MEMORANDUM FOR DISTRIBUTION

Subj: ACCESS TO RECORDS WITH EXCLUSIVE DISTRIBUTORS/DEALERS

Encl: (1) DPAP memo dated November 7, 2007

The Director of Defense Procurement and Acquisition Policy (DPAP) issued enclosure (1) in response to concerns that some exclusive distributors/dealers are not complying with the requirement to submit adequate information and data for determining fair and reasonable prices when the Truth In Negotiations Act (TINA) does not apply. In addition, enclosure (1) establishes a reporting requirement for contracting activities when an exclusive distributor/dealer refuses to provide requested cost data but, pursuant to FAR 15.403-3(a)(4), the head of the contracting activity (HCA) determines that it is in the best interest of the Government to make the award to that offeror.

Please remind contracting officers that distributor/dealers are responsible for supporting all costs contained within their proposals. Therefore, they must be diligent in requiring that distributors/dealers provide the necessary information and data for determining fair and reasonable prices.

Effective January 2, 2008, contracting activities are required to notify this office when the HCA has approved award of a contract, in accordance with FAR 15.403-3(a)(4), without obtaining requested cost data. The point of contact for this matter is Dwayne Weaver, who can be reached at (703) 693-4073 or via e-mail at dwayne.weaver@navy.mil.

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Distribution:
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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
(ACQUISITION), 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
(i) An exception otherwise applies to the subcontract; or
(ii) The waiver specifically includes the subcontract and the rationale supporting the waiver for that subcontract.

15.403-2 Other circumstances where cost or pricing data are not required.
(a) The exercise of an option at the price established at contract award or initial negotiation does not require submission of cost or pricing data.
(b) Cost or pricing data are not required for proposals used solely for overrun funding or interim billing price adjustments.

15.403-3 Requiring information other than cost or pricing data.
(a) General.
(1) The contracting officer is responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism, but the contracting officer should not obtain more information than is necessary (see 15.402(a)). If the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data from the offeror that is adequate to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)). Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer must require that the information submitted by the offeror include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. To determine the information an offeror should be required to submit, the contracting officer should consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7).
(2) The contractor's format for submitting the information should be used (see 15.403-5(b)(2)).
(3) The contracting officer must ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists.
(4) As specified in Section 808 of Public Law 105-261, an offeror who does not comply with a requirement to submit information for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:
(i) The effort made to obtain the data.
(ii) The need for the item or service.
(iii) Increased cost significant harm to the Government if award is not made.

(b) Adequate price competition. When adequate price competition exists (see 15.403-1(c)(1)), generally no additional information is necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional information is necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. In addition, the contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches.

(c) Commercial items.
(1) At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see 15.404-1(b)). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis (see 15.404-1).
(2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).
(i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.
(ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.
(iii) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).