Secretary on development of joint command, control, communications, and cyber capability, including integration and interoperability of such capability, through requirements, integrated architectures, data standards, and assessments.”.

SEC. 902. SENSE OF CONGRESS ON THE UNITED STATES MARINE CORPS.

(a) *FINDINGS.*—Congress finds the following:

(1) As senior United States statesman Dr. Henry Kissinger wrote in testimony submitted to the Committee on Armed Services of the Senate on January 29, 2015, “The United States has not faced a more diverse and complex array of crises since the end of the Second World War.”.

(2) The rise of non-state forces and near peer competitors has introduced destabilizing pressures around the globe.

(3) Advances in information and weapons technology have reduced the time available for the United States to prepare for and respond to crises against both known and unknown threats.

(4) The importance of the maritime domain cannot be overstated. As acknowledged in the March 2015 Navy, Marine Corps, and Coast Guard maritime strategy, “A Cooperative Strategy for 21st Century Seapower: Forward, Engaged, Ready”: “Oceans are the lifeblood of the interconnected global community. . . 90 percent of trade by volume travels across the oceans. Approximately 70 percent of the world’s population lives within 100 miles of the coastline.”.

(5) The United States must be prepared to rapidly respond to crises around the world regardless of the nation’s fiscal health.

(6) In this global security environment, it is critical that the nation possess a maritime force whose mission and ethos is readiness—a fight tonight force, forward deployed, that can respond immediately to emergent crises across the full range of military operations around the globe either from the sea or home station.

(7) The need for such a force was recognized by the 82nd Congress during the Korean War, when it mandated a core mis-

Survey on the costs of regulatory compliance (sec. 896)

The Senate amendment contained a provision (sec. 879) that would require the Secretary of Defense to conduct a survey of defense contractors with the highest level of reimbursements for cost-type contracts and identify the cost to industry of regulatory compliance with government unique acquisition regulations and requirements that are not imposed on commercial item contracts.

The House bill contained no similar provision.

The House recesses with a clarifying amendment.

Treatment of interagency and State and local purchases when the Department of Defense acts as contract intermediary for the General Services Administration (sec. 897)

The House bill contained a provision (sec. 847) on the sense of Congress on the treatment of the procurement of fire hoses.

The Senate amendment contained a similar provision (sec. 830) that would clarify that the requirements under chapter 148 of title 10, United States Code would not apply to a contract executed by the Department of Defense where the Department is acting as an intermediary for the General Services Administration (GSA) for purchase of products by other federal agencies or state and local governments.

The House recesses.

The conferees note that the chapter 148 process of obtaining a domestic non-availability determination of certain products, such as fire hoses, could have a significant effect on the ability of Federal agencies to respond to natural disasters or other emergencies.

Competition for religious services contracts (sec. 898)

The Senate amendment contained a provision (sec. 829) that would ensure that non-profit organizations can compete for contracts for religious related services on a United States military installation.

The House bill contained no similar provision.

The House recesses.

Pilot program regarding risk-based contracting for smaller contract actions under the Truth In Negotiations Act (sec. 899)

The Senate amendment contained a provision (sec. 823) that would amend the Truth in Negotiations Act (Public Law 87-653; 10 U.S.C. section 2306a) to raise the threshold for the requirement to provide certified cost or pricing data in non-price competitive procurements on non-commercial items from the current \$750,000 to \$5.0 million and require the Department of Defense (DOD) to establish a risk-based contracting approach, under which certified cost or pricing data would be required for a risk-based sample of contracts, to ensure that DOD is getting fair and reasonable prices for such contracts.

The House bill contained no similar provision.

The House recesses with an amendment that would establish a pilot program to test this authority.

