



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

In reply refer to
DARS Tracking Number: 2020-O0020

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

SUBJECT: Class Deviation—Section 890 Pilot Program to Accelerate Contracting and Pricing Processes

Effective immediately, this class deviation rescinds and supersedes Class Deviation 2019-O0008, dated April 1, 2019, to further implement the pilot program authority provided by section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). For contract actions (e.g. solicitation of offers for contract award or contract modifications) approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives (PCI) for participation in the pilot program, the contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of providing complete certified cost or pricing data.

Section 890, as amended, authorizes DoD to conduct a pilot program for contract actions in excess of \$50 million, which allows price reasonableness determinations to be based on actual cost and pricing data for purchases of the same or similar products for the DoD, and a reduction of the cost and pricing data to be submitted in accordance with 10 U.S.C. 2306a. Contract actions must be approved by the Director, DPC/PCI, to participate in the Section 890 pilot program prior to the issuance of a solicitation. Contracting officers may request approval to participate in the pilot program by completing and submitting the attached application template (Attachment 1) to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil. Participating contract actions must have an anticipated value of \$50 million or more. Contract actions best suited for the pilot

program are those of a recurring nature, for which there is reliable, historical actual cost data. It is preferable to conduct these pilots with companies that have approved business systems. Additionally, while not a condition for participation, use of a fixed-price-incentive contract type can reduce the cost risk for the participating parties and provide measurable results at the conclusion of the acquisition in relation to a target cost.

For those contract actions approved by the Director, DPC/PCI, the contracting officers shall—

- Use the deviation provision provided in Attachment 2, in lieu of the basic or alternate of the provision at DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, and detail the subset of cost or pricing data and format to be required from the offeror and subcontractors to which the Section 890 pilot is flowed down, in lieu of complete cost or pricing data as defined at FAR 2.101;
- Use the deviation clause provided in Attachment 3, which will apply to modifications approved for the Section 890 pilot in lieu of FAR 52.215-21, Requirements for Certified Cost of Pricing Data—Modifications, and detail in the request for proposal for the modification the specific cost or pricing data required to be submitted by the contractor and subcontractors to which the section 890 authority is flowed down;
- Use the deviation clause 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes, provided in Attachment 4 to ensure the contractor provides information necessary to evaluate the efficacy of the pilot program; and
- Make price reasonableness determinations based primarily on contractor actual cost data on prior acquisitions, in combination with more traditional certified cost or pricing data that may be required to support aspects of the current acquisition for which the contractor's historical cost experience may not be adequately representative of the current requirement.

The contracting officer may strategically establish the extent, structure, and level of detail of the historical actual cost data the contractor will be required to submit in lieu of complete certified cost or pricing data. It will be crucial for the contracting officer and contractor to have a detailed dialogue regarding the certified cost or pricing data that will be required under the authority of the pilot, to ensure that the contractor understands the contracting officer's expectations with regard to the data necessary to support a price reasonableness determination, and the traceability of that data to the contractor's proposal. Depending on the type and level of detail of certified cost or pricing data to be required in support of specific subcontracts to which the pilot authority is flowed down, the same discussion should take place between the contracting officer, the prime contractor, and the applicable subcontractors.

Measurement of pilot results will be provided at two junctures, as described at 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (see Attachment 4). The first will be within three months after the contract action approved for participation in the pilot is placed on contract. The second will be upon completion of performance of the contract action,

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to measure how closely the actual cost of performance aligned with the acquisition team's anticipated cost. Contracting officers shall submit both sets of results to osd.pentagon.ousd-a-s-mbx.dpc-pci@mail.mil as they become available.

This class deviation remains in effect until January 2, 2023, or until otherwise rescinded. My point of contact is Ms. Sara Higgins, who is available at (703) 220-4952 or by email at sara.a.higgins2.civ@mail.mil.

Kim Herrington
Acting Principal Director,
Defense Pricing and Contracting

Attachments:
As stated

Application to Participate in the Pilot Program Authorized under Section 890 of the FY19 National Defense Authorization Act (NDAA), as amended by Section 825 of the FY20 NDAA, for contract actions that exceed \$50 million.

