ACQUISITION
TECHNOLOGY
AND LOGISTICS

JUN 15 2006

In Reply Refer to:
DAR Tracking Number: 2006-E0003

MEMORANDUM FOR CHIEF, COMMAND ACQUISITION, UNITED STATES TRANSPORTATION COMMAND

SUBJECT: Defense Transportation Coordination Initiative – Cost Accounting Standards Waiver and Related FAR Deviation Request

Under the authority granted at 48 CFR 9903.201-5(b), I hereby authorize a waiver from Cost Accounting Standards (CAS) for the Defense Transportation Coordination Initiative (DTCI) prime contract to be awarded under solicitation RFP HTC711-06-R-0001. Approval is based on the contract meeting the conditions in Attachment 1.

Under the authority in FAR 1.402 and 1.403, I also authorize an individual deviation from the FAR provisions and related clauses identified in Attachment 2. Approval is based on the contract meeting the conditions in Attachments 2 and 3.

In approving this CAS waiver and FAR deviation it is recognized that, as stated in your request at Attachment 4, the following determinations have been made:

a. Without the waiver competition would be significantly restricted and is likely to eliminate world class competitors;
b. The Management Services Contract Line Item Number (CLIN) will be competitively awarded on a firm fixed price basis without the submission of cost or pricing data. The cost reimbursable Line Haul CLIN will be based on commercial market rates without the submission of cost or pricing data; and
c. There is minimal risk associated with this waiver and deviation, but there are substantial benefits to be derived through increased competition on the initial award, and significant opportunities for operating efficiencies and cost savings.

Any questions concerning this memorandum should be addressed to Mr. John McPherson, at 703-614-4840 or via e-mail at john.mcpherson@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachments:
As stated

Approval for Waiver from Cost Accounting Standards: Defense Transportation Coordination Initiative (DTIC) Contract to be Awarded Under Solicitation RFP HTC711-06-R-0001

The subject contract action is authorized a waiver from Cost Accounting Standards (CAS) based on the 24 May 2006 request for waiver from the United States Transportation Command (USTRANSCOM) at Attachment 4, so long as the contract meets the following conditions:

1. The waiver applies to the contract and any subcontract awarded to a company business segment that is not performing on a CAS-covered contract or subcontract at the time of award.
2. Award will be made based on adequate competition and price analysis. Cost or pricing data will not be obtained.
3. The Contract Line Item Number (CLIN) for Management Services will be firm fixed price.
4. The cost reimbursement CLIN for Direct Transportation Costs (line-haul transportation rates) will be awarded based on Not To Exceed (NTE) transportation rates for all transportation routes. NTE rates will be based on existing commercially available line-haul rates.
5. The DTCI prime contractor may, at its option, compete and award subcontracts for line haul rates on frequently used transportation routes.
6. The use of a transportation broker to assist in finding the most advantageous commercial line-haul rates is reimbursable at the normal commercial rate charged by the prime contractor to its other commercial customers. However, the combined total of line haul charges and brokerage fees shall not exceed the NTE rates included in the contract as discussed in paragraph 4 above.
7. The DTCI prime contractor shall pay and be reimbursed by the Government for carrier line haul invoices. Such invoices shall reflect actual line haul costs either in accordance with fixed line-haul rates specified in subcontract agreements between the prime contractor and the carrier, or actual line-haul rates paid for each shipment. No indirect costs, profit or any other markups of the DTCI prime contractor shall be added to the actual line haul charge, with the exception of broker fees as discussed in paragraph 6 above. In any case, reimbursement to the DTCI prime contractor will be limited to the NTE rates included in the contract.
8. Contract provisions provide for access to all records necessary to ensure that the freight transportation charges invoiced are in accordance with the terms of the contract.
9. Contract provisions include FAR Part 44 Subcontracting Policies and Procedures.
10. Contract provisions provide for the application of FAR Part 31 for post-award equitable adjustments and termination settlements that are based on actual costs.

Approval for Deviation from Selected Federal Acquisition Regulations: Defense Transportation Coordination Initiative (DTCI) Contract to be Awarded Under Solicitation RFP HTC711-06-R-0001

Subject to the conditions listed below, the subject contract action is authorized an individual deviation to develop and use, without further approval, contract terms and conditions that deviate, in whole or in part, from Federal Acquisition Regulations (FAR) parts:

- FAR 16.307 and FAR clause 52.216-7, Allowable Cost and Payment
- FAR 30, and FAR clauses 52.230-2, Cost Accounting Standards and 52.230-3, Disclosure and Consistency of Cost Accounting Practices.
- FAR 31. See Conditions 2 and 8 below.
- FAR 42.703-2(f) and FAR clause 52.242-4, Certification of Final Indirect Costs.
- FAR 42.709-6 and FAR clause 52.242-3, Penalties for Unallowable Costs.
- FAR 42.802 and FAR clause 52.242-1, Notice of Intent to Disallow Costs.

