§ 3701

TITLE 10—ARMED FORCES

Page 2326


"(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)(B) of title 10, United States Code (now 10 U.S.C. 3703(a)(3)), 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)(C) of title 10, United States Code (now 10 U.S.C. 3703(a)(3)), relating to submission of certified cost and pricing data.

"(3) A waiver pursuant to section 1502(b)(3)(B) of title 10, United States Code, relating to the applicability of cost accounting standards to contracts and subcontracts.

"(4) The term 'commercial product-commercial service exceptions' means an exception pursuant to section 2306a(b)(1)(C) of title 10, United States Code (now 10 U.S.C. 3703(a)(3)), relating to submission of certified cost and pricing data.''


CHAPTER 271—TRUTHFUL COST OR PRICING DATA (TRUTH IN NEGOTIATIONS)

Sec. 3701. Definitions.
3702. Required cost or pricing data and certification.
3703. Exceptions.
3704. Cost or pricing data on below-threshold contracts.
3705. Submission of other information.
3706. Price reductions for defective cost or pricing data.
3707. Interest and penalties for certain overpayments.
3708. Right to examine contractor records.

Editorial Notes

PRIOR PROVISIONS

§ 3702. Required cost or pricing data and certification

(a) WHEN REQUIRED.—The head of an agency shall require offerors, contractors, and sub-
contractors to make cost or pricing data available as follows:

(1) OFFEROR FOR PRIME CONTRACT.—An offeror for a prime contract under a chapter 137 legacy provision 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—

(A) 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

(B) 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.

(2) CONTRACTOR.—The contractor for a prime contract under a chapter 137 legacy provision 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 $2,000,000.

(3) OFFEROR FOR SUBCONTRACT.—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 chapter and the price of the subcontract is expected to exceed $2,000,000.

(4) SUBCONTRACTOR.—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 $2,000,000.

(b) CERTIFICATION.—A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under subsection (a) or required by the head of the agency concerned to submit such data under section 3704 of this title 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.

(c) TO WHOM SUBMITTED.—Cost or pricing data required to be submitted under subsection (a) (or under section 3704 of this title), and a certification required to be submitted under subsection (b), shall be submitted—

(1) 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

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

(d) APPLICABILITY OF CHAPTER.—Except as provided under section 3703 of this title, this chapter applies to contracts entered into by the head of an agency on behalf of a foreign government.

(e) SUBCONTRACTS NOT AFFECTED BY WAIVER.—A waiver of requirements for submission of certified cost or pricing data that is granted under section 3703(a)(3) of this title in the case of a contract or subcontract does not waive the requirement under subsection (a)(3) 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 subsection should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(f) MODIFICATIONS TO PRIOR CONTRACTS.—Under subsection (a), 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 as soon as practicable to reflect subparagraphs (B) and (C) of such paragraph, without requiring consideration.

(g) ADJUSTMENT OF AMOUNTS.—Effective on October 1 of each year that is divisible by 5, each amount set forth in subsection (a) shall be adjusted in accordance with section 1908 of title 41.

See References in Text note below.

AMENDMENTS

2021—Pub. L. 116–283, § 1831(c), amended Pub. L. 116–283, § 1831(c)(1), (2)(A), transferred subsection (a) of section 2306a of this title to this section and redesignated pars. (1) to (7) of such former subsection (a) as subssecs. (a) to (g), respectively.

Subsec. (a). Pub. L. 116–283, § 1831(c)(2)(A), (B), (3), as amended by Pub. L. 117–41, § 1701(b)(10)(B), after redesignation of section 2306a(a)(1) of this title as subsection (a) of this section, substituted “When Required” for “Re-
required Cost or Pricing Data and Certification” in heading, redesignated subpars. (A) to (D) as pars. (1) to (4), respectively, and substituted “a prime contract under chapter 237 legacy provision” for “a prime contract under this chapter” in introductory provisions of pars. (1) and (2).

