

multiyear contracting for that program and that any such request by the President was to include details about the request for a multiyear contract, including details about the negotiated contract terms and conditions, was repealed and restated as subsec. (h)(11) of this section by Pub. L. 101-189, §805(b), (c).

TECHNICAL DATA AND COMPUTER SOFTWARE PACKAGES; PROCUREMENT; CONTRACTING PERIOD; DEFERRED ORDERING CLAUSE; EXEMPTIONS; REPORT TO CONGRESSIONAL COMMITTEES; DEFINITIONS

Pub. L. 94-361, title VIII, §805, July 14, 1976, 90 Stat. 932, required that military contracts entered into during Oct. 1, 1976 to Sept. 30, 1978 for development or procurement of a major system include a deferred ordering clause with an option to purchase from the contractor technical data and computer software packages relating to the system, directed that such clause require such packages to be sufficiently detailed so as to enable procurement of such system or subsystem from another contractor, authorized that a particular contract may be exempted from the deferred ordering clause if the procuring authority reports to the House and Senate Committees on Armed Services his intent to so contract with an explanation for the exemption, and set out definitions for "major system", "deferred ordering", and "technical data".

§ 2306a. Cost or pricing data: truth in negotiations

(a) REQUIRED COST OR PRICING DATA AND CERTIFICATION.—(1) The head of an agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures that is only expected to receive one bid shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after June 30, 2018, the price of the contract to the United States is expected to exceed \$2,000,000; and

(ii) in the case of a prime contract entered into on or before June 30, 2018, the price of the contract to the United States is expected to exceed \$750,000.

(B) The contractor for a prime contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed \$2,000,000;

(ii) in the case of a change or modification made after July 1, 2018, to a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed \$750,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed \$750,000.

(C) An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and—

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed \$2,000,000;

(ii) in the case of a subcontract entered into after July 1, 2018, under a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed \$2,000,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed \$750,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed \$2,000,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed \$750,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted—

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under that paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before June 30, 2018, the head of the agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1).

All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted in accordance with section 1908 of title 41.

(b) EXCEPTIONS.—

(1) IN GENERAL.—Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

- (i) adequate competition that results in at least two or more responsive and viable competing bids; or
- (ii) prices set by law or regulation;

(B) for the acquisition of a commercial product or a commercial service;

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination; or

(D) to the extent such data—

(i) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and

(ii) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract.

(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES.—In the case of a modification of a contract or subcontract for a commercial product or commercial services that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial product or commercial services to a contract or subcontract for the acquisition of an item other than a commercial product or commercial services.

(3) NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL PRODUCTS.—(A) The exception in paragraph (1)(B) does not apply to cost or pricing data on noncommercial modifications of a commercial product that are expected to cost, in the aggregate, more than the amount specified in subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7), or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.

(B) In this paragraph, the term “non-commercial modification”, with respect to a

commercial product, means a modification of such product that is not a modification described in section 103(3)(A) of title 41.

(C) Nothing in subparagraph (A) shall be construed—

(i) to limit the applicability of the exception in subparagraph (A) or (C) of paragraph (1) to cost or pricing data on a noncommercial modification of a commercial product; or

(ii) to require the submission of cost or pricing data on any aspect of an acquisition of a commercial product other than the cost and pricing of noncommercial modifications of such product.

(4) COMMERCIAL PRODUCT OR COMMERCIAL SERVICE DETERMINATION.—(A) For purposes of applying the exception under paragraph (1)(B) to the required submission of certified cost or pricing data, the contracting officer may presume that a prior commercial product or commercial service determination made by a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such product or service.

(B) If the contracting officer does not make the presumption described in subparagraph (A) and instead chooses to proceed with a procurement of a product or service previously determined to be a commercial product or a commercial service using procedures other than the procedures authorized for the procurement of a commercial product or a commercial service, as the case may be, the contracting officer shall request a review of the commercial product or commercial service determination by the head of the contracting activity.

(C) Not later than 30 days after receiving a request for review of a determination under subparagraph (B), the head of a contracting activity shall—

(i) confirm that the prior determination was appropriate and still applicable; or

(ii) issue a revised determination with a written explanation of the basis for the revision.

(5) A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial products or commercial services in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions.

(6) DETERMINATION BY PRIME CONTRACTOR.—A prime contractor required to submit certified cost or pricing data under subsection (a) with respect to a prime contract shall be responsible for determining whether a subcontract under such contract qualifies for an exception under paragraph (1)(A) from such requirement.

(c) COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—

(1) AUTHORITY TO REQUIRE SUBMISSION.—Subject to paragraph (2), when certified cost or

pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) EXCEPTION.—The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

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

(d) SUBMISSION OF OTHER INFORMATION.—

(1) AUTHORITY TO REQUIRE SUBMISSION.—When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the offeror shall be required to submit to the contracting officer data other than certified cost or pricing data (if requested by the contracting officer), to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement. If the contracting officer determines that the offeror does not have access to and cannot provide sufficient information on prices for the same or similar items to determine the reasonableness of price, the contracting officer shall require the submission of information on prices for similar levels of work or effort on related products or services, prices for alternative solutions or approaches, and other information that is relevant to the determination of a fair and reasonable price. Contracting officers shall not determine the price of a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government.

(2) INELIGIBILITY FOR AWARD.—(A) In the event the contracting officer is unable to determine proposed prices are fair and reasonable by any other means, an offeror who fails to make a good faith effort to comply with a reasonable request to submit data in accordance with paragraph (1) is ineligible for award unless the head of the contracting activity, or the designee of the head of contracting activity, determines that it is in the best interest of the Government to make the award to that

offeror, based on consideration of pertinent factors, including the following:

(i) The effort to obtain the data.

(ii) Availability of other sources of supply of the item or service.

(iii) The urgency or criticality of the Government's need for the item or service.

(iv) Reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract based on information available to the contracting officer.

(v) Rationale or justification made by the offeror for not providing the requested data.

(vi) Risk to the Government if award is not made.

