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H. R. 8161

To amend title 10 and 41, United States Code, to strengthen requirements for Government contractors to submit certified and uncertified cost or pricing data and information supporting commercial product determinations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 21, 2022

Mrs. CAROLYN B. MALONEY of New York (for herself, Ms. SPEIER, Ms. PORTER, Mr. KHANNA, and Mr. LYNCH) introduced the following bill; which was referred to the Committee on Armed Services, and in addition to the Committee on Oversight and Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title 10 and 41, United States Code, to strengthen requirements for Government contractors to submit certified and uncertified cost or pricing data and information supporting commercial product determinations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Pricing with Cost
5 Transparency Act of 2022”.

1 **SEC. 2. SUBMISSION OF UNCERTIFIED COST DATA TO CON-**
2 **TRACTING OFFICERS.**

3 (a) SUBMISSION OF UNCERTIFIED COST DATA TO CI-
4 VILIAN AGENCIES.—Section 3505 of title 41, United
5 States Code, is amended—

6 (1) in subsection (a)—

7 (A) by striking “data other than certified”
8 and inserting “uncertified”; and

9 (B) by inserting after “the procurement.”
10 the following: “If the contracting officer deter-
11 mines that the uncertified pricing data sub-
12 mitted by the offeror, contractor, or subcon-
13 tractor is not adequate for evaluating the rea-
14 sonableness of the price of the contract, sub-
15 contract, or modification of the contract or sub-
16 contract, the offeror, contractor, or subcon-
17 tractor shall submit to the contracting officer
18 uncertified cost data to the extent necessary to
19 determine the reasonableness of such price.”;

20 (2) by redesignating subsection (b) as sub-
21 section (c); and

22 (3) by inserting after subsection (a) the fol-
23 lowing new subsection:

24 “(b) INELIGIBILITY FOR AWARD.—

25 “(1) In the event the contracting officer is un-
26 able to determine proposed prices are fair and rea-

sonable 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 the 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 product 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)

1 shall be reported to the senior procurement executive
2 on a periodic basis.

3 “(3) REPORT.—

4 “(A) ANNUAL REPORT.—The senior procure-
5 ment executive, or a designee, shall submit an an-
6 nual report to the Administrator of the Office of
7 Federal Procurement Policy identifying offerors that
8 have denied multiple requests for submission of
9 uncertified cost or pricing data over the preceding
10 three-year period, but nevertheless received an
11 award. The report shall identify products or services
12 offered by such offerors that should undergo should-
13 cost analysis.

14 “(B) NOTATION.—The contracting officer may
15 include a notation on such offerors in the system
16 used by the Federal Government to monitor or
17 record contractor past performance.

18 “(C) ASSESSMENT.—The senior procurement
19 executive shall—

20 “(i) assess the extent to which these
21 offerors are sole source providers; and

22 “(ii) develop strategies to incentivize new
23 entrants to increase the availability of other
24 sources of supply for the product or service.”.

1 (b) SUBMISSION OF UNCERTIFIED COST DATA TO
2 CONTRACTING OFFICERS.—Section 3705 of title 10,
3 United States Code, is amended—

4 (1) in subsection (a)—

5 (A) by striking “data other than certified”
6 and inserting “uncertified”; and

7 (B) by inserting after “a fair and reason-
8 able price.” the following: “If the contracting
9 officer determines that the uncertified pricing
10 data submitted by the offeror, contractor, or
11 subcontractor is not adequate for evaluating the
12 reasonableness of the price of the contract, sub-
13 contract, or modification of the contract or sub-
14 contract, the offeror, contractor, or subcon-
15 tractor shall submit to the contracting officer
16 uncertified cost data to the extent necessary to
17 determine the reasonableness of such price.”;
18 and

19 (2) in subsection (b)(1)—

20 (A) in the matter preceding subparagraph
21 (A), by striking “head of contracting” and in-
22 serting “head of the contracting”; and

23 (B) in subparagraph (B), by striking
24 “item” and inserting “product”.

1 (c) APPLICATION.—The amendments made by sub-
2 sections (a) and (b) shall apply with respect to contracts
3 awarded on or after the date that is one year after the
4 date of the enactment of this Act.

