

“(1) train the acquisition workforce on the use of the authority provided by sections 2306a(d) [now 10 U.S.C. 3705] and 2379 [now 10 U.S.C. 3455] 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) [now 10 U.S.C. 3705] and 2379 [now 10 U.S.C. 3455] 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) [now 10 U.S.C. 3705] and 2379 [now 10 U.S.C. 3455] 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.”

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 excep-

tional 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 [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)(B) of title 10, United States Code [now 10 U.S.C. 3703(a)(2)], 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.]

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

Sec.

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Editorial Notes

PRIOR PROVISIONS

A prior chapter 271, “TRUTHFUL COST OR PRICING DATA”, as added by Pub. L. 115-232, div. A, title VIII, § 801(a), Aug. 13, 2018, 132 Stat. 1828, and consisting of renumbered section 3701, was repealed by Pub. L. 116-283, div. A, title XVIII, § 1831(a), Jan. 1, 2021, 134 Stat. 4208.

§ 3701. Definitions

In this chapter:

(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 section 3706(a)(2) of this title, 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 and amended Pub. L. 116–283, div. A, title XVIII, §1831(a), (b), Jan. 1, 2021, 134 Stat. 4209; Pub. L. 117–81, div. A, title XVII, §1701(b)(10)(A), Dec. 27, 2021, 135 Stat. 2133.)

Editorial Notes

CODIFICATION

The text of subsec. (h) of section 2306a of this title, which was transferred to this section and amended by Pub. L. 116–283, §1831(b), was based on 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; Pub. L. 100–180, div. A, title VIII, §804(a), Dec. 4, 1987, 101 Stat. 1125; Pub. L. 103–355, title I, §§1204(1), 1208, Oct. 13, 1994, 108 Stat. 3275, 3277; Pub. L. 104–106, div. D, title XLII, §4201(a)(2)(B), Feb. 10, 1996, 110 Stat. 651; Pub. L. 111–350, §5(b)(15), Jan. 4, 2011, 124 Stat. 3843; Pub. L. 115–232, div. A, title VIII, §836(c)(5)(C), Aug. 13, 2018, 132 Stat. 1865. Pub. L. 99–500, Pub. L. 99–591, and Pub. L. 99–661 added identical sections. Pub. L. 99–591 is a corrected version of Pub. L. 99–500.

AMENDMENTS

2021—Pub. L. 116–283, §1831(b), as amended by Pub. L. 117–81, §1701(b)(10)(A), transferred subsec. (h) of section 2306a of this title to this section, struck out subsec. (h) designation and heading “Definitions” at beginning, and substituted “this chapter” for “this section” in introductory provisions and “section 3706(a)(2) of this title” for “subsection (e)(1)(B)” in par. (1).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by 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.

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 of 2021 Amendment note preceding section 3001 of this title.

§ 3702. Required cost or pricing data and certification

(a) WHEN REQUIRED.—The head of an agency shall require offerors, contractors, and subcontractors 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.—(A) 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.

(B)(i) An offeror for a subcontract (at any tier) of a contract under this chapter that is required to submit cost or pricing data under subparagraph (A) with respect to such subcontract may submit prices paid for the covered goods and services of such offeror for such subcontract under this clause if—

(I) such offeror is a nontraditional defense contractor (as defined in section 3014 of this title);

(II) the prices to be submitted are prices that were paid for the same goods and services as such covered goods and services; and

(III) the price of such subcontract is not expected to exceed \$5,000,000.

(ii) The submission of prices paid under clause (i) by an offereor¹ with respect to a subcontract shall be deemed to be the submission of cost or pricing data by such offeror with respect to such subcontract as required by subparagraph (A) if a contracting officer of the Department of Defense determines that the prices submitted under such clause are fair and reasonable based on supported cost or pricing data within the last 12 months.

(iii) In this subparagraph, the term “covered goods and services” means, with respect to an offeror for a subcontract (at any tier), the goods and services such offeror would provide under such subcontract.

(4) SUBCONTRACTOR.—The subcontractor for a subcontract covered by paragraph (3) 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.

¹ So in original. Probably should be “offeror”.