(B)(i) Any new determination made by the head of the contracting activity under subparagraph (A) shall be reported to the Principal Director, Defense Pricing and Contracting on a quarterly basis.

(ii) The Under Secretary of Defense for Acquisition and Sustainment, or a designee, shall produce an annual report identifying offerors that have denied multiple requests for submission of uncertified cost or pricing data over the preceding three-year period, but nevertheless received an award. The report shall identify products or services offered by such offerors that should undergo should-cost analysis. The Secretary of Defense may include a notation on such offerors in the system used by the Federal Government to monitor or record contractor past performance. The Under Secretary shall assess the extent to which these offerors are sole source providers within the defense industrial base and shall develop strategies to incentivize new entrants into the industrial base to increase the availability of other sources of supply for the product or service.

(3) LIMITATIONS ON AUTHORITY.—The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial products or commercial services.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial products or commercial services from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial products or commercial services that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

(e) PRICE REDUCTIONS FOR DEFECTIVE COST OR PRICING DATA.—(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such

price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that—

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost and pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2).

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if—

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if—

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(f) INTEREST AND PENALTIES FOR CERTAIN OVERPAYMENTS.—(1) If the United States makes an overpayment to a contractor under a contract subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States—

(A) for interest on the amount of such overpayment, to be computed—

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(g) RIGHT OF UNITED STATES TO EXAMINE CONTRACTOR RECORDS.—For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, the head of an agency shall have the authority provided by section 2313(a)(2) of this title.

(h) DEFINITIONS.—In this section:

(1) COST OR PRICING DATA.—The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) SUBCONTRACT.—The term “subcontract” includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(Added Pub. L. 99-500, §101(c) [title X, §952(a)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-166, and Pub.

L. 99-591, § 101(c) [title X, § 952(a)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-166; Pub. L. 99-661, div. A, title IX, formerly title IV, § 952(a), Nov. 14, 1986, 100 Stat. 3945, renumbered title IX, Pub. L. 100-26, § 3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 100-180, div. A, title VIII, § 804(a), (b), Dec. 4, 1987, 101 Stat. 1125; Pub. L. 101-510, div. A, title VIII, § 803(a)(1), (d), Nov. 5, 1990, 104 Stat. 1589, 1590; Pub. L. 102-25, title VII, § 701(b), (f)(8), Apr. 6, 1991, 105 Stat. 113, 115; Pub. L. 102-190, div. A, title VIII, § 804(a)-(c)(1), title X, § 1061(a)(9), Dec. 5, 1991, 105 Stat. 1415, 1416, 1472; Pub. L. 103-355, title I, §§ 1201-1209, Oct. 13, 1994, 108 Stat. 3273-3277; Pub. L. 104-106, div. D, title XLII, § 4201(a), title XLIII, § 4321(a)(2), (b)(7), Feb. 10, 1996, 110 Stat. 649, 671, 672; Pub. L. 104-201, div. A, title X, § 1074(a)(12), Sept. 23, 1996, 110 Stat. 2659; Pub. L. 105-85, div. A, title X, § 1073(a)(46), Nov. 18, 1997, 111 Stat. 1902; Pub. L. 105-261, div. A, title VIII, §§ 805(a), 808(a), Oct. 17, 1998, 112 Stat. 2083, 2085; Pub. L. 108-375, div. A, title VIII, § 818(a), Oct. 28, 2004, 118 Stat. 2015; Pub. L. 110-181, div. A, title VIII, § 814, Jan. 28, 2008, 122 Stat. 222; Pub. L. 111-350, § 5(b)(15), Jan. 4, 2011, 124 Stat. 3843; Pub. L. 113-291, div. A, title X, § 1071(a)(3), Dec. 19, 2014, 128 Stat. 3504; Pub. L. 114-92, div. A, title VIII, §§ 812, 851(b), 852(e), 853, Nov. 25, 2015, 129 Stat. 891, 916, 918, 919; Pub. L. 114-328, div. A, title VIII, § 822, Dec. 23, 2016, 130 Stat. 2276; Pub. L. 115-91, div. A, title VIII, § 811(a)(1), (b), Dec. 12, 2017, 131 Stat. 1459; Pub. L. 115-232, div. A, title VIII, § 836(c)(5), Aug. 13, 2018, 132 Stat. 1865; Pub. L. 116-92, div. A, title VIII, § 803, Dec. 20, 2019, 133 Stat. 1483.)

REFERENCES IN TEXT

Section 6621 of the Internal Revenue Code of 1986, referred to in subsec. (f)(1)(A)(ii), is classified to section 6621 of Title 26, Internal Revenue Code.

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500. Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 added identical sections.

AMENDMENTS

2019—Subsec. (d)(1). Pub. L. 116-92, § 803(1), inserted at end “Contracting officers shall not determine the price of a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government.”

Subsec. (d)(2), (3). Pub. L. 116-92, § 803(2), (3), added par. (2) and redesignated former par. (2) as (3).

2018—Subsec. (b)(1)(B). Pub. L. 115-232, § 836(c)(5)(A)(i), substituted “a commercial product or a commercial service” for “a commercial item”.

Subsec. (b)(2). Pub. L. 115-232, § 836(c)(5)(A)(ii), in heading, substituted “commercial products or commercial services” for “commercial items” and, in text, substituted “commercial product or commercial services” for “commercial item” wherever appearing.

Subsec. (b)(3). Pub. L. 115-232, § 836(c)(5)(A)(iii), in heading, substituted “commercial products” for “commercial items” and, in text, substituted “product” for “item” wherever appearing.

Subsec. (b)(4). Pub. L. 115-232, § 836(c)(5)(A)(iv)(I), substituted “Commercial product or commercial service” for “Commercial item” in heading.

Subsec. (b)(4)(A). Pub. L. 115-232, § 836(c)(5)(A)(iv)(II)-(IV), struck out “commercial item” after “applying the” and substituted “prior commercial product or commercial service determination” for “prior commercial item determination” and “of such product or service” for “of such item”.