I. Program/Contract Information

Program Name: _____

Cognizant Contracting Activity: _____
(Buying office, Command, Department or Agency)

Description of Requirement: _____
(Product, quantity, period of performance)

Estimated value of the current requirement: _____

Anticipated contract type: _____

List of relevant prior acquisitions to be used as the basis for projecting costs of the current acquisition under the pilot program:

Acquisition 1: _____
(Name, customer, product, quantity, period of performance, contract value, contract type)

Acquisition 2: _____
(Name, customer, product, quantity, period of performance, contract value, contract type)

List the same information for additional acquisitions as appropriate.

Please discuss the extent of commonality between current and prior acquisitions. Does the current acquisition include work not required in the prior acquisitions? Did the prior acquisitions include work not required in the current buy? Are there any significant requirement changes? Were actuals from previous buys requested on these listed acquisitions? If so, how were they used in proposal evaluation and/or negotiations?

II. Prime Contractor Information

Contractor Name and Location: _____

Contractor CAGE Code: _____

Status of Contractor's Accounting System as shown in CBAR: _____

III. Notional Approach to Data Requirements for the Bill of Materials

Please complete this section if the contracting officer plans to flow down the pilot authority to some or all first tier or lower tier subcontracts.

For each of the relevant prior acquisitions listed in Section I, above, please provide the total considered negotiated material and subcontract cost, in dollars and as a percentage of the total considered negotiated cost line.

Acquisition 1: _____
(Name, considered negotiated material/subcontract cost, in dollars and as a percent of the negotiated cost line)

Acquisition 2: _____
(Name, considered negotiated material/subcontract cost, in dollars and as a percent of the negotiated cost line)

List the same information for additional acquisitions as appropriate.

Please discuss any significant issues or challenges relating to material or subcontracts which were experienced in the context of the above-listed historical acquisitions.

Please discuss the extent of commonality between current and prior acquisitions with respect to the Bill of Materials. Does the current acquisition include significant subcontracted effort not required in the prior acquisitions? Did the prior acquisitions include significant subcontract effort not required in the current buy? Are there any significant requirement changes with respect to subcontracted items? Were actuals from previous buys requested for major subcontracts? If so, how were they used in the Government's proposal evaluation and/or negotiations with the prime contractor? _____

Please describe the contracting officer's planned approach for flowing down the Section 890 pilot authority to subcontracts. Please indicate whether the intent is to apply the authority to some or all first tier subcontracts subject to the Truth in Negotiations Act; the type and extent of data to be required; and whether the authority will be flowed down to lower tier subcontracts. If the type and extent of data to be required is expected to be scaled based on subcontract dollar value or other considerations, please explain. _____

IV. Acquisition Team Information

Contracting Officer name and contact information: _____

Buyer/Contract specialist name and contact information: _____

Considerations with Respect to Type and Extent of Certified Cost or Pricing Data to Be Required

The intent of this implementation of the Section 890 pilot program is to provide the flexibility for contracting officers to strategically identify and require submission of the specific cost or pricing data, including actual cost history details, which are expected to be most relevant in establishing a fair and reasonable price for the recurring costs associated with a product which has meaningful price history under DoD acquisitions. Contracting officers requesting approval to utilize this pilot program authority should be prepared to develop a strategy which will facilitate analysis of the contractor's proposal for the current requirement, including any non-recurring or unique aspects. Considerations may include the following:

Actual costs for relevant prior acquisitions for which performance is not complete: If any of the prior acquisitions to be used to establish price reasonableness for the current requirement are not physically complete as of the date of issuance of the solicitation, the contracting officer should require the contractor to provide and support their estimate to complete (ETC). (Document the requirement in the deviation version of 252.215-7010 or the request for proposal for a contract modification in accordance with 252.215-7XXX, as applicable.) Additionally, for incomplete efforts at both the prime and the subcontract level, the contractor/subcontractor should be required to provide a data refresh prior to commencement of negotiations and prior to conclusion of negotiations between the Government and the prime. Contractor refusals to disclose ETC values should be elevated through the management chain as described in DFARS PGI 215.404-1(a)(i)(A).

