SEC. ___. ENHANCEMENT OF AGENCY AUTHORITY TO EVALUATE CONTRACTOR DATA AND OF DEFENSE CONTRACT AUDIT AGENCY SUBPOENA AUTHORITY.

(a) ACCESS TO DATA FOR EVALUATION PURPOSES.—Subsection (a)(2) of section 2313 of title 10, United States Code, is amended by inserting "or for the purpose of evaluating data other than certified cost or pricing data with respect to a contract or subcontract, to have access to and " after "subcontract,".

(b) DCAA SUBPOENA AUTHORITY.—Subsection (b)(1) of such section is amended by inserting "or subcontractor" after "of a contractor".

Section-by-Section Analysis

This proposal would amend subsection (a)(2) of section 2313 of title 10, United States Code, to provide the Defense Contract Audit Agency (DCAA) the authority to evaluate data other than certified cost or pricing data. Because the subpoena authority provided in subsection (b) of section 2313 is based on the access under subsection (a) of section 2313, this amendment would also expand DCAA's subpoena authority to include such data. The proposal also includes a minor clarification to subsection (b)(1) of section 2313 by adding "or subcontractor" after the phrase "of any records of a contractor" to make subsection (b) consistent with subsection (a).

Data other than certified cost or pricing data encompasses a broad range of data. FAR (Federal Acquisition Regulation) 2.101 defines it as "pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism." Examples include: price data, sales data, and cost data. The level and type of data other than certified cost or pricing data DCAA requires varies depending upon whether a cost or price analysis is being performed. FAR 15.403-3(c) specifically states that the government may obtain data other than certified cost or pricing data in connection with evaluating the fair and reasonable price of commercial items; however, subsection (a)(2) of section 2313 of title 10, United States Code, limits DCAA's subpoena authority to certified cost or pricing data.

FAR 15.404-1 establishes a hierarchy of price and cost analysis techniques for commercial and non-commercial items where certified cost and pricing data are not permitted. When the contracting officer determines that the historical pricing data provided by the contractor is insufficient to determine that the price is fair and reasonable, the contracting officer may use other available techniques as appropriate to the circumstances, including the analysis of data other than certified cost or pricing data as defined in FAR 2.101. On occasion, contracting officers have made requests for data other than certified cost or pricing data for commercial parts

being acquired in a sole source, fixed-price acquisition. Those requests were made because the contracting officer determined there was insufficient recent historical pricing data to make a determination of the reasonableness of the increased prices being proposed by the contractors. In the past 12 months, at least two major contractors have refused to provide the data requested. Because the statute authorizing DCAA's subpoena authority includes only certified cost or pricing data and does not specify "data other than certified cost or pricing data," DCAA was unable to compel the production of data other than certified cost or pricing data to determine whether the proposed price increases on those commercial parts were fair and reasonable. As a result, the contracting officers were left with a decision to withhold award of the contract and develop a second source for a weapon system (which is not practical in most cases) or negotiate with less than optimal data. It also significantly delayed the acquisition of critical weapons systems and parts. Some contractors have also refused to provide data that substantiates sufficient commercial sales to support pricing based on the commercial sale prices.

The current statute limits DCAA's subpoena authority to certified cost or pricing data. This leaves the contracting officers with authority under the statutes (10 U.S.C. § 2306a(d)(1); 41 U.S.C. §3505(a)) and regulation (FAR 15.404-1) to request data other than certified cost or pricing data, but no way to compel the contractor to provide that data. The proposed amendment is needed to provide DCAA with the authority necessary to support the contracting officer by obtaining sufficient evidence to evaluate the fair and reasonable price of non-commercial and commercial items in accordance with statutory and regulatory provisions.

Budget Implications: The proposal has no budgetary impact as it addresses procurement processes and not amounts appropriated for procurement of items or services.

Changes to Existing Law: This proposal would amend section 2313 of title 10, United States Code, as follows (text to be added is shown in **bold underline;** text to be deleted is ~~struck through~~):

TITLE 10, UNITED STATES CODE

§ 2313. Examination of records of contractor

(a) AGENCY AUTHORITY.—(1) The head of an agency, acting through an authorized representative, is authorized to inspect the plant and audit the records of—

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of such contracts, made by that agency under this chapter; and

(B) a subcontractor performing any cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract or any combination of such subcontracts under a contract referred to in subparagraph (A).

(2) The head of an agency, acting through an authorized representative, is authorized, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to section 2306a of this title with respect to a contract or subcontract, **or for the purpose of evaluating data other than certified cost or pricing data with respect to a contract or subcontract, to have access to and** to examine all records of the contractor or subcontractor related to—

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or
(D) performance of the contract or subcontract.

(b) DCAA SUBPOENA AUTHORITY.—(1) The Director of the Defense Contract Audit Agency (or any successor agency) may require by subpoena the production of any records of a contractor **<u>or subcontractor</u>** that the Secretary of Defense is authorized to audit or examine under subsection (a).

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (1) may not be redelegated.

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