Subsec. (b)(4)(B). Pub. L. 115-232, § 836(c)(5)(A)(iv)(V)-(VII), substituted “of a product or

service previously determined to be a commercial product or a commercial service using procedures other than the procedures authorized for the procurement of a commercial product or a commercial service, as the case may be, the contracting officer shall request a review of the commercial product or commercial service determination” for “of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination”.

Subsec. (b)(4)(C). Pub. L. 115-232, § 836(c)(5)(A)(iv)(VIII), struck out “commercial item” before “determination” in introductory provisions.

Subsec. (b)(5). Pub. L. 115-232, § 836(c)(5)(A)(v), substituted “commercial products or commercial services” for “commercial items”.

Subsec. (d)(2), (3). Pub. L. 115-232, § 836(c)(5)(B), which directed the amendment of par. (2) by substituting “commercial products or commercial services” for “commercial items” wherever appearing, effective Jan. 1, 2020, was executed to par. (3) to reflect the probable intent of Congress and the intervening amendment by Pub. L. 116-92, which redesignated par. (2) as (3), effective Dec. 20, 2019. See 2019 Amendment note above.

Subsec. (h)(2). Pub. L. 115-232, § 836(c)(5)(C)(i), substituted “commercial products or commercial services” for “commercial items”.

Subsec. (h)(3). Pub. L. 115-232, § 836(c)(5)(C)(ii), struck out par. (3) which defined “commercial item”.

2017—Subsec. (a)(1)(A)(i). Pub. L. 115-91, § 811(a)(1)(A), (D)(i), substituted “June 30, 2018” for “December 5, 1990” and “\$2,000,000” for “\$500,000”.

Subsec. (a)(1)(A)(ii). Pub. L. 115-91, § 811(a)(1)(A), (C), substituted “June 30, 2018” for “December 5, 1990” and “\$750,000” for “\$100,000”.

Subsec. (a)(1)(B)(i). Pub. L. 115-91, § 811(a)(1)(D)(i), substituted “\$2,000,000” for “\$500,000”.

Subsec. (a)(1)(B)(ii). Pub. L. 115-91, § 811(a)(1)(A), (B), (D)(ii), substituted “July 1, 2018” for “December 5, 1991”, “June 30, 2018” for “December 5, 1990”, and “\$750,000” for “\$500,000”.

Subsec. (a)(1)(B)(iii). Pub. L. 115-91, § 811(a)(1)(C), substituted “\$750,000” for “\$100,000”.

Subsec. (a)(1)(C)(i). Pub. L. 115-91, § 811(a)(1)(D)(i), substituted “\$2,000,000” for “\$500,000”.

Subsec. (a)(1)(C)(ii). Pub. L. 115-91, § 811(a)(1)(A), (B), (D)(i), substituted “July 1, 2018” for “December 5, 1991”, “June 30, 2018” for “December 5, 1990”, and “\$2,000,000” for “\$500,000”.

Subsec. (a)(1)(C)(iii). Pub. L. 115-91, § 811(a)(1)(C), substituted “\$750,000” for “\$100,000”.

Subsec. (a)(1)(D)(i). Pub. L. 115-91, § 811(a)(1)(D)(i), substituted “\$2,000,000” for “\$500,000”.

Subsec. (a)(1)(D)(ii). Pub. L. 115-91, § 811(a)(1)(C), substituted “\$750,000” for “\$100,000”.

Subsec. (a)(6). Pub. L. 115-91, § 811(a)(1)(A), (E), amended par. (6) identically, substituting “June 30, 2018” for “December 5, 1990”.

Subsec. (a)(7). Pub. L. 115-91, § 811(a)(1)(F), substituted “in accordance with section 1908 of title 41.” for “to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.”

Subsec. (d)(1). Pub. L. 115-91, § 811(b), substituted “the offeror shall be required to submit to the contracting officer data other than certified cost or pricing data (if requested by the contracting officer), to the extent necessary” for “the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary”.

2016—Subsec. (a)(1)(A). Pub. L. 114-328, § 822(1), inserted “that is only expected to receive one bid” after “entered into using procedures other than sealed-bid procedures” in introductory provisions.

Subsec. (b)(1)(A)(i). Pub. L. 114-328, § 822(2)(A), substituted “competition that results in at least two or

more responsive and viable competing bids” for “price competition”.

Subsec. (b)(6). Pub. L. 114-328, §822(2)(B), added par. (6).

2015—Subsec. (b)(1)(D). Pub. L. 114-92, §812, added subpar. (D).

Subsec. (b)(4). Pub. L. 114-92, §851(b), added par. (4).

Subsec. (b)(5). Pub. L. 114-92, §853, added par. (5).

Subsec. (d)(1). Pub. L. 114-92, §852(e), inserted at end “If the contracting officer determines that the offeror does not have access to and cannot provide sufficient information on prices for the same or similar items to determine the reasonableness of price, the contracting officer shall require the submission of information on prices for similar levels of work or effort on related products or services, prices for alternative solutions or approaches, and other information that is relevant to the determination of a fair and reasonable price.”

2014—Subsec. (b)(3)(B). Pub. L. 113-291 substituted “section 103(3)(A) of title 41” for “section 4(12)(C)(i) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(C)(i))”.

2011—Subsec. (h)(3). Pub. L. 111-350 substituted “section 103 of title 41” for “section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))”.

2008—Subsec. (b)(3)(A). Pub. L. 110-181 substituted “the amount specified in subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7),” for “\$500,000” and inserted “(at the time of contract award)” after “total price of the contract”.

2004—Subsec. (b)(3). Pub. L. 108-375 added par. (3).

1998—Subsec. (a)(5). Pub. L. 105-261, §805(a), amended par. (5) generally. Prior to amendment, par. (5) read as follows: “For purposes of paragraph (1)(C), a contractor or subcontractor granted a waiver under subsection (b)(1)(C) shall be considered as having been required to make available cost or pricing data under this section.”

Subsec. (d)(1). Pub. L. 105-261, §808(a), substituted “the contracting officer shall require that the data submitted” for “the data submitted shall”.