Non-recurring effort: The contracting officer will need to consider non-recurring effort from two perspectives. First, the contractor should be required to separately identify the non-recurring activity performed in prior acquisitions, and provide adequate actual cost details to ensure exclusion of that cost from cost estimates for the current requirement. Secondly, the contracting officer will need to work with the contractor to identify non-recurring requirements which are part of the current acquisition. The CO must then determine the type and extent of certified cost or pricing data required to support establishment of a fair and reasonable price for that portion of the effort.

Fixed vs variable cost: Where there are quantity differences between the current requirement and the prior acquisitions to be used to establish price reasonableness, it is critical that the contracting officer take into account the impact of fixed vs variable costs. The contractor should be required to separately identify the fixed and variable components of the historical actuals, and provide the cost of each at a level of detail that will support the Government's appropriate use of the historical actuals in the evaluation of the proposed cost for the current requirement.

Changed requirements: If there are significant requirement changes between the prior acquisitions and the current requirement, the contracting officer must develop an appropriate approach for segregating the costs associated with tasks performed in the prior acquisitions that are not required in the instant effort, to ensure those costs are not projected into estimates for the current requirements. Additionally, the contracting officer must determine what cost or pricing data will be required to support new work not required or performed under the prior acquisitions.

Labor: The contracting officer will need to ensure that the contractor provides adequate insight into the composition of the historical labor actuals to inform the Government's evaluation of the proposal for the current requirement. For example, the prior actuals may need to show hours by labor category by task. Where labor hours included in the historical acquisitions were proposed based on factors, and the contractor's proposal for the current requirement is expected to use the same or similar factors, it may be useful to compare proposed factors for prior acquisitions to actual outcomes for those efforts.

Subcontracts subject to the Truth in Negotiations Act (TINA): For the purposes of this pilot, the authority provided under Section 890 of the FY19 NDAA may be flowed down to first-tier or lower-tier subcontracts subject to TINA, at the discretion of the contracting officer. This means that, for those subcontracts for which the pilot authority is flowed down, the contracting officer for acquisitions approved for participation in the pilot will need to establish the extent, structure, and level of detail of the historical actual cost data which subcontractors will be required to submit in lieu of traditional certified cost or pricing data, and must ensure that the actuals are presented in a manner that will support efficient and effective evaluation of the subcontract proposal for the current requirement. It may be useful to stratify the covered subcontracts by proposed dollar value; for a subset of the subcontracts (generally, the major subcontracts), the contracting officer may find it appropriate to require submission of actuals at a level of detail similar to the types of breakout required for the prime contractor's prior actuals. For some subcontracts it may be appropriate to obtain only limited insight into the total actuals, e.g., total cost, total labor dollars/hours, and total material. For lower dollar subcontracts, it may be appropriate to either require submission of the subcontractor's recurring actual cost for specified prior acquisitions in support of DoD contracts, or simply obtain the prime's purchase order history for the specified prior acquisitions. The contracting officer's insight into the quality of the

prime's negotiated vendor pricing in the context of the historical acquisitions may come into play in making this decision. For those subcontracts for which the pilot authority is flowed down, consideration should be given to obtaining subcontract cost breakouts segregating recurring and non-recurring effort, at a minimum. If there are significant quantity variations between the prior subcontracts and the current requirement, it may also be prudent to gain insight into the breakout of fixed and variable costs under the subcontract. Cost implications of requirement changes between the prior subcontracts and the current requirement must be considered: the cost of work performed under prior subcontracts but not currently required must be segregated in the historical actuals, while new requirements must be adequately supported in the subcontract proposal, since the cost history of prior subcontracts will not be informative with respect to the new work. The contracting officer may wish to consider whether there is benefit in requiring submission of the prime's cost analyses for select subcontracts, as these become available. In addition to the historical actuals, the contracting officer should also consider requiring the prime contractor and its subcontractors to disclose suppliers' quotes, offers, and agreed-to vendor pricing for the current requirement as those data become available.

