SEC. ___. COMMERCIAL PRODUCT OR COMMERCIAL SERVICE DETERMINATIONS

(a) IN GENERAL.—Section 2306a(b) of title 10, United States Code, is amended—

(1) by striking paragraph (4); and

(2) by redesignating paragraphs (5) and (6) as paragraphs (4) and (5), respectively.

(b) CONFORMING AMENDMENT.—Section 2380(b)(2)(B) of such title is amended by striking "following—" and all that follows through "(ii) a written" and inserting "following a written".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal is a top Acquisition and Sustainment efficiency initiative to ensure that the Department has the authority and flexibility to make appropriate commercial product and commercial service determinations, based on the unique circumstances of individual procurements, and obtain the necessary cost or pricing information in order to negotiate fair and reasonable prices and prevent excessive pricing practices. The definition of commercial products or commercial services can be applied in a very broad manner and requires judgment on the part of individual contracting officers. However, once one individual contracting officer makes a determination of commerciality, this has broad implications for every subsequent contracting officer who may be under a different set of circumstances but who no longer has discretion to make a determination in the best interest of the Department. Furthermore, once the decision has been made to determine commerciality, this decision has additional implications with respect to the Truth in Negotiations Act. Even though previous buys may have been subject to the requirement for certified cost or pricing data, once an item is converted to a commercial product or commercial service, it is no longer subject to the requirements for certified cost or pricing data. As illustrated by the TransDigm Group, Inc's pricing practices, generally once a conversion to a commercial product or commercial service is made, it is common for prices to increase and subsequent contracting officers find it difficult to obtain data necessary to determine price reasonableness and negotiate fair and reasonable prices on behalf of the taxpayer.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget Request.

Changes to Existing Law: This proposal would make the following changes to sections 2306a and 2380 of title 10, United States Code (as amended by Public Law 115–232):

§2306a. Cost or pricing data: truth in negotiations

(a) Required Cost or Pricing Data and Certification.-(1) The head of an agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this chapter 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-

(i) 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

(ii) 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.

(B) The contractor for a prime contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if-

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed $2,000,000;

(ii) in the case of a change or modification made after July 1, 2018, to a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed $750,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed $750,000.

(C) 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 section and-

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed $2,000,000;

(ii) in the case of a subcontract entered into after July 1, 2018, under a prime contract that was entered into on or before June 30, 2018, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed $2,000,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed $750,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if-

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed $2,000,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed $750,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) 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.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted-

(A) 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

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) 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 paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) 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 to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted in accordance with section 1908 of title 41.

(b) Exceptions.-

(1) In general .-Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract-

(A) for which the price agreed upon is based on-

(i) adequate competition that results in at least two or more responsive and viable competing bids; or

(ii) prices set by law or regulation;

(B) for the acquisition of a commercial product or a commercial service;

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination; or

(D) to the extent such data-

(i) 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

(ii) 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.

(2) 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)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if-

(A) 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)(A) or (1)(B); and

(B) 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.

(3) Noncommercial modifications of commercial products .-(A) The exception in paragraph (1)(B) 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 subsection (a)(1)(A)(i), as adjusted from time to time under subsection (a)(7), or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.

(B) In this paragraph, 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.

(C) Nothing in subparagraph (A) shall be construed-

(i) to limit the applicability of the exception in subparagraph (A) or (C) of paragraph (1) to cost or pricing data on a noncommercial modification of a commercial product; or

(ii) 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.

~~(4) Commercial product or commercial service determination .-(A) For purposes of applying the exception under paragraph (1)(B) 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.~~

~~(B) If the contracting officer does not make the presumption described in subparagraph (A) 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 product or a commercial service, as the case may be, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity.~~

~~(C) Not later than 30 days after receiving a request for review of a determination under subparagraph (B), the head of a contracting activity shall-~~

~~(i) confirm that the prior determination was appropriate and still applicable; or~~

~~(ii) issue a revised determination with a written explanation of the basis for the revision.~~

(~~5~~4) A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial products or commercial services in establishing price reasonableness on a subsequent purchase

if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions.

(~~6~~5) Determination by prime contractor .-A prime contractor required to submit certified cost or pricing data under subsection (a) with respect to a prime contract shall be responsible for determining whether a subcontract under such contract qualifies for an exception under paragraph (1)(A) from such requirement.

(c) Cost or Pricing Data on Below-Threshold Contracts.-

(1) Authority to require submission.-Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) 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 agency of 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 subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) Exception.-The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

(3) Delegation of authority prohibited.-The head of a procuring activity may not delegate functions under this paragraph.

(d) Submission of Other Information.-

(1) Authority to require submission .-When certified cost or pricing data are not required to be submitted under this section 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 subsection (b)(1)(A), 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.

(2) Limitations on authority .-The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

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

(B) 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.

(C) 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.

(e) Price Reductions for Defective Cost or Pricing Data.-(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) 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.

(B) For the purposes of this section, 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.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) 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.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that-

(A) 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-

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

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

(B) 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;

(C) 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

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2).

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if-

(i) 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

(ii) 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 paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if-

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) 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 paragraph (1)(B), 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.

(f) Interest and Penalties for Certain Overpayments.-(1) If the United States makes an overpayment to a contractor under a contract subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States-

(A) for interest on the amount of such overpayment, to be computed-

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(g) Right of United States To Examine Contractor Records.-For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, the head of an agency shall have the authority provided by section 2313(a)(2) of this title.

(h) Definitions .-In this section:

(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 subsection (e)(1)(B), 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.

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§2380. Commercial product and commercial service determinations by Department of Defense

(a) In General.-The Secretary of Defense shall-

(1) establish and maintain a centralized capability with necessary expertise and resources to provide assistance to the military departments and Defense Agencies in making commercial product and commercial service determinations, conducting market research, and performing analysis of price reasonableness for the purposes of procurements by the Department of Defense; and

(2) provide to officials of the Department of Defense access to previous Department of Defense commercial product and commercial service determinations, market research, and analysis used to determine the reasonableness of price for the purposes of procurements by the Department of Defense.

(b) Items Previously Acquired Using Commercial Acquisition Procedures.-

(1) Determinations.-A contract for a product or service acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation shall serve as a prior commercial product or service determination with respect to such product or service for purposes of this chapter unless the senior procurement executive of the military department or the Department of Defense as designated for purposes of section 1702(c) of title 41 determines in writing that it is no longer appropriate to acquire the product or service using commercial acquisition procedures.

(2) Limitation.-(A) Except as provided under subparagraph (B), funds appropriated or otherwise made available to the Department of Defense may not be used for the procurement under part 15 of the Federal Acquisition Regulation of a product or service that was previously acquired under a contract using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation.

(B) The limitation under subparagraph (A) does not apply to the procurement of a product or service that was previously acquired using commercial acquisition procedures under part 12 of the Federal Acquisition Regulation ~~following-~~

~~(i) a written determination by the head of contracting activity pursuant to section 2306a(b)(4)(B) of this title that the use of such procedures was improper; or~~

~~(ii) a written~~ <u>following a written</u> determination by the senior procurement executive of the military department or the Department of Defense as designated for purposes of section 1702(c) of title 41 that it is no longer appropriate to acquire the product or service using such procedures.