1997—Subsec. (a)(5). Pub. L. 105-85 substituted “subsection (b)(1)(C)” for “subsection (b)(1)(B)”.

1996—Subsec. (b). Pub. L. 104-106, §4321(a)(2), made technical correction to directory language of Pub. L. 103-355, §1202(a). See 1994 Amendment note below.

Pub. L. 104-106, §4201(a)(1), amended subsec. (b) generally, revising and restating as pars. (1) and (2) the provisions of former pars. (1) and (2) and striking out par. (3).

Subsec. (c). Pub. L. 104-106, §4201(a)(1), amended subsec. (c) generally, revising and restating as subsec. (c) the provisions of former subsec. (c)(1).

Subsec. (d). Pub. L. 104-106, §4321(b)(7)(A), which directed amendment of subsec. (d)(2)(A)(ii), by inserting “to” after “The information referred”, could not be executed because subsec. (d)(2)(A) did not contain a cl. (ii) or the language “The information referred” subsequent to amendment by Pub. L. 104-106, §4201(a)(1). See below.

Pub. L. 104-106, §4201(a)(1), amended subsec. (d) generally, revising and restating as pars. (1) and (2) provisions of former subssecs. (c)(2) and (d)(2), (4) and striking out provisions of former subsec. (d)(1), (3) relating to procurements based on adequate price competition and authority to audit.

Subsec. (e)(4)(B)(ii). Pub. L. 104-106, §4321(b)(7)(B), struck out second comma after “parties”.

Subsec. (h). Pub. L. 104-106, §4201(a)(2), redesignated subsec. (i) as (h) and struck out former subsec. (h) which read as follows: “REQUIRED REGULATIONS.—The Federal Acquisition Regulation shall contain provisions concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) (as adjusted pursuant to paragraph (7) of such subsection).

Such information, at a minimum, shall include appropriate information on the 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 proposed contract or subcontract for the procurement.”

Subsec. (h)(3). Pub. L. 104-201 inserted “(41 U.S.C. 403(12))” before period at end.

Subsec. (i). Pub. L. 104-106, §4201(a)(2)(B), redesignated subsec. (i) as (h).

Subsec. (i)(3). Pub. L. 104-106, §4321(b)(7)(C), which directed amendment of subsec. (i)(3) by inserting “(41 U.S.C. 403(12))” before period at end, could not be executed because section did not contain a subsec. (i) subsequent to the amendment by Pub. L. 104-106, §4201(a)(2)(B), redesignating subsec. (i) as (h). See above.

1994—Subsec. (a)(1)(A)(i). Pub. L. 103-355, §1201(a)(1), struck out “and before January 1, 1996,” after “December 5, 1990.”

Subsec. (a)(1)(A)(ii). Pub. L. 103-355, §1201(a)(2), struck out “or after December 31, 1995,” after “December 5, 1990.”

Subsec. (a)(5). Pub. L. 103-355, §1202(b), substituted “subsection (b)(1)(B)” for “subsection (b)(2)”.

Subsec. (a)(6). Pub. L. 103-355, §1201(c), struck out subpar. (A) designation and subpar. (B) which read as follows: “The head of an agency is not required to modify a contract under subparagraph (A) if that head of an agency determines that the submission of cost or pricing data with respect to that contract should be required under subsection (c).”

Subsec. (a)(7). Pub. L. 103-355, §1201(b), added par. (7).

Subsec. (b). Pub. L. 103-355, §1202(a), as amended by Pub. L. 104-106, §4321(a)(2), amended heading and text of subsec. (b) generally. Prior to amendment, text read as follows: “This section need not be applied to a contract or subcontract—

“(1) for which the price agreed upon is based on—

“(A) adequate price competition;

“(B) established catalog or market prices of commercial items sold in substantial quantities to the general public; or

“(C) prices set by law or regulation; or

“(2) in an exceptional case when the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.”

Subsec. (c). Pub. L. 103-355, §1203, amended heading and text of subsec. (c) generally. Prior to amendment, text read as follows: “When cost or pricing data are not required to be submitted by subsection (a), such data may nevertheless be required to be submitted by the head of the agency if the head of the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract. In any case in which the head of the agency requires such data to be submitted under this subsection, the head of the agency shall document in writing the reasons for such requirement.”

Subsec. (d). Pub. L. 103-355, §1204, added subsec. (d) and redesignated former subsec. (d) as (e).

Subsec. (e). Pub. L. 103-355, §1204(1), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(4)(A)(ii), (B)(ii). Pub. L. 103-355, §1207, inserted “or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties,” after “(or price of the modification)”.

Subsec. (f). Pub. L. 103-355, §1204(1), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(1). Pub. L. 103-355, §1209, struck out “with the Department of Defense” before “subject to this section” in introductory provisions.

Subsec. (g). Pub. L. 103-355, §1205, added subsec. (g) and struck out heading and text of former subsec. (g). Text read as follows:

“(1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting

through any authorized representative of the head of the agency who is an employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to—

- “(A) the proposal for the contract or subcontract;
- “(B) the discussions conducted on the proposal;
- “(C) pricing of the contract or subcontract; or
- “(D) performance of the contract or subcontract.

“(2) The right of the head of an agency under paragraph (1) shall expire three years after final payment under the contract or subcontract.

“(3) In this subsection, the term ‘records’ includes books, documents, and other data.”

Pub. L. 103-355, §1204(1), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (i).

Subsec. (h). Pub. L. 103-355, §1206, added subsec. (h).

Subsec. (i). Pub. L. 103-355, §1208, amended heading and text of subsec. (i) generally. Prior to amendment, text read as follows: “In this section, the term ‘cost or pricing data’ means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.”

Pub. L. 103-355, §1204(1), redesignated subsec. (g) as (i).

1991—Subsec. (a)(1)(A). Pub. L. 102-190, §804(a), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of the contract if the price of the contract to the United States is expected to exceed \$500,000 or, in the case of a contract to be awarded after December 31, 1995, \$100,000.”