Subsec. (a)(1). Pub. L. 116–283, §1831(c)(2)(C), inserted heading and redesignated clss. (1) and (2) as subsps. (A) and (B), respectively.

Subsec. (a)(2). Pub. L. 116–283, §1831(c)(2)(D)(i)–(v), which directed amendment of par. (2) by redesignating cls. (1) to (iii) as subsps. (A) to (C), respectively, and making further substitutions in text and which could not be executed, was repealed by Pub. L. 117–81, §1701(b)(10)(C).


Subsec. (a)(3). Pub. L. 117–81, §1701(c)(3)(A), substituted “paragraph (1)” for “subparagraph (C)” in introductory provisions of par. (3) by redesignating cls. (1) to (iii) as subsps. (A) to (C), respectively, and making further substitutions in text and which could not be executed, was repealed by Pub. L. 117–81, §1701(b)(10)(C).

Pub. L. 116–283, §1831(c)(2)(E)(i)–(v), which directed amendment of par. (3) by redesignating cls. (1) to (iii) as subsps. (A) to (C), respectively, and making further substitutions in text and which could not be executed, was repealed by Pub. L. 117–81, §1701(b)(10)(C).

Pub. L. 116–283, §1831(c)(2)(F)(i)–(v), (v), which directed amendment of par. (4) by redesignating cls. (1) and (ii) as subsps. (A) and (B), respectively, and making further substitutions in text and which could not be executed, was repealed by Pub. L. 117–81, §1701(b)(10)(E).

Pub. L. 116–283, §1831(c)(2)(F)(ii), which directed substitution of “paragraph (3)” for “subparagraph (C)” in introductory provisions of par. (4) and which could not be executed as directed but could be executed in text of par. (4), was repealed by Pub. L. 117–81, §1701(b)(10)(E).


Subsec. (a)(4). Pub. L. 116–283, §1831(c)(2)(F)(ii), (iv), (v), which directed amendment of par. (4) by redesignating cls. (iv) and (v) as subsps. (A) and (B), respectively, and making further substitutions in text and which could not be executed, was repealed by Pub. L. 117–81, §1701(b)(10)(E).

Pub. L. 116–283, §1831(c)(2)(F)(iii), which directed substitution of “paragraph (3)” for “subparagraph (C)” in introductory provisions of par. (4) and which could not be executed as directed but could be executed in text of par. (4), was repealed by Pub. L. 117–81, §1701(b)(10)(E).

Pub. L. 116–283, §1831(c)(3)(B), substituted “paragraph (1)” for “paragraph (1)’s chapter” for “under this section”.

Subsec. (b). Pub. L. 116–283, §1831(c)(3)(C), substituted “paragraph (1)” for “paragraph (1)’s chapter” for “under this section”.

Pub. L. 116–283, §1831(c)(3)(D), as amended by Pub. L. 117–81, §1701(b)(10)(F), after redesignation of section 2306a(a)(2) of this title as subsec. (b) of this section, inserted heading and substituted “subsection (a)” for “subsection (a)”.

Subsec. (c). Pub. L. 116–283, §1831(c)(3)(E), after redesignation of section 2306a(a)(3) of this title as subsec. (c) of this section, inserted heading, redesignated subpars. (A) and (B) as pars. (1) and (2), respectively, and, in introductory provisions, substituted “subsection (a)” for “subsection (a)” in section 3704 of this title for “subsection (c)”.

Subsec. (d). Pub. L. 117–81, §1701(c)(3)(B), substituted “this chapter” for “this section”.

Pub. L. 116–283, §1831(c)(6), after redesignation of section 2306a(a)(4) of this title as subsec. (d) of this section, inserted heading and substituted “section 3703 of this title” for “subsection (b)”.