Material and subcontracts below the TINA threshold or meeting a TINA exception: The deviation provision DFARS 252.215-7010(d)(5) and deviation clause 252.215-7XXX(c)(5) in support of this pilot address expectations with respect to subcontracts not subject to TINA. The Government has no entitlement to incurred cost data for these subcontracts. The PCO will need to consider whether data in addition to the prime contractor's purchase order history will be needed to support proposed pricing for these items. In particular, where the prime contractor has made a commerciality assertion with regard to a subcontractor, the contracting officer will need to consider whether data other than certified cost or pricing data will be required, and if so, the type and extent of data.

Interdivisional transfers: For interdivisional transfers subject to TINA, the PCO will need to determine the appropriate level of detail for supporting cost or pricing data. Considerations may include the dollar value of the interdivisional transfer and the complexity of the effort.

ODCs: While discrete ODCs are often proposed based on judgmental estimates, the contracting officer should consider whether the historical ODC cost experience from the prior acquisitions may provide an appropriate basis for projection of ODC cost for the current effort. The concepts of recurring vs non-recurring costs and fixed vs variable, discussed above, may also come into play.

Rates and factors: It may be useful to compare proposed rates and factors for prior acquisitions to actual outcomes, especially with respect to estimating factors which are not the subject of an FPRA or an FPRR. However, contracting officers would generally be expected to use prospective DCMA rate positions, when available, in the pricing of the current requirement.

Format and content of the proposal for the current requirement: The contracting officer should consider what traditional proposal content will still be required under the auspices of the Section 890 pilot, if the actual cost detail from prior acquisitions is provided, and what typical proposal content may be foregone. For example, the contractor should still be expected to submit a cost element summary at the CLIN level and in the aggregate, a priced bill of materials, and a time-phased breakdown of labor hours and rates by category. Labor basis of estimate (BOE) sheets may not be needed to support that portion of the current requirement which is identical to the requirements of prior buys, whereas the contractor should be expected to submit BOEs to support non-recurring effort which is not represented

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in the prior actuals. The contracting officer may elect to require submission of some prime cost analyses of subcontract proposals, while perhaps choosing to rely on the prime's PO history or the subcontractor's submission of prior actuals for other subcontracts. While the specifics will vary according to the circumstances of each pilot program acquisition, it is critical for the contracting officer to have a proposal evaluation plan in place in order to ensure that the optimal subset of data is obtained to permit efficient and effective proposal evaluation, negotiation, and establishment of a fair and reasonable price.

252.215-7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. (DEVIATION 2020-O0020)

Use the following deviation provision, in lieu of the basic or alternate of the provision at 252.215-7010, in solicitations that the Director, Pricing and Contracting Initiatives/Defense Pricing and Contracting, has authorized for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92).

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA (DEVIATION 2020-O0020) (AUG 2020)

(a) *Definitions.* As used in this provision—

“Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

“Non-Government sales” means sales of the supplies or services to non-Governmental entities for purposes other than governmental purposes.

“Relevant sales data” means information provided by an offeror on sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

“Sufficient non-Government sales” means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

“Uncertified cost data” means the subset of “data other than certified cost or pricing data” (see FAR 2.101) that relates to cost.

(b) *Exceptions from certified cost or pricing data.*

(1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in paragraphs (b)(1)(i) and (ii) of this provision. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted and whether the price is fair and reasonable.

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(i) *Exception for price set by law or regulation - Identification of the law or regulation establishing the price offered.* If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Commercial item exception.* For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract number and military department, defense agency, or other DoD component that rendered such determination, and if available, a Government point of contact;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror's current catalog showing the price for that item; and

(2) If the catalog pricing provided with this proposal is not consistent with all relevant sales data, a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments);

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit DoD to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.

