

ment or Defense Agency if the Secretary of Defense determines that the department or agency will be unable to meet such requirement by that date.

(2) The Secretary shall submit to Congress written notice of any determination made under paragraph (1) and the reasons for the determination. The Secretary shall submit such notice, if at all, not later than January 1, 2003.

(d) SECRETARY CONCERNED DEFINED.—In this section, the term “Secretary concerned” means the Secretary of each military department and the Secretary of Defense with respect to the Defense Agencies.

(Added Pub. L. 105–85, div. A, title III, §350(a), Nov. 18, 1997, 111 Stat. 1691.)

**§ 2379. Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items**

(a) REQUIREMENT FOR DETERMINATION AND NOTIFICATION.—A major weapon system of the Department of Defense may be treated as a commercial item, or purchased under procedures established for the procurement of commercial items, only if—

(1) the Secretary of Defense determines that—

(A) the major weapon system is a commercial item, as defined in section 4(12)<sup>1</sup> of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)); and

(B) such treatment is necessary to meet national security objectives;

(2) the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such system; and

(3) the congressional defense committees are notified at least 30 days before such treatment or purchase occurs.

(b) TREATMENT OF SUBSYSTEMS AS COMMERCIAL ITEMS.—A subsystem of a major weapon system (other than a commercially available off-the-shelf item as defined in section 35(c)<sup>1</sup> of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))) shall be treated as a commercial item and purchased under procedures established for the procurement of commercial items only if—

(1) the subsystem is intended for a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or

(2) the contracting officer determines in writing that—

(A) the subsystem is a commercial item, as defined in section 4(12)<sup>1</sup> of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)); and

(B) the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such subsystem.

(c) TREATMENT OF COMPONENTS AND SPARE PARTS AS COMMERCIAL ITEMS.—(1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item as defined in section 35(c)<sup>1</sup> of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))) may be treated as a commercial item for the purposes of section 2306a of this title only if—

(A) the component or spare part is intended for—

(i) a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (a); or

(ii) a subsystem of a major weapon system that is being purchased, or has been purchased, under procedures established for the procurement of commercial items in accordance with the requirements of subsection (b); or

(B) the contracting officer determines in writing that—

(i) the component or spare part is a commercial item, as defined in section 4(12)<sup>1</sup> of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)); and

(ii) the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such component or spare part.

(2) This subsection shall apply only to components and spare parts that are acquired by the Department of Defense through a prime contract or a modification to a prime contract (or through a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value).

(d) INFORMATION SUBMITTED.—To the extent necessary to make a determination under subsection (a)(2), (b)(2), or (c)(1)(B), the contracting officer may request the offeror to submit—

(1) prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers; and

(2) if the contracting officer determines that the information described in paragraph (1) is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

(e) DELEGATION.—The authority of the Secretary of Defense to make a determination under subsection (a) may be delegated only to the Deputy Secretary of Defense, without further redelegation.

(f) MAJOR WEAPON SYSTEM DEFINED.—In this section, the term “major weapon system” means a weapon system acquired pursuant to a major defense acquisition program (as that term is defined in section 2430 of this title).

(Added Pub. L. 109–163, div. A, title VIII, §803(a)(1), Jan. 6, 2006, 119 Stat. 3370; amended Pub. L. 110–181, div. A, title VIII, §815(a)(1), Jan. 28, 2008, 122 Stat. 222.)

REFERENCES IN TEXT

Section 4(12) of the Office of Federal Procurement Policy Act, referred to in subsecs. (a)(1)(A), (b)(2)(A),

<sup>1</sup> See References in Text note below.

and (c)(1)(B)(i), means section 4(12) of Pub. L. 93-400, which was classified to section 403(12) of former Title 41, Public Contracts, and was repealed and restated in section 103 of Title 41, Public Contracts, by Pub. L. 111-350, §§ 3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. For disposition of sections of former Title 41, see Disposition Table preceding section 101 of Title 41.

Section 35(c) of the Office of Federal Procurement Policy Act, referred to in subsecs. (b) and (c)(1), means section 35(c) of Pub. L. 93-400, which was classified to section 431(c) of former Title 41, Public Contracts, and was repealed and restated as section 104 of Title 41, Public Contracts, by Pub. L. 111-350, §§ 3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. For disposition of sections of former Title 41, see Disposition Table preceding section 101 of Title 41.

AMENDMENTS

2008—Subsec. (a)(2), (3). Pub. L. 110-181, § 815(a)(1)(A), added par. (2) and redesignated former par. (2) as (3).

Subsec. (b). Pub. L. 110-181, § 815(a)(1)(B), added subsec. (b) and struck out former subsec. (b). Former text read as follows: “A subsystem or component of a major weapon system shall be treated as a commercial item and purchased under procedures established for the procurement of commercial items if such subsystem or component otherwise meets the requirements (other than requirements under subsection (a)) for treatment as a commercial item.”