Conditions of Deviation Approval.

1. Award will be made based on adequate competition and price analysis. Cost or pricing data will not be obtained.
2. Contract provisions include the use of FAR Part 31 Allowable Cost and Payment provisions in the case of post-award equitable adjustments and termination settlements that are based on actual costs.
3. The Contract Line Item Number (CLIN) for Management Services will be firm fixed price.
4. The cost reimbursement CLIN for Direct Transportation Costs (line-haul transportation rates) will be awarded based on Not To Exceed (NTE) transportation rates for all transportation routes. NTE rates will be based on existing commercially available line-haul rates.
5. The DTCI prime contractor may, at its option, compete and award subcontracts for line haul rates on frequently used transportation routes.
6. The use of a transportation broker to assist in finding the most advantageous commercial line-haul rates is reimbursable at the normal commercial rate charged by the prime contractor to its other commercial customers. However, the combined total of line haul charges and brokerage fees shall not exceed the NTE rates included in the contract as discussed in paragraph 4 above.
7. The DTCI prime contractor shall pay and be reimbursed by the Government for carrier line haul invoices. Such invoices shall reflect actual line haul costs either in accordance with fixed line-haul rates specified in subcontract agreements

between the prime contractor and the carrier, or actual line-haul rates paid for each shipment. No indirect costs, profit or any other markups of the DTCI prime contractor shall be added to the actual line haul charge, with the exception of broker fees as discussed in paragraph 6 above. In any case, reimbursement to the DTCI prime contractor will be limited to the NTE rates included in the contract.

8. To the extent any fixed prices or rates are established based on estimated costs (e.g., in lieu of competitive commercial market rates), in determining such rates, the rates shall not include the costs identified in Attachment 3 and will be subject to penalties for submission of unallowable costs.
9. Contract provisions provide for access to all records necessary to ensure that the freight transportation charges invoiced are in accordance with the terms of the contract.
10. Contract provisions include FAR Part 44 Subcontracting Policies and Procedures.

10 U.S.C 2324 (e): Specific Costs Not Allowable.

(1) The following costs are not allowable under a covered contract:

(A) Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I)   Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J)   Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(K) Costs incurred in making any payment (commonly known as a “golden parachute payment”) which is -

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor’s assets.

(L) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor’s own defects in materials or workmanship.

(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country.

(0) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k).

(P) Costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the benchmark compensation amount determined applicable for the fiscal year by the Administrator for Federal Procurement Policy under section 39 of the Office of Federal Procurement Policy Act (41 U.S.C. § 435).

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DRIVE
SCOTT AIR FORCE BASE, ILLINOIS 62225-5357

24 May 2006

MEMORANDUM FOR DIRECTOR DEFENSE PROCUREMENT AND ACQUISITION POLICY

FROM: USTRANSCOM -TCAQ

SUBJECT: Defense Transportation Coordination Initiative (DTCI) – Cost Accounting Standards (CAS) Waiver Request and Related FAR Deviation Request

1. References:

   a. DPAP/P Memo, 31 Jan 03

   b. USTRANSCOM & DPAP Teleconference, 23 Mar 06

   c. USTRANSCOM Ltr, 12 May 06

   d. USTRANSCOM, DPAP & DCAA Teleconference, 19 May 06

2. In response to the 19 May 06 teleconference (Reference d) between Defense Procurement and Acquisition Policy (DPAP)--Mr. Dave Capitano and Mr. John McPherson, USTRANSCOM representatives--Mr. Chris Harrington, Mr. Rick Cassady, Mr. Ron Toops (DCAA Liaison), and DCAA Headquarters representatives--Ms. Pat West and Ms. Fran Cornett, the attached DTCI CAS Waiver Request is forwarded for review and action. The initial teleconference (Reference b) with the same USTRANSCOM and DPAP representatives laid out the process and requirements for submission of a draft Business Case Analysis (BCA) for DTCI in support of a formal CAS waiver request. This draft BCA was transmitted via USTRANSCOM's 12 May 06 letter (Reference c) and was discussed in the 19 May 06 teleconference (Reference d).