5 **SEC. 3. DISCRETION TO REQUIRE CERTIFIED COST OR**
6 **PRICING DATA ON BELOW-THRESHOLD CON-**
7 **TRACTS.**

8 (a) DISCRETION.—Section 3504(a) of title 41,
9 United States Code, is amended by inserting before “In
10 any case” the following: “The head of the procuring activ-
11 ity should consider making such a determination when a
12 contractor, offeror, or subcontractor has previously failed
13 to provide adequate uncertified cost or pricing data when
14 requested or required, or other significant risk factors im-
15 pede the Government’s ability to determine the reason-
16 ableness of price.”.

17 (b) COST OR PRICING DATA ON BELOW-THRESHOLD
18 CONTRACTS.—Section 3704(a) of title 10, United States
19 Code, is amended by inserting before “In any case” the
20 following: “The head of the procuring activity may con-
21 sider making such a determination when a contractor, of-
22 feror, or subcontractor has previously failed to provide
23 adequate uncertified cost or pricing data when requested
24 or required, or other significant risk factors impede the

1 ability of the Government to determine the reasonableness
 2 of price.”.

3 **SEC. 4. DATA REQUIREMENTS FOR COMMERCIAL PRODUCT**
 4 **PRICING NOT BASED ON ADEQUATE PRICE**
 5 **COMPETITION.**

6 Section 3705 of title 10, United States Code, is
 7 amended—

8 (1) by redesignating subsections (b) and (c) as
 9 subsections (c) and (d), respectively; and

10 (2) by inserting after subsection (a) the fol-
 11 lowing new subsection (b):

12 “(b) **AUTHORITY TO REQUIRE SUBMISSION OF IN-**
 13 **FORMATION FOR COMMERCIAL PRODUCTS OF A TYPE**
 14 **CUSTOMARILY USED BY GENERAL PUBLIC OR NON-**
 15 **GOVERNMENTAL ENTITIES.—**

16 “(1) **DATA TO SUPPORT COMMERCIAL PRODUCT**
 17 **DETERMINATION.—**For products proposed as com-
 18 mercial as defined in section 103(1) of title 41, and
 19 that have not previously been determined commercial
 20 in accordance with section 3703(d) of this title, or
 21 to the extent necessary to perform a periodic review
 22 of a commercial product determination in accordance
 23 with section 3703(e) of this title, the offeror shall be
 24 required to identify the comparable commercial
 25 product that is customarily used by the general pub-

1 lic or nongovernmental entities that serves as the
2 basis for the ‘of a type’ assertion. The offeror shall
3 submit a comparison of the essential physical char-
4 acteristics and functionality between the proposed
5 ‘of a type’ product and the comparable commercial
6 product in support of the ‘of a type’ assertion. The
7 offeror shall also provide the National Stock Num-
8 bers for both the comparable commercial product
9 used by the general public, if one is assigned, and
10 the product proposed to meet the Government’s re-
11 quirement, if one is assigned.

12 “(2) DATA TO SUPPORT PRICE REASONABLE-
13 NESS.—When procurements that include products
14 proposed as commercial as defined in 103(1) of title
15 41 and are not covered by the exceptions in section
16 3703(a)(1) of this title, and the contracting officer
17 determines data available from within the Govern-
18 ment and outside sources are insufficient to deter-
19 mine price reasonableness or the contracting officer
20 determines the proposed price is not reasonable, the
21 offeror shall be required to provide data to support
22 price reasonableness for a contract, subcontract, or
23 modification of a contract or subcontract as follows:

24 “(A) If the offeror sells the commercial
25 product that is customarily used by the general

1 public or nongovernmental entities, the offeror
2 shall provide the contracting officer access to all
3 unredacted sales data or purchase order history
4 for the commercial product so the contracting
5 officer can review unredacted sales to the gen-
6 eral public or nongovernmental entities. If the
7 contracting officer determines the proposed
8 price is not reasonable after evaluating the sales
9 data, the offeror shall be required to provide
10 the contracting officer with cost data, including
11 information on labor cost, material cost, and
12 overhead rates, for the purpose of establishing
13 price reasonableness.

14 “(B) If the offeror does not sell the com-
15 mercial product that is customarily used by the
16 general public or nongovernmental entities for
17 purposes other than governmental purposes
18 that serves as the basis for its ‘of a type’ asser-
19 tion for the proposed product, the offeror shall
20 provide the contracting officer with cost data,
21 including information on labor cost, material
22 cost, and overhead rates, for the purpose of es-
23 tablishing price reasonableness.”.