Subsecs. (c) to (f). Pub. L. 110-181, § 815(a)(1)(C), (D), added subsecs. (c) and (d) and redesignated former subsecs. (c) and (d) as (e) and (f), respectively.

EFFECTIVE DATE

Pub. L. 109-163, div. A, title VIII, § 803(b), Jan. 6, 2006, 119 Stat. 3371, provided that: “The amendments made by subsection (a) [enacting this section] shall take effect on the date of the enactment of this Act [Jan. 6, 2006], and shall apply to contracts entered into on or after such date.”

CHAPTER 141—MISCELLANEOUS  
PROCUREMENT PROVISIONS

- Sec. 2381. Contracts: regulations for bids.
- 2382. Consolidation of contract requirements: policy and restrictions.
- 2383. Contractor performance of acquisition functions closely associated with inherently governmental functions.
- 2384. Supplies: identification of supplier and sources.
- 2384a. Supplies: economic order quantities.
- 2385. Arms and ammunition: immunity from taxation.
- 2386. Copyrights, patents, designs, etc.; acquisition.
- 2387. Procurement of table and kitchen equipment for officers' quarters: limitation on.
- [2388. Renumbered.]
- 2389. Ensuring safety regarding insensitive munitions.
- 2390. Prohibition on the sale of certain defense articles from the stocks of the Department of Defense.
- 2391. Military base reuse studies and community planning assistance.
- 2392. Prohibition on use of funds to relieve economic dislocations.
- 2393. Prohibition against doing business with certain offerors or contractors.
- [2394, 2394a. Renumbered.]
- 2395. Availability of appropriations for procurement of technical military equipment and supplies.
- 2396. Advances for payments for compliance with foreign laws, rent in foreign countries, tuition, public utility services, and pay and supplies of armed forces of friendly foreign countries.

- Sec. [2397 to 2398a. Repealed or Renumbered.]
- 2399. Operational test and evaluation of defense acquisition programs.
- 2400. Low-rate initial production of new systems.
- 2401. Requirement for authorization by law of certain contracts relating to vessels, aircraft, and combat vehicles.
- 2401a. Lease of vehicles, equipment, vessels, and aircraft.
- 2402. Prohibition of contractors limiting subcontractor sales directly to the United States.
- [2403 to 2407. Repealed or Renumbered.]
- 2408. Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors.
- 2409. Contractor employees: protection from reprisal for disclosure of certain information.
- [2409a. Repealed.]
- 2410. Requests for equitable adjustment or other relief: certification.
- 2410a. Contracts for periods crossing fiscal years: severable service contracts; leases of real or personal property.
- 2410b. Contractor inventory accounting systems: standards.
- [2410c. Renumbered.]
- 2410d. Subcontracting plans: credit for certain purchases.
- [2410e. Repealed.]
- 2410f. Debarment of persons convicted of fraudulent use of “Made in America” labels.
- 2410g. Advance notification of contract performance outside the United States.
- [2410h. Renumbered.]
- 2410i. Prohibition on contracting with entities that comply with the secondary Arab boycott of Israel.
- 2410j. Displaced contractor employees: assistance to obtain certification and employment as teachers or employment as teachers' aides.
- 2410k. Defense contractors: listing of suitable employment openings with local employment service office.
- 2410l. Contracts for advisory and assistance services: cost comparison studies.
- 2410m. Retention of amounts collected from contractor during the pendency of contract dispute.
- 2410n. Products of Federal Prison Industries: procedural requirements.
- 2410o. Multiyear procurement authority: purchase of dinitrogen tetroxide, hydrazine, and hydrazine-related products.
- 2410p. Contracts: limitations on lead system integrators.
- 2410q. Multiyear contracts: purchase of electricity from renewable energy sources.

AMENDMENTS

2008—Pub. L. 110-181, div. A, title VIII, § 828(b), title X, § 1063(a)(11), Jan. 28, 2008, 122 Stat. 229, 322, inserted period at end of item 2410p and added item 2410q.

2006—Pub. L. 109-364, div. A, title VIII, § 807(a)(2), div. B, title XXVIII, § 2851(c)(2), Oct. 17, 2006, 120 Stat. 2315, 2495, added item 2410p and struck out items 2388 “Liquid fuels and natural gas: contracts for storage, handling, or distribution”, 2394 “Contracts for energy or fuel for military installations”, 2394a “Procurement of energy systems using renewable forms of energy”, 2398 “Procurement of gasohol as motor vehicle fuel”, 2398a “Procurement of fuel derived from coal, oil shale, and tar sands”, 2404 “Acquisition of certain fuel sources: authority to waive contract procedures; acquisition by exchange; sales authority”, and 2410c “Preference for energy efficient electric equipment”.

Pub. L. 109-163, div. A, title VIII, § 815(d)(2), Jan. 6, 2006, 119 Stat. 3382, substituted “Requirement for authorization by law of certain contracts relating to vessels, aircraft, and combat vehicles” for “Requirement