3. It is our understanding that DPAP will review this formal request for a DTCI CAS waiver with concurrent review by DCAA Headquarters. If this review and coordination is successful, the formal CAS waiver request package will be submitted to the Director, DPAP, for a decision. Elements included in this CAS waiver request and related FAR deviations, to the extent that they have been identified at this time, are listed below. In addition, elements required by DFARS 201.4(2) – Deviations from the FAR are addressed as follows:

   a. Individual deviation from all CAS requirements per FAR Part 30, which incorporate 48 CFR 9903.201-1 (FAR Appendix Cost Accounting Preambles and Regulations) and related FAR clauses at FAR 52.230-2, Cost Accounting

Standards and FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices.

b. Individual deviation from the following FAR provisions and related clauses: 1) FAR 16.307 and FAR clause 52.216-7, Allowable Cost and Payment; 2) FAR 42.703-2(f) and FAR clause 52.242-4, Certification of Final Indirect Costs; 3) FAR 42.709-6 and FAR clause 52.242-3, Penalties for Unallowable Costs; and, 4) FAR 42.802 and FAR clause 52.242-1, Notice of Intent to Disallow Costs.

c. Individual Deviation from FAR Part 31 provisions that incorporate or duplicate CAS requirements, to include FAR Part 31.205 Selected Costs.

d. FAR 1.401(a) and 1.401(b) best categorize this FAR deviation request.

e. There will be no significant effect beyond the internal operating procedures of USTRANSCOM. If the CAS waiver and related FAR deviations are approved and implemented, significant reductions in cost and administrative impacts are likely to result. Deviations of a similar nature have been approved on prior occasions by DPAP with resulting reductions in costs and administrative burdens on contractors.

f. It is anticipated that the CAS waiver and related FAR deviations will be needed for a period of seven years beginning December 2006 and ending December 2013, assuming all DTCI contract option periods are exercised.

g. This is the first CAS waiver and related FAR deviation requests from USTRANSCOM and approval for the same has not been previously received.

h. The proposed CAS waiver and related FAR deviations have not been published in the Federal Register.

i. The proposed CAS waiver and related FAR deviations have been coordinated through USTRANSCOM JA and there are no legal objections.

j. The CAS waiver and related FAR deviations will be limited to any company operating segment that does not currently have a CAS-covered contract or subcontracts.

k. The CAS waiver and related FAR deviations apply only to the contracts awarded under the DTCI acquisition.

4. This DTCI CAS waiver request addresses the benefits and the risks of waiving CAS and related FAR Part 31 provisions for the DTCI program and was prepared to address specific elements outlined in the Reference a. Memo. Specifically, this request addresses approving CAS waivers under “exceptional circumstance” authority in accordance with the provisions of section 817 of the National Defense Authorization Act for Fiscal Year 2003. This cited authority applies only when the following determinations are made:

a. The services cannot reasonably be obtained under the contract without the granting of the waiver;

b. The price can be determined fair and reasonable without the application of the CAS; and

c. There are demonstrated benefits to granting the waiver

5. USTRANSCOM Command Acquisition representatives are prepared to respond to your questions and comments with respect to this submission. My point of contact is Chris Harrington (618-256-4300).

GAIL M. JORGENSON
Chief, Command Acquisition

Attachment:
DTCI CAS Waiver Request

cc:
DCAA HQ
ADUSD/TP(COL Robert S. Guarino)

CAS WAIVER REQUEST
DEFENSE TRANSPORTATION COORDINATION INITIATIVE (DTCI)
UNITED STATES TRANSPORTATION COMMAND– COMMAND ACQUISITION

USTRANSCOM requests a waiver from all Cost Accounting Standards (CAS) requirements and related FAR deviations to include FAR Part 31 provisions for the planned competitively awarded DTCI contract, estimated value of $1.4B over a potential seven-year contract life (three-year base period, two one-year option periods, and one one-year award term-option periods). This contract has been determined by the Contracting Officer to be non-commercial based on the significant amount of DoD-specific requirements identified in the DTCI Performance Work Statement that will directly support the national defense. Additionally, the government anticipates a significant cost savings in lower transportation rates during contract performance and has included cost-reimbursement provisions in the DTCI contract in order to take advantage of these lower transportation rates. These cost reimbursement provisions in association with the projected DTCI freight spend dollars trigger the requirement for the application of CAS. However, based on our extensive market research, requiring CAS will limit the competition significantly and will provide no added benefit to the government.