Subsec. (a)(1)(B). Pub. L. 102-190, §804(a), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: “The contractor for a contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if the price adjustment is expected to exceed the dollar amount applicable under subparagraph (A) to that contract (or such lesser amount as may be prescribed by the head of the agency).”

Pub. L. 102-25, §701(b)(1), substituted “the dollar amount applicable under subparagraph (A) to that contract” for “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to a contract to be made after December 31, 1995, \$100,000”.

Subsec. (a)(1)(C). Pub. L. 102-190, §804(a), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: “An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if—

“(i) the price of the subcontract is expected to exceed the dollar amount applicable under subparagraph (A) to the prime contract of that subcontract; and

“(ii) the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section.”

Subsec. (a)(1)(C)(i). Pub. L. 102-25, §701(b)(2), substituted “the dollar amount applicable under subparagraph (A) to the prime contract of that subcontract” for “\$500,000 or, in the case of a subcontract to be awarded after December 31, 1995, \$100,000”.

Subsec. (a)(1)(D). Pub. L. 102-190, §804(a), amended subpar. (D) generally. Prior to amendment, subpar. (D) read as follows: “The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if the price adjustment is expected to exceed the dollar amount applicable under subparagraph (A) to the prime contract of that

subcontract (or such lesser amount as may be prescribed by the head of the agency).”

Pub. L. 102-25, §701(b)(3), substituted “the dollar amount applicable under subparagraph (A) to the prime contract of that subcontract” for “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to be made after December 31, 1995, \$100,000”.

Subsec. (a)(5). Pub. L. 102-190, §804(c)(1), substituted “paragraph (1)(C)” for “paragraph (1)(C)(ii)”.

Subsec. (a)(6). Pub. L. 102-190, §804(b), added par. (6).

Subsec. (e)(1)(A)(i). Pub. L. 102-25, §701(f)(8), which directed the substitution of “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”, could not be executed because “Internal Revenue Code of 1954” does not appear.

Subsec. (e)(1)(A)(ii). Pub. L. 102-190, §1061(a)(9), substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”.

1990—Subsec. (a)(1)(A). Pub. L. 101-510, §803(a)(1)(A), substituted “\$500,000 or, in the case of a contract to be awarded after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (a)(1)(B). Pub. L. 101-510, §803(a)(1)(B), substituted “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to a contract to be made after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (a)(1)(C)(i). Pub. L. 101-510, §803(a)(1)(C), substituted “\$500,000 or, in the case of a subcontract to be awarded after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (a)(1)(D). Pub. L. 101-510, §803(a)(1)(D), substituted “\$500,000 (or such lesser amount as may be prescribed by the head of the agency) or, in the case of a change or modification to be made after December 31, 1995, \$100,000” for “\$100,000”.

Subsec. (c). Pub. L. 101-510, §803(d), inserted at end “In any case in which the head of the agency requires such data to be submitted under this subsection, the head of the agency shall document in writing the reasons for such requirement.”

1987—Subsec. (a)(5). Pub. L. 100-180, §804(b)(1), substituted “a waiver under subsection (b)(2)” for “such a waiver”, and struck out first sentence authorizing head of an agency to waive requirement under this subsection for contractor, subcontractor, or offeror to submit cost or pricing data.

Subsec. (e)(2). Pub. L. 100-180, §804(b)(2), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Except as provided under subsection (d), the liability of a contractor under this subsection shall not be affected by the contractor’s refusal to submit a certification under subsection (a)(2) with respect to the cost or pricing data involved.”

Subsec. (g). Pub. L. 100-180, §804(a), amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows: “In this section, the term ‘cost or pricing data’ means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.”

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

EFFECTIVE DATE OF 2004 AMENDMENT

Pub. L. 108-375, div. A, title VIII, §818(b), Oct. 28, 2004, 118 Stat. 2016, as amended by Pub. L. 109-364, div. A, title X, §1071(g)(11), Oct. 17, 2006, 120 Stat. 2403, provided that: “Paragraph (3) of subsection (b) of section 2306a of title 10, United States Code (as added by subsection

(a)), shall take effect on June 1, 2005, and shall apply with respect to offers submitted, and to modifications of contracts or subcontracts made, on or after that date.”

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by sections 4201(a) and 4321(b)(7) of Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 2302 of this title.

Pub. L. 104–106, div. D, title XLIII, § 4321(a), Feb. 10, 1996, 110 Stat. 671, provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355 as enacted.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 2302 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101–510, div. A, title VIII, § 803(a)(2), Nov. 5, 1990, 104 Stat. 1590, as amended by Pub. L. 102–25, title VII, § 704(a)(4), Apr. 6, 1991, 105 Stat. 118, provided that the amendments to this section by Pub. L. 101–510 would apply to contracts entered into after Dec. 5, 1990, subcontracts under such contracts, and modifications or changes to such contracts and subcontracts, prior to repeal by Pub. L. 102–190, div. A, title VIII, § 804(c)(2), Dec. 5, 1991, 105 Stat. 1416.

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100–180, div. A, title VIII, § 804(c), Dec. 4, 1987, 101 Stat. 1125, provided that:

“(1) Subsection (a) [amending this section] shall apply to any contract, or modification of a contract, entered into after the end of the 30-day period beginning on the date of the enactment of this Act [Dec. 4, 1987].

“(2) The amendments made by subsection (b) [amending this section] shall apply with respect to contracts, or modifications of contracts, entered into after the end of the 120-day period beginning on October 18, 1986.”

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–500, § 101(c) [title X, § 952(d)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–169, Pub. L. 99–591, § 101(c) [title X, § 952(d)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–169, and Pub. L. 99–661, div. A, title IX, formerly title IV, § 952(d), Nov. 14, 1986, 100 Stat. 3949, renumbered title IX, Pub. L. 100–26, § 3(5), Apr. 21, 1987, 101 Stat. 273, provided that:

“(1) Except as provided in paragraph (2), section 2306a of title 10, United States Code (as added by subsection (a)), and the amendment and repeal made by subsection (b) [amending section 2306 of this title and repealing a provision set out as a note under section 2304 of this title], shall apply with respect to contracts or modifications on contracts entered into after the end of the 120-day period beginning on the date of the enactment of this Act [Oct. 18, 1986].

