

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)