The waiver would apply to any contract or subcontract awarded to a company operating segment that is currently not performing on a CAS-covered contract at the time of award.
The nature of the DTCI contract effort, coupled with specific contract requirements of this acquisition, mitigate any increased risk that would otherwise result from a CAS waiver. The competitively awarded hybrid type contract will be divided into a firm fixed priced CLIN for management services, a cost reimbursement CLIN for direct transportation costs and an Award Fee CLIN for incentives.

Based on the initial competition and negotiation, Not To Exceed (NTE) line-haul transportation rates will be established in the contract for the various shipment modes and origin/destination points. These line-haul rates will typically be based upon miles, weight or volume (i.e., cube). These NTE line-haul rates will allow USTRANSCOM to ensure that rates used to initially obligate funds of the government at the time of shipment request, are based on competitive market line-haul rates and are reasonable. As part of a cost reimbursable CLIN, they provide the added advantage of allowing lower actual line-haul rates during contract performance after the DTCI prime contractor has optimized freight movement by consolidating loads and arranging freight movement based upon current market based transportation rates, a stated goal of DTCI. The CAS waiver will allow use of FAR Part 15 cost reimbursement contracting provisions without the burden of CAS requirements. These FAR Part 15 cost reimbursement provisions will allow the DoD to benefit from cost savings due to freight consolidation and optimization, that otherwise are not obtainable today under firm fixed price contracting methods to include those utilizing FAR Part 12 procedures.

There are two potential processes that the DTCI prime contractor may follow when acquiring transportation services under the contract:

1. The DTCI prime contractor is responsible for the FFP management services under the contract to include arranging the actual freight shipment. The DTCI prime contractor will be required to perform an in-house evaluation, to include assessing the most effective and efficient mode of shipment considering the delivery requirements, as well as a competitive evaluation to ensure the transportation line-haul rates are at or below current commercial rates for the mode of shipment. The NTE line-haul rates to be used by the DTCI prime contractor, which will result in the initial obligation of funds for the government, must be approved by the contracting officer. The DTCI prime contractor will typically subcontract freight shipments to other commercial carriers. The line-haul rates for those shipments will either be determined based upon competing subcontractors for the immediate shipment or firm fixed line-haul rates based on the terms of a commercial agreement already in place, for a specified period and for minimum freight capacity, with a subcontractor where the agreement was initially awarded based upon competition. Again, the line-haul rates cannot exceed the NTE rates for line-haul established in the contract.
2. The DTCI prime contractor may use a broker (in-house or external) to find the most reasonable commercial line-haul rate, and will pay a broker fee that is consistent with the commercial practice of using a broker, and the fee will be the normal commercial broker fee charged to other commercial customers. In any case, the line-haul rates (including the broker fee) cannot exceed the NTE rates for line-haul that were established based on the initial competition and evaluated against current market rate trends in the industry. The DTCI prime contractor, in the case of an asset-based 3PL, may also use intra-company assets to arrange the movement of freight but the line-haul rates established by this separate business unit will be competed with external market line-haul rates based upon the current commercial practice in place today with asset-based 3PLs.

The contract will also have performance metrics that incentivize cost savings. The DTCI contract will include a cost savings key performance indicator requiring the contractor to meet or exceed specified cost savings objectives for each year of the contract, after establishment of a one-year performance baseline. The contractor will be provided with additional incentive for exceeding the cost reduction objective via an Award Fee Plan criterion. The methodology for determining cost savings will include agreeing upon some baseline of freight volume for specified lanes and comparing the consolidation results and savings in line-haul rates by the DTCI contractor.

For the cost reimbursement CLIN, the DTCI prime contractor will be required to submit monthly invoices based on the application of the competitive commercial line-haul rates described above. To be allowable, the DTCI prime contractor must pay the carrier invoices and the payments must be in accordance with either the fixed line-haul rates per the subcontract agreement between the DTCI prime contractor and the carrier or current market based line-haul rates obtainable at the time of shipment. There will be no indirect costs, nor profit or any other markups applied by the DTCI prime contractor with the exception of broker fees as previously discussed.

DTCI contract provisions will provide for auditing of the cost reimbursement CLIN to ensure that the freight transportation charges invoiced are reasonable costs. This will include ensuring that the freight transportation charges are allocable to the DTCI contract, the transportation line-haul rates were determined reasonable by the DTCI contractor and are otherwise compliant with the DTCI contract requirements. The tests for reasonableness will include analysis of the documentation supporting invoiced transportation line-haul rates to ensure they were competitively priced per current subcontract carrier agreements or competitively obtained on the current transportation market via published rate tenders on file or other market based rate determinations. In addition, documentation in support of price analysis techniques that support price reasonableness determinations for transportation rates will be evaluated. Any DTCI CLIN 0002 direct freight transportation costs billed to the government and subsequently determined unallowable will be recouped via payment demand and/or payment offset provisions included in the DTCI contract.