“(2) Subsection (e) of such section shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.”

REGULATIONS

Pub. L. 114–92, div. A, title VIII, § 851(d), Nov. 25, 2015, 129 Stat. 917, provided that: “Not later than 180 days after the date of the enactment of this Act [Nov. 25, 2015], the Defense Federal Acquisition Regulation Supplement shall be updated to reflect the requirements of this section [enacting section 2380 of this title, amending this section, and enacting provisions set out as notes under this section] and the amendments made by this section.”

Pub. L. 101–510, div. A, title VIII, § 803(c), Nov. 5, 1990, 104 Stat. 1590, directed Secretary of Defense to prescribe regulations identifying type of procurements for

which contracting officers should consider requiring submission of certified cost or pricing data under subsec. (c) of this section, and also directed Secretary to prescribe regulations concerning types of information that offerors had to submit for contracting officer to consider in determining whether price of procurement to Government was fair and reasonable when certified cost or pricing data were not required to be submitted under this section because price of procurement to the United States was not expected to exceed \$500,000, such information, at minimum, to include appropriate information on prices at which such offeror had previously sold same or similar products, with such regulations to be prescribed not later than six months after Nov. 5, 1990, prior to repeal by Pub. L. 103–355, title I, § 1210, Oct. 13, 1994, 108 Stat. 3277.

CONSTRUCTION

Pub. L. 114–92, div. A, title VIII, § 851(e), Nov. 25, 2015, 129 Stat. 917, provided that: “Nothing in this section [enacting section 2380 of this title, amending this section, and enacting provisions set out as notes under this section] or the amendments made by this section shall be construed to preclude the contracting officer for the procurement of a commercial item from requiring the contractor to supply information that is sufficient to determine the reasonableness of price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement.”

PILOT PROGRAM TO ACCELERATE CONTRACTING AND PRICING PROCESSES

Pub. L. 115–232, div. A, title VIII, § 890, Aug. 13, 2018, 132 Stat. 1919, as amended by Pub. L. 116–92, div. A, title VIII, § 825, Dec. 20, 2019, 133 Stat. 1491, provided that:

“(a) IN GENERAL.—The Secretary of Defense shall establish a pilot program to reform and accelerate the contracting and pricing processes associated with contracts in excess of \$50,000,000 by—

“(1) basing price reasonableness determinations on actual cost and pricing data for purchases of the same or similar products for the Department of Defense; and

“(2) reducing the cost and pricing data to be submitted in accordance with section 2306a of title 10, United States Code.

“(b) REPORT.—Not later than January 30, 2021, the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on the results of the pilot program authorized under subsection (a).

“(c) SUNSET.—The authority to carry out the pilot program under this section shall expire on January 2, 2023.”

PILOT PROGRAM FOR STREAMLINING AWARDS FOR INNOVATIVE TECHNOLOGY PROJECTS

Pub. L. 114–92, div. A, title VIII, § 873(a)–(g), Nov. 25, 2015, 129 Stat. 939, 940, as amended by Pub. L. 114–328, div. A, title VIII, § 896, Dec. 23, 2016, 130 Stat. 2326, provided that:

“(a) EXCEPTION FROM CERTIFIED COST AND PRICING DATA REQUIREMENTS.—The requirements under section 2306a(a) of title 10, United States Code, shall not apply to a contract, subcontract, or modification of a contract or subcontract valued at less than \$7,500,000 awarded to a small business or nontraditional defense contractor pursuant to—

“(1) a technical, merit-based selection procedure, such as a broad agency announcement, or

“(2) the Small Business Innovation Research Program or Small Business Technology Transfer Program,

unless the head of the agency determines that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

“(b) EXCEPTION FROM RECORDS EXAMINATION REQUIREMENT.—The requirements under subparagraphs (A), (B), and (C) of section 2313(a)(2) of title 10, United States Code, and subsection (b) of section 2313 of title 10, United States Code, shall not apply to a contract valued at less than \$7,500,000 awarded to a small business or nontraditional defense contractor pursuant to—

“(1) a technical, merit-based selection procedure, such as a broad agency announcement, or

“(2) the Small Business Innovation Research Program,

unless the head of the agency determines that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award, and if such performance audit is initiated within 18 months of the contract completion.

“(c) TREATMENT AS COMPETITIVE PROCEDURES.—Use of a technical, merit-based selection procedure or the Small Business Innovation Research Program or Small Business Technology Transfer Program for the pilot program under this section shall be considered to be use of competitive procedures for purposes of chapter 137 of title 10, United States Code.

“(d) DISCRETION TO USE NON-CERTIFIED ACCOUNTING SYSTEMS.—In executing programs under this pilot program, the Secretary of Defense shall establish procedures under which a small business or nontraditional contractor may engage an independent certified public accountant for the review and certification of its accounting system for the purposes of any audits required by regulation, unless the head of the agency determines that this is not appropriate based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

“(e) GUIDANCE AND TRAINING.—The Secretary of Defense shall ensure that acquisition and auditing officials are provided guidance and training on the flexible use and tailoring of authorities under the pilot program to maximize efficiency and effectiveness.

“(f) SUNSET.—The exceptions under subsections (a) and (b) shall terminate on October 1, 2020.

“(g) DEFINITIONS.—In this section [enacting this note and amending section 638 of Title 15, Commerce and Trade]:

“(1) SMALL BUSINESS.—The term ‘small business’ has the meaning given the term ‘small business concern’ under section 3 of the Small Business Act (15 U.S.C. 632).

“(2) NONTRADITIONAL DEFENSE CONTRACTOR.—The term ‘nontraditional defense contractor’ has the meaning given that term in section 2302(9) of title 10, United States Code.”