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(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) *Requirements for certified cost or pricing data.* This acquisition is accomplished under the authority of section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) In lieu of providing complete cost or pricing data, as defined in FAR 2.101, the Offeror shall submit a subset of cost or pricing data and supporting attachments as follows: *[Contracting Officer shall list the specific cost or pricing data deemed necessary to establish price reasonableness for this acquisition, and describe the required submission format for each type of data. At a minimum, the Contracting Officer shall identify the specific prior DoD purchases of the same or similar products for which the Offeror is required to submit the actual cost of performance. The Offeror is not required to submit cost or pricing data that is not listed within this provision. If the Contracting Officer finds that additional cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer shall issue an amendment to the solicitation, revising this paragraph as needed to require the submission of the additional data.]*

(2)(i) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, using the following language:

Certificate of Current Cost or Pricing Data for Acquisitions Accomplished under the Authority of Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, as amended by Section 825 of the NDAA for FY 2020

This is to certify that, to the best of my knowledge and belief, the cost or pricing data required by the provision at 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (DEVIATION 2020-00020) of the Request for Proposal for this action, and submitted either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's Representative in support of _____* are accurate, complete, and current as of _____**. This certification includes the cost or pricing data supporting any advance

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agreements and forward pricing rate agreements between the Offeror and the Government that are part of the proposal.

Firm _____

Signature _____

Name _____

Title _____

Date of execution*** _____

* Identify the proposal involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

***Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(ii) The certificate does not constitute a representation as to the accuracy of the Offeror's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. With respect to the certified cost or pricing data required by paragraphs (c)(1) or (e) of this provision (as revised by solicitation amendment, if applicable), if the Offeror had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the Offeror's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(iii) The Contracting Officer and Offeror are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates applicable to the certified cost or pricing data required by paragraphs (c)(1) or (e) of this provision should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the Offeror's or a subcontractor's

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organization on matters significant to contractor management and to the Government will be treated as reasonably available, if that data was required to be submitted by paragraph (c)(1) or (e) of this provision. What is significant depends upon the circumstances of each acquisition.

(iv) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the Offeror's proposal.

(v) If certified cost or pricing data are requested by the Government and submitted by the Offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement in accordance with FAR 15.403-1(c)(1).

(d) *Requirements for data other than certified cost or pricing data.*

(1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: *[Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].*

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) *Subcontract price evaluation.*

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(i) The Offeror shall obtain from subcontractors the minimum information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented, but excluding paragraph (c), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(e) *Subcontracts.*

(1) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has been flowed down, in lieu of the requirements in paragraphs (a) and (b) of the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, of this solicitation, the Offeror shall require the subcontractor to submit a subset of cost or pricing data (actually or by specific identification in writing) as follows:

(i)(A) *[Contracting Officer shall add paragraphs as necessary to identify each first-tier subcontract to which the authority of the Section 890 pilot has been flowed down, and the specific certified cost or pricing data required for each subcontract. Contracting Officer shall list the specific cost or pricing data deemed necessary to determine that the price is fair and reasonable for each subcontract, and describe the required submission format for each type of data. The type and extent of data required may differ based on the dollar value of the subcontract proposal, or other appropriate considerations. At a minimum, the Contracting Officer shall identify the specific prior subcontracts awarded in support of the DoD purchases of the same or similar products for which the subcontractor is required to submit the actual cost of performance. The Contracting Officer shall specify whether the authority of the Section 890 pilot is further flowed down to any lower-tier subcontract pertaining to each first-tier subcontract. Where the pilot authority is flowed down to lower-tier subcontracts, the Contracting Officer shall describe the specific certified cost or pricing data that is to be provided by each affected lower-tier subcontractor. The subcontractor and lower tier subcontractors to which the pilot authority is flowed down are not required to submit certified cost or*

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pricing data that is not listed within this provision. If the Contracting Officer finds that additional certified cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer shall issue an amendment to the solicitation, revising this paragraph as needed to require the submission of the additional data.]

(ii) In the event a subcontractor denies the Offeror access to the data described in paragraph (e)(1)(i) of this provision, the data may be provided directly to the Contracting Officer.

(iii) If a subcontractor is unable to provide the extent of historical actual cost experience required by paragraph (e)(1)(i), then the Offeror shall require the subcontractor to provide certified cost or pricing data in accordance with paragraph (e)(2) of this clause.

(iv) The Offeror shall require the subcontractor to certify in substantially the form prescribed in paragraph (c)(2) of this provision that, to the best of its knowledge and belief, the data submitted under paragraph (e)(1)(i) of this provision were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract.

(2) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has not been flowed down, the Offeror shall require the subcontractor to provide certified cost or pricing data in accordance with the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, of this solicitation and shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of the clause at 52.215-12 were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract.

