§ 3704. Cost or pricing data on below-threshold contracts

(a) AUTHORITY TO REQUIRE SUBMISSION.—Subject to subsection (b), when certified cost or pricing data are not required to be submitted by section 3702 of this title 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 head of the procuring activity of the reasonableness of the price of the contract, subcontract, or modification. In any case in which the head of the procuring activity requires such data to be submitted under this section, the head of the procuring activity shall require that the data be submitted under this subsection.

(b) 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 paragraphs (1) or (2) of section 3703(a) of this title.

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

AMENDMENTS

2021—Pub. L. 116–283, § 3704(c)(1)(A), transferred subsec. (c) of section 3704 of this title to this section and struck out subsec. (c) designation and heading “Cost or Pricing Data on Below-Threshold Contracts” at beginning.

Editorial Notes

CODIFICATION

The text of subsec. (c) of section 3206a of this title, which was transferred to this section and amended by Pub. L. 116–283, § 1831(e), was based on Pub. L. 99–591, § 101(c) [title X, § 952(a)], Oct. 18, 1986, 100 Stat. 3341–82, 3341–166, and Pub. L. 99–590, § 101(c) [title X, § 952(a)].
a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government.

(b) INELIGIBILITY FOR AWARD.—(1) 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 subsection (a) 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:

(A) The effort to obtain the data.

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

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

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

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

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

(2)(A) Any new determination made by the head of the contracting activity under paragraph (1) shall be reported to the Principal Director, Defense Pricing and Contracting on a quarterly basis.

(B) 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, including—

(i) identifying situations under which such denial occurs to exclude situations outside the control of the offeror or Federal Government;

(ii) identifying whether such denial is from the prime contractor or subcontractor; and

(iii) developing an appropriate timeframe for requiring submission of uncertified cost or pricing data before a request for such data is considered a denial, including a standardized determination of a starting point and conclusion for such requests.

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

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

(2) 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.

(3) 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.


Editorial Notes
CODIFICATION


AMENDMENTS

2023—Subsec. (b)(2)(B). Pub. L. 118–31, §802(1), inserted at end “The Under Secretary shall make appropriate portions of the report available to the leadership of the offerors named in such report.”


2021—Pub. L. 116–283, §1831(f)(1), transferred subsec. (d) of section 2306a of this title to this section, struck out subsec. (d) designation and heading “Submission of Other Information” at beginning, and redesignated pars. (1) to (3) as subssecs. (a) to (c), respectively, and re-aligned margins.

Subsec. (a). Pub. L. 116–283, §1831(f)(2), after redesignation of section 2306a(d)(1) of this title as subsec. (a) of this section, substituted “under this chapter” for “under this section” and “section 3703(a)(1) of this title” for “subsection (b)(1)(A)”.

Subsec. (b). Pub. L. 116–283, §1831(f)(3)(A), (B)(i), (C)(i), after redesignation of section 2306a(d)(2) of this title as subsec. (b) of this section, redesignated subpar. (A) and its cls. (i) to (vi) as par. (1) and subpars. (A) to (F), respectively, and redesignated subpar. (B) and its cls. (i) and (ii) as par. (2) and subpars. (A) and (B), respectively.


Subsec. (c). Pub. L. 116–283, §1831(f)(4), after redesignation of section 2306a(d)(3) of this title as subsec. (c) of this section, redesignated subpars. (A) to (C) as pars.
§ 3706 Price reductions for defective cost or pricing data

(a) Provision Requiring Adjustment.—

(1) IN GENERAL.—A prime contract (or change or modification to a prime contract) under which a certificate under section 3702(b) of this title 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.

(2) What constitutes defective cost or pricing data.—For the purposes of this chapter, 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.

(b) Valid Defense.—In determining for purposes of a contract price adjustment under a contract provision required by subsection (a) 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 agree upon a date other than the date of agreement on the price of the contract to the contractor (or subcontractor).

(c) Invalid Defense.—It is not a defense to an adjustment of the price of a contract under a contract provision required by subsection (a) that—

(1) 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—

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

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

(2) 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;

(3) 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

(4) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under section 3702(b) of this title.

(d) Offsets.—

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

(A) 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

(B) 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 subsection (a)(2), another date agreed upon between the parties, and that the data were not submitted as specified in section 3702(c) of this title before such date.

(2) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under paragraph (1) if—

(A) the certification under section 3702(b) of this title with respect to the cost or pricing data involved was known to be false when signed; or

(B) the United States proves that, had the cost or pricing data referred to in paragraph (1)(B) 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 subsection (a)(2), 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.


Editorial Notes

Codification


Amendments

2021—Pub. L. 116–283, §1831(g)(1), transferred subsec. (e) of section 2306a of this title to this section, struck