[Section 896(2)(B) of Pub. L. 114-328, which directed amendment of par. (2) of subsec. (b) of section 873 of Pub. L. 114-92, set out above, by inserting “, and if such performance audit is initiated within 18 months of the contract completion” before the period at the end, was executed by making the insertion before the period at the end of the concluding provisions of subsec. (b), to reflect the probable intent of Congress.]

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

Pub. L. 114-92, div. A, title VIII, § 899, Nov. 25, 2015, 129 Stat. 955, provided that:

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

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

“(1) The requirement under subparagraph (A) of such paragraph to submit cost or pricing data for a

prime contract entered into during the pilot program period.

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

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

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

“(c) RISK-BASED CONTRACTING.—

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

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

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

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

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

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

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

“(d) REPORTS.—Not later than January 1, 2017, and January 1, 2019, the Secretary of Defense shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on activities undertaken under this section.

“(e) DEFINITIONS.—In this section:

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

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

GUIDANCE AND TRAINING RELATED TO EVALUATING REASONABLENESS OF PRICE

Pub. L. 112-239, div. A, title VIII, § 831, Jan. 2, 2013, 126 Stat. 1842, provided that:

“(a) GUIDANCE.—Not later than 180 days after the date of the enactment of this Act [Jan. 2, 2013], the Under

Secretary of Defense for Acquisition, Technology, and Logistics shall issue guidance on the use of the authority provided by sections 2306a(d) and 2379 of title 10, United States Code. The guidance shall—

“(1) include standards for determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price;

“(2) include standards for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price;

“(3) ensure that in cases in which such uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations; and

“(4) provide that no additional cost information may be required by the Department of Defense in any case in which there are sufficient non-Government sales to establish reasonableness of price.

“(b) TRAINING AND EXPERTISE.—Not later than 270 days after the date of the enactment of this Act, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall develop and begin implementation of a plan of action to—

“(1) train the acquisition workforce on the use of the authority provided by sections 2306a(d) and 2379 of title 10, United States Code, in evaluating reasonableness of price in procurements of commercial items; and

“(2) develop a cadre of experts within the Department of Defense to provide expert advice to the acquisition workforce in the use of the authority provided by such sections in accordance with the guidance issued pursuant to subsection (a).

“(c) DOCUMENTATION REQUIREMENTS.—The Under Secretary of Defense for Acquisition, Technology, and Logistics shall ensure that requests for uncertified cost information for the purposes of evaluating reasonableness of price are sufficiently documented. The Under Secretary shall require that the contract file include, at a minimum, the following:

“(1) A justification of the need for additional cost information.

“(2) A copy of any request from the Department of Defense to a contractor for additional cost information.

“(3) Any response received from the contractor to the request, including any rationale or justification provided by the contractor for a failure to provide the requested information.

“(d) COMPTROLLER GENERAL REVIEW AND REPORT.—

“(1) REVIEW REQUIREMENT.—The Comptroller General of the United States shall conduct a review of data collected pursuant to sections 2306a(d) and 2379 of title 10, United States Code, during the two-year period beginning on the date of the enactment of this Act.

“(2) REPORT REQUIREMENT.—Not later than 180 days after the end of the two-year period referred to in paragraph (1), the Comptroller General shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report on—

“(A) the extent to which the Department of Defense needed access to additional cost information pursuant to sections 2306a(d) and 2379 of title 10, United States Code, during such two-year period in order to determine price reasonableness;

“(B) the extent to which acquisition officials of the Department of Defense complied with the guidance issued pursuant to subsection (a) during such two-year period;

“(C) the extent to which the Department of Defense needed access to additional cost information during such two-year period to determine reasonableness of price, but was not provided such information by the contractor on request; and

“(D) recommendations for improving evaluations of reasonableness of price by Department of Defense

acquisition professionals, including recommendations for any amendments to law, regulations, or guidance.”

PRICE TREND ANALYSIS FOR SUPPLIES AND EQUIPMENT PURCHASED BY THE DEPARTMENT OF DEFENSE

Pub. L. 111-383, div. A, title VIII, § 892, Jan. 7, 2011, 124 Stat. 4310, which provided for the analysis of information on price trends for certain supplies and equipment purchased by the Department of Defense, was repealed by Pub. L. 114-92, div. A, title X, § 1073(f), Nov. 25, 2015, 129 Stat. 996.

GRANTS OF EXCEPTIONS TO COST OR PRICING DATA CERTIFICATION REQUIREMENTS AND WAIVERS OF COST ACCOUNTING STANDARDS

Pub. L. 107-314, div. A, title VIII, § 817, Dec. 2, 2002, 116 Stat. 2610, as amended by Pub. L. 112-81, div. A, title VIII, § 809(a), Dec. 31, 2011, 125 Stat. 1490; Pub. L. 113-291, div. A, title X, § 1071(b)(7), Dec. 19, 2014, 128 Stat. 3507; Pub. L. 115-91, div. A, title X, § 1051(j), Dec. 12, 2017, 131 Stat. 1563; Pub. L. 115-232, div. A, title VIII, §§ 825, 836(f)(4), Aug. 13, 2018, 132 Stat. 1856, 1871, provided that:

“(a) GUIDANCE FOR EXCEPTIONS IN EXCEPTIONAL CIRCUMSTANCES.—Not later than 60 days after the date of the enactment of this Act [Dec. 2, 2002], the Secretary of Defense shall issue guidance on the circumstances under which it is appropriate to grant an exceptional case exception or waiver with respect to certified cost and pricing data and cost accounting standards.

“(b) DETERMINATION REQUIRED FOR EXCEPTIONAL CASE EXCEPTION OR WAIVER.—The guidance shall, at a minimum, include a limitation that a grant of an exceptional case exception or waiver is appropriate with respect to a contract, subcontract, or (in the case of submission of certified cost and pricing data) modification only upon a determination that—

“(1) the property or services cannot reasonably be obtained under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver;

“(2) the price can be determined to be fair and reasonable without the submission of certified cost and pricing data or the application of cost accounting standards, as the case may be; or

“(3) there are demonstrated benefits to granting the exception or waiver.