1 **SEC. 5. PERIODIC REVIEW OF COMMERCIAL PRODUCT DE-**
2 **TERMINATIONS.**

3 (a) EXCEPTIONS.—Section 3703 of title 10, United
4 States Code, is amended—

5 (1) in subsection (d)(1), by inserting after
6 “such product or service” the following: “, subject to
7 the limitation in subsection (e)”;

8 (2) by redesignating subsections (e) and (f) as
9 subsections (f) and (g), respectively; and

10 (3) by inserting after subsection (d) the fol-
11 lowing new subsection:

12 “(e) PERIODIC REVIEW OF CERTAIN COMMERCIAL
13 PRODUCT DETERMINATIONS.—(1) Commercial product
14 determinations shall be periodically reviewed, no less fre-
15 quently than every five years, to ensure that the initial
16 decision was appropriate and that the market conditions
17 continue to support the designation, if—

18 “(A) the product is not regularly sold in sub-
19 stantial quantities in the commercial marketplace in
20 essentially the same form; and

21 “(B) the product has not been subject to ade-
22 quate competition, as defined in subsection
23 (a)(1)(A), from a different product or products since
24 the determination was made, unless the procurement
25 is subject to the exception in subsection (a)(1)(B).

1 “(2) Reviews of commercial product determinations
2 shall be approved at a level above the contracting officer.
3 The Director of the Defense Contract Management Agen-
4 cy, the Director of the Defense Contract Audit Agency,
5 or other appropriate experts in the Department may sup-
6 port such reviews upon request, consistent with section
7 3456(b)(1)(A) of this title.”.

8 (b) COMMERCIAL PRODUCT AND COMMERCIAL SERV-
9 ICE DETERMINATIONS BY DEPARTMENT OF DEFENSE.—
10 Section 3456(c) of title 10, United States Code, is amend-
11 ed—

12 (1) in paragraph (1), by inserting after “this
13 chapter” the following: “subject to periodic reviews
14 of certain commercial product determinations as set
15 forth in section 3703(e) of this title, or”; and

16 (2) in paragraph (2)—

17 (A) in the heading, by striking “LIMITA-
18 TION” and inserting “LIMITATIONS”;

19 (B) in subparagraph (A), by inserting
20 “and (C)” after “subparagraph (B)”; and

21 (C) by inserting at the end the following
22 new subparagraph:

23 “(C) The limitation under subparagraph
24 (A) does not apply to the periodic review of

1 commercial product determinations as set forth
2 in 3703(e) of this title.”.

3 **SEC. 6. GAO REVIEW AND REPORT ON GOVERNMENT CON-**
4 **TRACTORS USING DISTRIBUTORS TO AVOID**
5 **SCRUTINY.**

6 (a) REVIEW REQUIRED.—

7 (1) IN GENERAL.—The Comptroller General of
8 the United States shall conduct a review of the prev-
9 alence and trends of contractors of executive agen-
10 cies using distributors or other intermediaries as a
11 means of avoiding legal or regulatory requirements,
12 such as requirements to provide certified or
13 uncertified cost or pricing data.

14 (2) ADDITIONAL CONTENTS OF REVIEW.—In
15 conducting the review under paragraph (1), the
16 Comptroller General shall consider—

17 (A) any effects of this practice on the abil-
18 ity of the Government to—

19 (i) acquire needed goods at reasonable
20 prices; and

21 (ii) avoid waste, fraud, and abuse in
22 the procurement process; and

23 (B) how executive agencies may differen-
24 tiate between the legitimate business purposes
25 for the use of distributor relationships, com-

1 pared to situations where the distributors large-
2 ly serve to avoid legal and regulatory require-
3 ments.

4 (b) REPORT REQUIRED.—Not later than one year
5 after the date of the enactment of this Act, the Comp-
6 troller General shall submit a report containing the results
7 of the review required by subsection (a) to—

8 (1) the Committees on Armed Services of the
9 Senate and the House of Representatives;

10 (2) the Committee on Oversight and Reform of
11 the House of Representatives; and

12 (3) the Committee on Homeland Security and
13 Governmental Affairs of the Senate.

14 (c) EXECUTIVE AGENCY DEFINED.—In this section,
15 the term “executive agency” has the meaning given that
16 term in section 133 of title 41, United States Code.

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