DTCI contract provisions will also include FAR Part 44 Subcontracting Policies and Procedures to include Contractors Purchasing System Reviews, as well as the DFARS 215 estimating system requirements as applicable. Necessary purchasing system controls applicable to the DTCI prime contractor include make or buy decisions, selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placement and administration of orders and the expedited delivery of materials. Necessary estimating system controls include an estimating system that addresses and ensures responsibility for review and analysis of the reasonableness of subcontract prices.

It should also be noted that contract provisions will be included requiring the use of FAR Part 31 Allowable Cost and Payment provisions in the case of post-award equitable adjustments and termination settlements which require negotiation based upon actual costs.

In establishing contract price, certified cost or pricing data will not be obtained. Award will be made based on adequate competition, price analysis and cost realism analysis using data on existing commercial rates for transportation services.

The DTCI acquisition is the first attempt by the DoD to acquire the services of a world-class coordinator of transportation management services, or a third party logistics (3PL) provider as they are commonly referred to in the industry, on a large scale across the DoD enterprise. The DoD awarded a Part 12 commercial contract (Southeast prototype) to Eagle Global Logistics on 30 March 2001 for freight management services to be provided in the Southeastern United States (Alabama, Florida and Georgia). Services obtained under this contract were limited in scope and were not of the magnitude of those to be obtained under the DTCI effort. The results of this prototype contract indicated that there were potential benefits to be realized by the DoD, should a more comprehensive set of requirements be identified and acquired, that would leverage the DoD enterprise and provide direct support to the warfighter.

Based upon the extensive market research performed for the DTCI acquisition, it is clear that the ability to reasonably obtain DTCI services would be impacted without a waiver being granted. Without it, restricted competition would likely result due to offerors changing their proposal strategies in an attempt to avoid CAS compliance, or not bid at all, particularly for those top 3PL providers most important to the DTCI competition. Significant increased proposal costs would directly result from offerors proposing the additional costs necessary for CAS compliance, as well as a potential reduction in technical abilities, since some very capable and more technologically advanced contractors would choose not to bid. Increased costs could also result from companies changing proposal strategies to avoid CAS compliance by subcontracting on a commercial item basis to a CAS compliant prime contractor. The additional overhead costs associated with this strategy could be significant.

There is also no significant value in applying CAS to this procurement. The fixed price management services line item will be negotiated on a competitive basis without the submission of cost or pricing data. If this was the entire contract, then it would be exempt from the application of CAS under the current exemption at 9903.201-1(b)(15). However, due to the hybrid nature of this contract - FFP and cost reimbursable CLINS – and the estimated dollar value of freight spend this effort is not exempt from CAS.

The cost reimbursement line item will be reimbursed based on the actual line-haul rates paid to the transportation carriers (with no application of indirect costs by the DTCI prime contractor). These reimbursable costs are based on fixed transportation line-haul rates established by competition and/or the commercial market place, and represent the actual rates reimbursed by the DTCI prime contractor to the freight carrier. These fixed transportation rates will be specified in an agreement between the DTCI prime contractor and the carrier as is done in the normal competitive marketplace. Thus, there is no benefit to applying CAS, since neither the accounting practices of the DTCI prime contractor or of the carriers are used in determining the reimbursable amount. In fact, even if CAS were applied, we would not expect any resulting cost impacts. The cost impact under CAS is computed based on the difference between the amount that was paid using a noncompliant practice and the amount that would have been paid had the contractor used a compliant practice. Since the Government did not rely on the contractor's accounting practices in pricing or reimbursing the contract, a cost impact would not result.

In summary, there is minimal risk associated with this waiver, but there are substantial benefits to be derived through increased competition on the initial award and significant opportunities for overall transportation cost savings for DTCI during contract performance. Cost risk mitigation provisions incorporated into the DTCI contract include: establishment of NTE transportation rates; invoice/payment auditing of transportation rates for allowability; exclusion of any indirect costs or markups on top of direct freight transportation charges; inclusion of FAR Part 44 Subcontracting/Contractor Purchasing System Review controls and DFARS 215 estimating system controls; and, inclusion of Award Fee Plan provisions which include incentives for achieving overall lower transportation costs.