

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 [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 reserved 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 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)¹ 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,² 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.

(Added and amended Pub. L. 116–283, div. A, title XVIII, §1831(a), (c), Jan. 1, 2021, 134 Stat. 4209; Pub. L. 117–81, div. A, title VIII, §804(b), title XVII, §1701(b)(10)(B)–(G), (c)(3), Dec. 27, 2021, 135 Stat. 1816, 2133, 2134, 2136.)

Editorial Notes

REFERENCES IN TEXT

Subparagraphs (B) and (C) of such paragraph, referred to in subsec. (f), probably mean pars. (2) and (3) of subsec. (a) of this section, which were transferred and redesignated from subpars. (B) and (C) of par. (1) of subsec. (a) of section 2306a of this title by Pub. L. 116–283. See 2021 Amendment notes below.

CODIFICATION

The text of subsec. (a) of section 2306a of this title, which was transferred to this section and amended by Pub. L. 116–283, §1831(c), 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(b)(1), Dec. 4, 1987, 101 Stat. 1125; Pub. L. 101–510, div. A, title VIII, §803(a)(1), Nov. 5, 1990, 104 Stat. 1589; Pub. L. 102–25, title VII, §701(b), Apr. 6, 1991, 105 Stat. 113; Pub. L. 102–190, div. A, title VIII, §804(a)–(c)(1), Dec. 5, 1991, 105 Stat. 1415, 1416; Pub. L. 103–355, title I, §§1201, 1202(b), Oct. 13, 1994, 108 Stat. 3273, 3274; 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), Oct. 17, 1998, 112 Stat. 2083; Pub. L. 114–328, div. A, title VIII, §822(1), Dec. 23, 2016, 130 Stat. 2276; Pub. L. 115–91, div. A, title VIII, §811(a)(1), Dec. 12, 2017, 131 Stat. 1459; Pub. L. 116–283, div. A, §814(a)(1), Jan. 1, 2021, 134 Stat. 3479; Pub. L. 117–81, div. A, title VIII, §804(a), Dec. 27, 2021, 135 Stat. 1816. 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(c)(1), (2)(A), transferred subsec. (a) of section 2306a of this title to this section and redesignated pars. (1) to (7) of such former subsec. (a) as subsecs. (a) to (g), respectively.

Subsec. (a). Pub. L. 116–283, §1831(c)(2)(A), (B), (3), as amended by Pub. L. 117–81, §1701(b)(10)(B), after redesignation of section 2306a(a)(1) of this title as subsec. (a) of this section, substituted “When Required” for “Re-

¹ So in original. Probably should be “paragraph (3)”.

² See References in Text note below.

quired 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 a chapter 137 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 cls. (i) and (ii) as subpars. (A) and (B), respectively.

Subsec. (a)(2). Pub. L. 116-283, §1831(c)(2)(D)(ii)-(v), which directed amendment of par. (2) by redesignating cls. (i) to (iii) as subpars. (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)(i).

Pub. L. 116-283, §1831(c)(2)(D), as amended by Pub. L. 117-81, §1701(b)(10)(C)(ii), inserted heading.

Subsec. (a)(3). Pub. L. 117-81, §1701(c)(3)(A), substituted “under this chapter” for “under this section”.

Pub. L. 116-283, §1831(c)(2)(E)(ii)-(v), which directed amendment of par. (3) by redesignating cls. (i) to (iii) as subpars. (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)(D)(i).

Pub. L. 116-283, §1831(c)(2)(E), as amended by Pub. L. 117-81, §1701(b)(10)(D)(ii), (iii), inserted heading.

Subsec. (a)(4). Pub. L. 116-283, §1831(c)(2)(F)(ii), (iv), (v), which directed amendment of par. (4) by redesignating cls. (i) and (ii) as subpars. (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)(i).

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)(i).

Pub. L. 116-283, §1831(c)(2)(F), as amended by Pub. L. 117-81, §1701(b)(10)(E)(ii), (iii), inserted heading.

Subsec. (b). Pub. L. 116-283, §1831(c)(4), 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 “paragraph (1)” and “section 3704 of this title” for “subsection (c)”.

Subsec. (c). Pub. L. 116-283, §1831(c)(5), 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) (or under section 3704 of this title)” for “paragraph (1) (or under subsection (c))” and “subsection (b)” for “paragraph (2)”.

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) of this title” for “subsection (b)(1)(C)”, “subsection (a)(3)” for “paragraph (1)(C)”, and “that subsection” for “that paragraph”.

Subsec. (f). Pub. L. 116-283, §1831(c)(8)(D), which directed substitution of “paragraphs (2)(B) and (3)(B) of subsection (a)” for “subparagraphs (B)(ii) and (C)(ii) of paragraph (1)”, could not be executed because the phrase “subparagraphs (B)(ii) and (C)(ii) of paragraph (1)” did not appear after the intervening amendment made by Pub. L. 117-81, §804(a), to subsec. (a)(6) of section 2306a of this title prior to its transfer to subsec. (f) of this section.

Pub. L. 116-283, §1831(c)(8)(C), which directed substitution of “that subsection” for “that paragraph” and could not be executed, was repealed by Pub. L. 117-81, §1701(b)(10)(G).

Pub. L. 116-283, §1831(c)(8)(B), substituted “subsection (a)” for “paragraph (1)”.

Pub. L. 116-283, §1831(c)(8)(A), as amended by Pub. L. 117-81, §804(b), inserted heading.

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 of 2021 Amendment note preceding section 3001 of this title.

DATA COLLECTION

Pub. L. 117-81, div. A, title VIII, §862(b), Dec. 27, 2021, 135 Stat. 1852, provided that: “The Secretary of Defense shall develop and implement a plan to collect and analyze data on the use of authority under such section 873 [of Pub. L. 114-92, set out below] for the purposes of—
“(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 873 and related policy issues.”

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; Pub. L. 116-283, div. A, title VIII, §832, Jan. 1, 2021, 134 Stat. 3753; Pub. L. 117-81, div. A, title VIII, §862(a), Dec. 27, 2021, 135 Stat. 1852, provided that:

“(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(b)(2)(A)-(C)], and subsection (b) of section 2313 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, 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 [former] 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, 2024.

“(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 [now 10 U.S.C. 3014].”

[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.]

§ 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, without 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 in 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 103(3)(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