Subsec. (e). Pub. L. 116–283, §1831(c)(7), after redesignation of section 2306a(a)(5) of this title as subsec. (e) of this section, inserted heading and substituted “section 3703(a)(3)” for “subsection (b)(1)(C)’s”, “subsection (a)(3)” for “paragraph (1)(C)’s”, “paragraph (1)” for “paragraph (1)’s”, and “paragraphs (2)(B) and (3)(B) of subsection (a)” for “subparagraphs (B)(ii) and (C)(ii) of paragraph (1)”.

Subsec. (f). Pub. L. 116–283, §1831(c)(8)(B), substituted “paragraph (1)” for “paragraph (1)’s”.


Subsec. (g). Pub. L. 116–283, §1831(c)(9), after redesignation of section 2306a(a)(7) of this title as subsec. (g) of this section, inserted heading and substituted “subsection (a)” for “paragraph (1)”.

Statutory Notes and Related Subsidiaries

**Effective Date of 2021 Amendment**

Amendment by section 1701(b)(10)(B)–(G) of Pub. L. 117–81 applicable as if included in the enactment of title XVIII of Pub. L. 116–283 as enacted, see section 1701(a)(2) of Pub. L. 117–81, set out in a note preceding section 3001 of this title and Effective Date note below.

Amendment by section 1701(c)(3) of Pub. L. 117–81 to take effect immediately after the amendments made by title XVIII of Pub. L. 116–283 have taken effect, see section 1701(a)(3) of Pub. L. 117–81, set out in a note preceding section 3001 of this title and Effective Date note below.

**Effective Date**

Section and amendment by Pub. L. 116–283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116–283, set out as an Effective Date note of section 3001 of this title.

**DATA COLLECTION**


(1) developing and sharing best practices; and

(2) providing information to the Secretary of Defense and Congress on the use of authority under such section 787 and related policy issues.”

**PILOT PROGRAM FOR STREAMLINING AWARDS FOR INNOVATIVE TECHNOLOGY PROJECTS**


(a) **EXCEPTION FROM CERTIFIED COST AND PRICING DATA REQUIREMENTS**—“The requirements under section 2306a(a) of title 10, United States Code [now 10 U.S.C. 3702], 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 [now 10 U.S.C. 3841(c)], 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.”
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.

(1) 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 [former] chapter 137 of title 10, United States Code.

(2) DISCUSSION 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.

(3) 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.

(4) SUNSET.—The exceptions under subsections (a) and (b) shall terminate on October 1, 2024.

§ 3703. Exceptions

(a) IN GENERAL.—Submission of certified cost or pricing data shall not be required under section 3702 of this title in the case of a contract, a subcontract, or modification of a contract or subcontract—

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

(A) adequate competition that results in at least two or more responsive and viable competing bids; or

(B) prices set by law or regulation;

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

(3) in an exceptional case when the head of the procuring activity is authorized by delegation, determines that the requirements of this chapter may be waived and justifies in writing the reasons for such determination; or

(4) to the extent such data—

(A) 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

(B) 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.

(b) 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 that may not be required by reason of paragraph (1) or (2) of subsection (a), submission of certified cost or pricing data shall not be required under section 3702 of this title if—

(1) 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) or (2) of subsection (a); and

(2) 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.

(c) NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL PRODUCTS.—(1) The exception in subsection (a)(2) 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 section 3702(a)(1)(A) of this title, as adjusted from time to time under section 3702(g) of this title, or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.

(2) In this subsection, the term “noncommercial modification”, with respect to a commercial product, means a modification of such product that is not a modification described in section 1033(b)(A) of title 41.

(3) Nothing in paragraph (1) shall be construed—

(A) to limit the applicability of the exception in paragraph (1) or (3) of subsection (a) to cost or pricing data on a noncommercial modification of a commercial product; or

(B) 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.

(d) COMMERCIAL PRODUCT OR COMMERCIAL SERVICE DETERMINATION.—(1) For purposes of applying the exception under subsection (a)(2) 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.

(2) If the contracting officer does not make the presumption described in paragraph (1) 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