

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 section, the head of the procuring activity shall justify in writing the reason for such requirement.

(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 paragraph (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.

(Added and amended Pub. L. 116–283, div. A, title XVIII, §1831(a), (e), Jan. 1, 2021, 134 Stat. 4209, 4213.)

Editorial Notes

CODIFICATION

The text of subsec. (c) of section 2306a of this title, which was transferred to this section and amended by Pub. L. 116–283, §1831(e), 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. 101–510, div. A, title VIII, §803(d), Nov. 5, 1990, 104 Stat. 1590; Pub. L. 103–355, title I, §1203, Oct. 13, 1994, 108 Stat. 3274; Pub. L. 104–106, div. D, title XLII, §4201(a)(1), Feb. 10, 1996, 110 Stat. 650. 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(e)(1)(A), transferred subsec. (c) of section 2306a of this title to this section and struck out subsec. (c) designation and heading “Cost or Pricing Data on Below-Threshold Contracts” at beginning.

Subsec. (a). Pub. L. 116–283, §1831(e)(1)(B), (2), redesignated par. (1) of section 2306a(c) of this title as subsec. (a) of this section, realigned margin, and substituted “subsection (b)” for “paragraph (2)”, “section 3702 of this title” for “subsection (a)”, and “under this section” for “under this subsection”.

Subsec. (b). Pub. L. 116–283, §1831(e)(1)(B), (3), redesignated par. (2) of section 2306a(c) of this title as subsec. (b) of this section, realigned margin, and substituted “under this subsection” for “under this paragraph” and “paragraph (1) or (2) of section 3703(a) of this title” for “subparagraph (A) or (B) of subsection (b)(1)”.

Subsec. (c). Pub. L. 116–283, §1831(e)(1)(B), (4), redesignated par. (3) of section 2306a(c) of this title as subsec. (c) of this section, realigned margin, and substituted “under this subsection” for “under this paragraph”.

Statutory Notes and Related Subsidiaries

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.

§ 3705. Submission of other information

(a) AUTHORITY TO REQUIRE SUBMISSION.—When certified cost or pricing data are not required to

be submitted under this chapter 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 section 3703(a)(1) of this title, 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.

(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 of 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 of 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 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 Sec-

retary 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.

(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.

(Added and amended Pub. L. 116–283, div. A, title XVIII, §1831(a), (f), Jan. 1, 2021, 134 Stat. 4209, 4213.)

Editorial Notes

CODIFICATION

The text of subsec. (d) of section 2306a of this title, which was transferred to this section and amended by Pub. L. 116–283, §1831(f), was based on Pub. L. 103–355, title I, §1204, Oct. 13, 1994, 108 Stat. 3275; Pub. L. 104–106, div. D, title XLII, §4201(a)(1), Feb. 10, 1996, 110 Stat. 650; Pub. L. 105–261, div. A, title VIII, §808(a), Oct. 17, 1998, 112 Stat. 2085; Pub. L. 114–92, div. A, title VIII, §852(e), 853, Nov. 25, 2015, 129 Stat. 918; Pub. L. 115–91, div. A, title VIII, §811(b), Dec. 12, 2017, 131 Stat. 1459; Pub. L. 115–232, div. A, title VIII, §836(c)(5)(B), Aug. 13, 2018, 132 Stat. 1865, as amended by Pub. L. 116–283, div. A, title X, §1081(d)(4)(B)(i), Jan. 1, 2021, 134 Stat. 3874; Pub. L. 116–92, div. A, title VIII, §803, Dec. 20, 2019, 133 Stat. 1483.

AMENDMENTS

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 realigned 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. (b)(1). Pub. L. 116–283, §1831(f)(3)(B)(ii), substituted “subsection (a)” for “paragraph (1)” in introductory provisions.

Subsec. (b)(2)(A). Pub. L. 116–283, §1831(f)(3)(C)(ii), substituted “paragraph (1)” for “subparagraph (A)”.

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. (1) to (3), respectively, and substituted “under subsection (a)” for “under paragraph (1)” in introductory provisions.

Statutory Notes and Related Subsidiaries

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.

§ 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 rely on the defective data submitted by the contractor or subcontractor.

(c) INVALID DEFENSES.—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