“(c) APPLICABILITY OF NEW GUIDANCE.—The guidance issued under subsection (a) shall apply to each exceptional case exception or waiver that is granted on or after the date on which the guidance is issued.

“(d) DEFINITIONS.—In this section:

“(1) The term ‘exceptional case exception or waiver’ means either of the following:

“(A) An exception pursuant to section 2306a(b)(1)(C) of title 10, United States Code, relating to submission of certified cost and pricing data.

“(B) A waiver pursuant to section 1502(b)(3)(B) of title 41, United States Code, relating to the applicability of cost accounting standards to contracts and subcontracts.

“(2) The term ‘commercial product-commercial service exception’ means an exception pursuant to section 2306a(b)(1)(B) of title 10, United States Code, relating to submission of certified cost and pricing data.”

[Section 836(f)(4)(A) of Pub. L. 115-232, which directed amendment of section 817(d)(1) of Pub. L. 107-314, set out above, by substituting “commercial product-commercial service exceptions” for “commercial item exceptions”, could not be executed because those words did not appear subsequent to amendment by section 1051(j) of Pub. L. 115-91.]

DEFENSE COMMERCIAL PRICING MANAGEMENT IMPROVEMENT

Pub. L. 105-261, div. A, title VIII, § 803, Oct. 17, 1998, 112 Stat. 2081, as amended by Pub. L. 106-65, div. A, title X, § 1067(3), Oct. 5, 1999, 113 Stat. 774; Pub. L. 107-314,

div. A, title VIII, §823, Dec. 2, 2002, 116 Stat. 2615; Pub. L. 109-364, div. A, title VIII, §819, Oct. 17, 2006, 120 Stat. 2330; Pub. L. 113-291, div. A, title X, §1071(b)(9), Dec. 19, 2014, 128 Stat. 3507, which required revision of the Federal Acquisition Regulation to clarify the procedures and methods to be used for determining the reasonableness of prices of certain commercial items, was repealed by Pub. L. 115-232, div. A, title VIII, §812(b)(18), Aug. 13, 2018, 132 Stat. 1848.

REVIEW BY INSPECTOR GENERAL

Pub. L. 101-510, div. A, title VIII, §803(b), Nov. 5, 1990, 104 Stat. 1590, provided that (1) after increase in threshold for submission of cost or pricing data under subsec. (a) of this section, as amended by section 803(a) of Pub. L. 101-510, had been in effect for three years, Inspector General of Department of Defense was to conduct review of effects of increase in threshold, (2) that such review was to address whether increasing threshold improved acquisition process in terms of reduced paperwork, financial or other savings to government, an increase in number of contractors participating in defense contracting process, and adequacy of information available to contracting officers in cases in which certified cost or pricing data were not required under this section, (3) that Inspector General was to submit to Secretary of Defense a report on review conducted under paragraph (1), with Secretary of Defense required to submit such report to Congress, along with appropriate comments, upon completion of report (and comments) but not later than date on which President submitted budget to Congress pursuant to section 1105 of Title 31, Money and Finance, for fiscal year 1996, prior to repeal by Pub. L. 103-355, title I, §1210, Oct. 13, 1994, 108 Stat. 3277.

DEFINITION OF COMMERCIAL ITEM

Pub. L. 114-92, div. A, title VIII, §851(c), Nov. 25, 2015, 129 Stat. 917, provided that: “Nothing in this section [enacting section 2380 of this title, amending this section, and enacting provisions set out as notes under this section] or the amendments made by this section shall affect the meaning of the term ‘commercial item’ under subsection (a)(5) of section 2464 of title 10, United States Code, or any requirement under subsection (a)(3) or subsection (c) of such section.” [Pub. L. 115-232 amended subsecs. (a)(3), (5) and (c) of section 2464 of title 10 by substituting references to “commercial products or commercial services” for references to “commercial items”. See 2018 Amendment notes set out under that section.]

§ 2306b. Multiyear contracts: acquisition of property

(a) IN GENERAL.—To the extent that funds are otherwise available for obligation, the head of an agency may enter into multiyear contracts for the purchase of property whenever the head of that agency finds each of the following:

(1) That the use of such a contract will result in significant savings of the total anticipated costs of carrying out the program through annual contracts.

(2) That the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities.

(3) That there is a reasonable expectation that throughout the contemplated contract period the head of the agency will request funding for the contract at the level required to avoid contract cancellation.

(4) That there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive.

(5) That the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(6) In the case of a purchase by the Department of Defense, that the use of such a contract will promote the national security of the United States.

(7) In the case of a contract in an amount equal to or greater than \$500,000,000, that the conditions required by subparagraphs (C) through (F) of subsection (i)(3) will be met, in accordance with the Secretary’s certification and determination under such subsection, by such contract.

(b) REGULATIONS.—(1) Each official named in paragraph (2) shall prescribe acquisition regulations for the agency or agencies under the jurisdiction of such official to promote the use of multiyear contracting as authorized by subsection (a) in a manner that will allow the most efficient use of multiyear contracting.

(2)(A) The Secretary of Defense shall prescribe the regulations applicable to the Department of Defense.

(B) The Secretary of Homeland Security shall prescribe the regulations applicable to the Coast Guard, except that the regulations prescribed by the Secretary of Defense shall apply to the Coast Guard when it is operating as a service in the Navy.

(C) The Administrator of the National Aeronautics and Space Administration shall prescribe the regulations applicable to the National Aeronautics and Space Administration.

(c) CONTRACT CANCELLATIONS.—The regulations may provide for cancellation provisions in multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. The cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

(d) PARTICIPATION BY SUBCONTRACTORS, VENDORS, AND SUPPLIERS.—In order to broaden the defense industrial base, the regulations shall provide that, to the extent practicable—

(1) multiyear contracting under subsection (a) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(2) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(e) PROTECTION OF EXISTING AUTHORITY.—The regulations shall provide that, to the extent practicable, the administration of this section, and of the regulations prescribed under this section, shall not be carried out in a manner to preclude or curtail the existing ability of an agency—

(1) to provide for competition in the production of items to be delivered under such a contract; or