(End of provision)

252.215-7997 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program. (DEVIATION 2020-O0020)

Use the following deviation clause for contract modifications that the Director, Defense Pricing and Contracting/Pricing and Contracting Initiatives, has authorized for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). This deviation clause will apply to the modification in lieu of the basic or alternate I or IV of the clause at FAR 52.215-21.

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA—MODIFICATIONS—SECTION 890 PILOT PROGRAM (DEVIATION 2020-O0020) (AUG 2020)

This deviation clause is only applicable to contract modifications that have been approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives (PCI) for participation in the pilot program implementing section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense.

(a) *Exceptions from certified cost or pricing data.*

(1) In lieu of submitting certified cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth in Federal Acquisition Regulation (FAR) 15.403-4(a)(1) on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information described in paragraphs (a)(1)(i) and (ii) of this clause. If the threshold for submission of certified cost or pricing data specified in FAR 15.403-4(a)(1) is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable—

(i) *Identification of the law or regulation establishing the price offered.* If the price is controlled under law by periodic rulings, reviews, or similar actions of a

governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) *Information on modifications of contracts or subcontracts for commercial items.*

(A) If—

(1) The original contract or subcontract was granted an exception from certified cost or pricing data requirements because the price agreed upon was based on adequate price competition or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item; and

(2) The modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(B) For a commercial item exception, the Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification. Such information may include—

(1) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(3) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records,

documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace.

(b) *Requirements for certified cost or pricing data.* If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) In lieu of providing complete cost or pricing data in accordance with the clause at FAR 52.215-21 of this contract, the Contractor shall submit a subset of cost or pricing data, data other than certified cost or pricing data, and supporting attachments as specified by the Contracting Officer in the request for proposal for the modification. The Contracting Officer will list the specific cost or pricing data deemed necessary to establish price reasonableness for this contract modification, and describe the required submission format for each type of data. At a minimum, the Contracting Officer will identify the specific prior DoD purchases of the same or similar products for which the contractor is required to submit the actual cost of performance. The Contractor is not required to submit cost or pricing data that is not listed within the request for proposal for the modification. If the Contracting Officer finds that additional cost or pricing data are needed in order to determine that the price is fair and reasonable, the Contracting Officer will issue an amendment to the request for proposal, and the Contractor will be required to submit the additional data.

(2)(i) As soon as practicable after agreement on price, but before award (except for unpriced actions), the Contractor shall submit a Certificate of Current Cost or Pricing Data, using the following language:

Certificate of Current Cost or Pricing Data for Contract Modifications Accomplished
under the Authority of Section 890 of the National Defense Authorization Act (NDAA)
for Fiscal Year (FY) 2019, as amended by Section 825 of the NDAA for FY 2020

This is to certify that, to the best of my knowledge and belief, the cost or pricing data required for this contract modification, in accordance with the request for proposal for this contract modification and the deviation clause at 252.215-7997, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications—Section 890 Pilot Program (DEVIATION 2020-O0020), and submitted either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's Representative in support of _____* are accurate, complete, and current as of _____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the Contractor and the Government that are part of the proposal.

Firm _____

Signature _____

Name _____

Title _____

Date of execution*** _____

* Identify the proposal involved, giving the appropriate identifying number (e.g., RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(ii) The certificate does not constitute a representation as to the accuracy of the Contractor's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. With respect to the certified cost or pricing data required by paragraphs (b) or (d) of this clause, if the Contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the Contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(iii) The Contracting Officer and Contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates applicable to the certified cost or pricing data required by paragraphs (b)(1) or (d) of this clause should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the Contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available, if that data was required to be

submitted by paragraph (b)(1) or (d)(1) and (d)(2) of this clause. What is significant depends upon the circumstances of each acquisition.

(iv) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the Contractor's proposal.

(v) If certified cost or pricing data are requested by the Government and submitted by the Contractor, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

(3) The Contractor is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e., two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement in accordance with FAR 15.403-1(c)(1).