**Request for Approval Section 899, FY 2016 Pilot on Risk Based Technology to Require
Submission of Cost or Pricing Data**

Section 1: For the purposes of carrying out a pilot program as authorized by section 899 of the Fiscal Year 2016 National Defense Authorization Act, in which \$5,000,000 shall be the threshold applicable for obtaining certified cost or pricing data, please provide the following information:

- a. As submitted for Director, Defense Procurement and Acquisition Policy approval to participate in this pilot program:
 - (i) Program Name
 - (ii) Contract Number(s)
 - (iii) Contractor(s) Name
 - (iv) Subcontractor(s) Name
 - (v) Amount of Prime Level Award & Estimated Subcontract Price(s)

- b. Please address the following:
 - (i) Whether the Government received, within the previous 12 months, adequate certified cost or pricing data and completed cost analysis, with similar configuration, and quantity and delivery schedules.
 - (ii) Whether the price analysis demonstrates historical pricing stability with no significant expectation of future deviation.
 - (iii) Report any deficiencies with DFARS 252.215-7002 (Estimating System Requirements) or DFARS 252.242-7006 (Accounting System Administration).
 - (iv) Have contractors/subcontractors demonstrated a history of providing quality products in accordance with delivery terms?
 - (v) Have contractors/subcontractors demonstrated a history of providing data required by the contracting officer to determine the proposed prices are fair and reasonable?
 - (vi) Identify any significant previous audit findings or other required previous contract adjustments.

- c. Include a discussion of the potential for a contract or subcontract entered into or modified during the pilot program period where certified data may nevertheless be required to be submitted upon HCA determination that —
 - (i) Such data is necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract; or
 - (ii) Such data is required in accordance with a risk-based contracting approach established pursuant to section 899, paragraph (c).

Section 2: Reporting requirements for the approved programs:

- a. For any usage of this pilot program authority, submit a report to DPAP/CPIC (osd.pentagon.ousd-atl.mbx.cpic@mail.mil) by October 31, 2018. The report should include the following, at a minimum:

- (i) Extent and applicability of use to include a description of the risk-based approach taken
- (ii) Contract Number(s)
- (iii) Contractor Name(s)
- (iv) Subcontractor Name(s)
- (v) Amount of Prime-Level Award(s) & Estimated Subcontract Prices
- (vi) Savings (dollars and time) to Include the Basis for the Savings
- (vii) Lessons Learned
- (viii) Recommendations, if any, for Future Legislative Changes

Pilot Program Regarding Risk-Based Contracting For Smaller Contract Actions Under The Truth In Negotiations Act

252.215-7010 Requiring certified cost or pricing data. (DEVIATION Fiscal Year 2016-O00XX)

Include the attached clause in the contract(s) that were approved by DPAP for participation in the pilot program authorized by Section 899 of the National Defense Authorization Act and regarding risk-based contracting for smaller contract actions under the Truth in Negotiations Act. This deviation applies for the purposes of a pilot program under FAR Part 15.403-4(a)(1), in which \$5,000,000 shall be the threshold applicable for obtaining certified cost or pricing data for pricing contracts and for any price adjustment amounts considering both increases and decreases.

Requiring certified cost or pricing data. (DEVIATION 2016-O00XX)

- a. The threshold for submission of certified cost or pricing data at FAR 15.403-4 on this contract is \$5,000,000.
- b. If the Head of Contracting Activity (HCA) determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract, the HCA may determine such data may nevertheless be required to be submitted (for a contract or subcontract entered into or modified during the pilot program period). However, requiring certified cost or pricing data under this paragraph shall not apply to any contract of an offeror that has not been awarded, for at least the one-year period preceding the issuance of a solicitation for the contract, nor any other contract in excess of \$5,000,000 under which the offeror was required to submit certified cost or pricing data.
- c. If the HCA requires certified cost or pricing data to be submitted under paragraph b, the Contracting Officer will notify the contractor of this determination prior to contract negotiations.
- d. As a condition of participating in this pilot program, the contractor shall provide the contracting officer, with verifiable data documenting any savings (time or money) achieved and as a result of this pilot the basis of those savings, resulting from the higher threshold.

(End of clause)