(c) *Requirements for data other than certified cost or pricing data.*

(1) Data other than certified cost or pricing data submitted in accordance with this clause shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in Defense Federal Acquisition Regulation Supplement (DFARS) 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Contractor or prospective subcontractor in its business operations.

(3) The Contractor shall provide information described as follows: *[Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3].*

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Contractor shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) *Subcontract price evaluation.*

(i) The Contractor shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Contractor relies on relevant sales data for similar items to determine the price is reasonable, the Contractor shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(d) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (d), but excluding paragraph (b), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(1) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has been flowed down, in lieu of the requirements in paragraphs (a) and (b) of the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, of this contract, the Contractor shall require the subcontractor to submit a subset of cost or pricing data (actually or by specific identification in writing) as specified in the request for proposal for the modification.

(i) The Contracting Officer will add paragraphs in the request for proposal as necessary to identify each first-tier subcontract to which the authority of the Section 890 pilot has been flowed down, and the specific certified cost or pricing data required for each subcontract. Contracting Officer will list the specific cost or pricing data deemed necessary to determine that the price is fair and reasonable for each subcontract, and describe the required submission format for each type of data. The type and extent of data required may differ based on the dollar value of the subcontract proposal, or other appropriate considerations. At a minimum, the Contracting Officer will identify the specific prior subcontracts awarded in support of the DoD purchases of the same or similar products for which the subcontractor is required to submit the actual cost of performance. The Contracting Officer will specify whether the authority of the Section 890 pilot is further flowed down to any lower-tier subcontract pertaining to each first-tier subcontract. Where the pilot authority is flowed down to lower-tier subcontracts, the Contracting Officer will describe the specific certified cost or pricing data that is to be provided by each affected lower-tier subcontractor. The subcontractor and lower tier subcontractors to which the pilot authority is flowed down are not required to submit certified cost or pricing data that is not listed within the request for proposal.

(ii) In the event a subcontractor denies the Contractor access to the data described in paragraph (d)(1)(i) of this clause, the data may be provided directly to the Contracting Officer.

(iii) If a subcontractor is unable to provide the extent of historical actual cost experience required by paragraph (d)(1)(i), then the Contractor shall require the subcontractor to provide certified cost or pricing data in accordance with paragraph (d)(2) of this clause.

(iv) The Contractor shall require the subcontractor to certify in substantially the form prescribed in paragraph (b)(2) of this clause that, to the best of its knowledge and belief, the data submitted under paragraph (d)(1)(i) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(2) For subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4 to which the authority of the Section 890 pilot has not been flowed down, the Contractor shall require the subcontractor to provide certified cost or pricing data in accordance with the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, of this contract and shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(End of clause)

Update to Section 890 Pilot Program to Accelerate Contracting and Pricing Processes

252.215-7998 Pilot Program to Accelerate Contracting and Pricing Processes. (DEVIATION 2020-O0020)

Use the following deviation clause in solicitations and resulting contracts or in a contract with a contract modification that the Director, Defense Pricing and Contracting/Pricing and Contracting Initiatives, has authorized for participation in the pilot program implementing Section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by Section 825 of the NDAA for FY 2020 (Pub. L. 116-92).

PILOT PROGRAM TO ACCELERATE CONTRACTING AND PRICING PROCESSES (DEVIATION 2020-O0020) (AUG 2020)

(a) One or more contract actions under this acquisition is accomplished under the authority of section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 825 of the NDAA for FY 2020 (Pub. L. 116-92). The intent of this pilot program is to test the efficacy of basing price reasonableness determinations primarily on actual costs of performance for prior purchases of the same or similar products for the Department of Defense.

(b) As a condition of participating in this pilot program, the Contractor shall submit to the Contracting Officer the following:

(1) Verifiable data documenting any proposal preparation and negotiation support savings (time and money) achieved as a result of this pilot program. This data shall be provided—

(i) For contracts that are subject to the pilot program, within 3 months after contract award; or

(ii) For contract modifications that are subject to the pilot program, within 3 months after execution of the modification.

(2) The actual cost of performance for the contract action that was subject to the pilot program. This information shall be provided within 3 months after completion of performance of the part of the contract action that was subject to the pilot program.

(End of clause)